

# WAIVING ENVIRONMENTAL CONCERNS ALONG THE BORDER: FENCE CONSTRUCTION AND THE WAIVER AUTHORITY OF THE REAL ID ACT

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“While developing additional layers of border security is a priority for our nation, it should not impede our ability to also continue to be good environmental stewards.”<sup>1</sup>  
“The REAL ID Act is a big threat, and D[e]partment of H[omeland] S[ecurity] wields that like a club.”<sup>2</sup>

## I. INTRODUCTION

In 1994, the former Immigration and Naturalization Service (“INS”) instituted a border enforcement policy aimed at deterring illegal immigration along strategic points of the United States’ southern border by increasing the presence of border patrol agents and constructing physical barriers.<sup>3</sup> The INS anticipated that securing conventional routes of entry would force illegal immigrants to more remote and rugged sections of the border that would be more difficult to traverse.<sup>4</sup> The ultimate success of the policy has been debated, but it did result in a substantial decrease of illegal entries in places like San Diego, California and El Paso, Texas.<sup>5</sup> As anticipated, the number of

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1. Letter from Sen. Joseph I. Lieberman, Chairman of the Homeland Sec. and Governmental Affairs Comm., to Michael Chertoff, Sec’y of U.S. Dep’t of Homeland Sec. (Dec. 10, 2007), *available at* 2007 WLNR 24416830.

2. Brady McCombs, *Near-Done Border Fence Stirs Critics-Defenders*, ARIZ. DAILY STAR, Nov. 17, 2007, at A1, *available at* 2007 WLNR 25634966 (quoting Daniel Patterson, Southwest Director of Public Employees for Environmental Responsibility).

3. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 127-28 (2001). The targeted geographical areas included El Paso, Texas, San Diego, California, Arizona and Brownsville, Texas. *Id.*

4. Daniel A. Scharf, Note, *For Humane Borders: Two Decades of Death and Illegal Activity in the Sonoran Desert*, 38 CASE W. RES. J. INT’L L. 141, 159 (2006).

5. *Id.* at 154; *see* U.S. GEN. ACCOUNTING OFFICE, REP. TO THE COMM. ON THE JUDICIARY, U.S. S.

attempted illegal entries also increased along more remote sections of the border, although it is unclear that the inhospitable terrain has deterred significant numbers of illegal immigrants from crossing the border.

One result of the increased activity along remote sections of the border has been the environmental degradation of federally managed lands, including vast amounts of trash, human waste, abandoned cars, wildfires, and the creation of hundreds of new footpaths.<sup>6</sup> The environmental effects of illegal immigration are of sufficient concern that one government official has opined, “[T]he best thing you can do for the environment [in Arizona] is to have control of the border.”<sup>7</sup> Congress is seeking to control the southern border of the United States through the construction of hundreds of miles of fencing.<sup>8</sup> A fence may mitigate some of the environmental damage resulting from illegal immigration, but conservationists fear that it will also create irreversible damage to the border region’s unique ecosystems.<sup>9</sup> Despite the warnings of conservationists and scientists regarding the ecological consequences of fence construction, Former Secretary of Homeland Security (“SHS”), Michael Chertoff, has exercised his authority to waive compliance with environmental laws, pursuant to Title I, § 102 of the REAL ID Act on five occasions.<sup>10</sup> Most recently, Secretary Chertoff has invoked the waiver authority twice in early April of 2008 to complete 22 miles of fencing in Texas, and 245 miles of

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AND THE COMM. ON THE JUDICIARY, H.R., *ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED* 11 (1997), available at <http://www.gao.gov/cgi-bin/getrpt?GGD-98-21>.

6. GOOD NEIGHBOR ENVTL. BD., *ENVIRONMENTAL PROTECTION AND BORDER SECURITY ON THE U.S.-MEXICO BORDER* 18-22 (2007), available at [http://www.epa.gov/ocem/gneb/gneb\\_president\\_reports.htm](http://www.epa.gov/ocem/gneb/gneb_president_reports.htm); IMMIGRATION AND NATURALIZATION SERV., U.S. BORDER PATROL, U.S. DEP’T OF THE INTERIOR, U.S. FOREST SERV., AND U.S. ENVTL. PROT. AGENCY, *REPORT TO THE HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS, IMPACTS CAUSED BY UNDOCUMENTED ALIENS CROSSING FEDERAL LANDS IN SOUTHEAST ARIZONA* 14-22 (2002), available at [http://www.blm.gov/az/undoc\\_alien/SEAZ\\_REPORT2.pdf](http://www.blm.gov/az/undoc_alien/SEAZ_REPORT2.pdf) [hereinafter REPORT].

7. GOOD NEIGHBOR ENVTL. BD., *supra* note 6, at 19 (quoting Larry Parkinson, Deputy Assistant Secretary, Department of the Interior).

8. See Stephen Dinan, *Bush Signs Law to Build Border Fence*, WASH. TIMES, Oct. 27, 2006, at A1, available at 2006 WLNR 18679030.

9. Tim Vanderpool, *Borderline Tragedy*, TUCSON WKLY., May 11, 2006, available at <http://www.tucsonweekly.com/gbase/Currents/Content?oid=82094>.

10. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Secretary Chertoff exercised his waiver authority on the following occasions: September of 2005 to construct fencing through the Tijuana River National Estuarine Research Reserve near San Diego, January of 2007 to construct fencing through the Barry M. Goldwater Air Force Range in Arizona, October of 2007 to complete fencing near the San Pedro National Riparian Conservation Area in Arizona, and twice in April of 2008. Richard Marosi & Nicole Gaouette, *Border Fence Will Skirt Laws*, CHI. TRIB., at 1, available at 2008 WLNR 6185656.

fencing, by far the largest area affected by such a waiver, in parts of California, Arizona and Texas.<sup>11</sup>

This note discusses the fence construction along the U.S.-Mexico border and contends that the authority given to the SHS to bypass environmental regulations to ensure expeditious construction in the REAL ID Act of 2005 should be amended. Part II traces the history of the waiver authority from its origin in the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) to its current expansive scope as reflected in the REAL ID Act of 2005. Part III argues that the waiver authority is unnecessary because existing environmental legislation, specifically the National Environmental Policy Act (“NEPA”), gives adequate consideration to a federal agency’s objectives while also balancing the environmental effects of pursuing those objectives. Part IV presents a case study of the role of NEPA in the construction of the Alaskan pipeline and offers it as an example of how NEPA could play a valuable role in fence construction along the U.S.-Mexico border. Part V addresses the arguments that are most frequently proffered as justification for the broad scope of the waiver authority. Finally, the note concludes by calling on Congress to amend the broad waiver authority given to the SHS by requiring that federal agencies comply with NEPA on those stretches of the fence that have not yet been completed.

## II. THE WAIVER AUTHORITY: A FREE PASS ON COMPLIANCE WITH ENVIRONMENTAL LAWS

The construction of a fence along the southern border of the United States is a massive project intended to stretch nearly 700 miles in length and for which Congress has authorized 2.7 billion dollars in funds.<sup>12</sup> Despite the

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11. Michael Chertoff, *Legal Waivers Will be Used to Speed Border Fence Project*, CONGRESS DAILY, Apr. 2, 2008, available at 2008 WLNR 6161401. On his use of the waiver authority, Secretary Chertoff has stated,

The bottom line is this: We will continue to use the authority that Congress gave this department in a way that’s sensitive to local concerns, that is mindful of the need to protect the environment, but that does not allow the process of securing the border to get bogged down in endless litigation or procedural wrangling that will result in years going by before we complete the mission that Congress has mandated and that the American people rightfully expect us to get done.

Press Release, Dep’t of Homeland Sec., Remarks by Homeland Sec. Sec’y Michael Chertoff on the State of Immigration (Nov. 6, 2007), available at 2007 WL 3277309 [hereinafter State of Immigration].

12. Randal C. Archibold, *Border Fence is not Likely to be Done by Year’s End*, N.Y. TIMES, at A16, available at 2008 WLNR 17213769; Michael L. Culotta & Aimee J. Frederickson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 521, 526 (2007).

ecological and historical uniqueness of much of this land,<sup>13</sup> the SHS possesses the authority to waive all legal regulations concerning it, including environmental laws, if such regulations are related to construction of the fence.<sup>14</sup> The original waiver power was given to the Attorney General pursuant to § 102(c) of IIRIRA,<sup>15</sup> and its use was limited to the waiver of NEPA and the Endangered Species Act (“ESA”) in furtherance of the construction of barriers along the United States’ border with Mexico.<sup>16</sup> The INS (later the U.S. Customs and Border Patrol) never invoked the waiver authority of § 102(c) of the IIRIRA, and continued to comply with both NEPA and the ESA.<sup>17</sup>

In May of 2005, Congress enacted the REAL ID Act,<sup>18</sup> which amended the waiver authority of IIRIRA § 102(c) by expanding its scope in two significant ways.<sup>19</sup> First, the REAL ID Act waiver deleted references to NEPA and the ESA, and replaced it with language permitting the SHS<sup>20</sup> to waive all “legal requirements” in order to construct barriers at the border.<sup>21</sup> The second expansion of the waiver authority under the REAL ID Act prohibited judicial

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13. See REPORT, *supra* note 6, at 8-11 (discussing ecological and historical richness of southeast Arizona); see also Margaret Downing, *Border Fence May Destroy Wildlife Habitat*, HOUSTON PRESS, May 31, 2007, available at 2007 WLNR 10774625 (discussing importance of the ecosystems and wildlife in the border areas of south Texas).

14. The waiver of all legal regulations encompasses “any local, state or federal statute, regulation, or administrative order.” MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, 16 (2005), available at <http://openocrs.com/document/RL32754>. It does not, however, permit the SHS to waive an individual’s constitutional right. BLAS NUÑEZ-NETO & YULE KIM, CONGRESSIONAL RESEARCH SERVICE, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 7-8 (2006), available at <http://openocrs.com/document/RL33659>.

15. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

16. The waiver provision applied generally to areas of the border where high volumes of illegal immigrants entered, as well as to the construction of 14 miles of fencing near San Diego, California. NUÑEZ-NETO & KIM, *supra* note 14, at 6; GARCIA ET AL., *supra* note 14, at 15.

17. NUÑEZ-NETO & KIM, *supra* note 14, at 6.

18. The REAL ID Act “was attached to an emergency supplemental bill that funded causes like national defense and the war on terror (a ‘must-pass’ bill).” Arianna Garcia, Note, *The REAL ID Act and the Negative Impact on Latino Immigrants*, 9 SCHOLAR 275, 278 (2007).

19. NUÑEZ-NETO & KIM, *supra* note 14, at 7; GARCIA ET AL., *supra* note 14, at 16.

20. The INS was abolished in § 471 of the Homeland Security Act of 2002, thus the original waiver authority given to the Attorney General was transferred to the Secretary of Homeland Security. Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 291 (2002)).

21. NUÑEZ-NETO & KIM, *supra* note 14, at 7-8; GARCIA ET AL., *supra* note 14, at 16. As one author has noted, “The ability to waive any legal requirements includes waiving any local, state, and federal statute. This broad spectrum of laws includes anything from employment laws to laws prohibiting construction on sacred burial grounds.” Garcia, *supra* note 18, at 296.

review of the waiver unless the review involves a constitutional matter.<sup>22</sup> The language of the amended waiver authority in the REAL ID Act is expansive to a degree that rarely is seen in federal legislation.<sup>23</sup> The only limitation on the use of the waiver is that it be exercised in relation to the “expeditious construction” of the barriers along the border.<sup>24</sup> The SHS may exercise the waiver authority at any time in the agency’s decision-making process, but until he or she invokes the waiver the agency must continue to comply with all relevant legal requirements.<sup>25</sup>

The waiver authority permits the SHS to act unilaterally in furthering construction of a fence without concern for the ramifications on the environment and communities along the U.S.-Mexico border. It is the contention of this note that Congress should amend the waiver authority to require compliance with NEPA, so that fence construction will proceed in a manner that considers both the immigration interests of the U.S. government and the environmental interests of conservationists and landowners along the southern border of the United States.

### III. NEPA: A LEGISLATIVE MANDATE TO BALANCE AGENCY AND ENVIRONMENTAL INTERESTS

NEPA was the first comprehensive environmental legislation passed in the United States and responded to growing concerns about the impact of governmental decisions on the environment.<sup>26</sup> With the passage of NEPA, the federal government’s role in dealing with the environment shifted fundamentally from that of a reactionary actor to an anticipatory actor.

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22. GARCIA ET AL., *supra* note 14, at 16.

23. *Id.* It also has been noted that the piece of federal legislation that most closely approximates this broad grant of waiver authority is 43 U.S.C. § 1652(c), which permitted construction of the Alaskan pipeline without compliance with procedural legal requirements and prohibited judicial review except for cases raising constitutional matters. NUÑEZ-NETO & KIM, *supra* note 14, at 8.

24. NUÑEZ-NETO & KIM, *supra* note 14, at 8.

25. *Id.* The Secretary’s decision to exercise the waiver is deemed effective when it is published in the Federal Register. GARCIA ET AL., *supra* note 14, at 16.

26. LINDA LUTHER, CONG. RESEARCH SERVICE, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND INTERPRETATION 1-2 (2005), available at <http://openncrs.cdt.org/document/RL33152/>. NEPA has been referred to as an environmental Magna Carta. *Id.* at 2. It is remarkably “short, simple and comprehensive” when compared to subsequent environmental legislation, which has become “increasingly prescriptive, detailed and complex.” ALVIN L. ALM, ENVTL. PROT. AGENCY, NEPA: PAST, PRESENT, AND FUTURE (Jan./Feb. 1998), <http://www.epa.gov/history/topics/nepa/01.htm>. For a brief history of the scientific, societal and political forces that forged NEPA see generally MATTHEW J. LINDSTROM & ZACHARY A. SMITH, THE NATIONAL ENVIRONMENTAL POLICY ACT 16-27 (2001).

According to the principle sponsor of NEPA, Senator Henry M. Jackson (D-WA), the legislation's purpose was to create "institutions and procedures" designed to "anticipate environmental problems."<sup>27</sup> NEPA respects the primary mission of respective government agencies and recognizes that those agencies are concerned foremost with their particular mission, whether it is immigration, energy or labor.<sup>28</sup> But, the legislation also recognizes that environmental issues affect Americans individually, as well as collectively, and thus requires agencies to give sufficient consideration to the environmental consequences resulting from their projects. NEPA is designed to create a balancing of those interests, not an inevitable outcome in favor of either a federal agency or environmental concerns.<sup>29</sup>

An agency's consideration of the environmental effects of its actions is mandated primarily through Title I, § 102(2) of the act, which has been referred to as the "action forcing" provision of NEPA.<sup>30</sup> Specifically, § 102(2)(C) requires agencies to provide an environmental impact statement ("EIS") for "major [f]ederal actions significantly affecting the quality of the human environment."<sup>31</sup> An EIS should address specific topics such as

the environmental impact of the proposed action, adverse environmental effects that are unavoidable if the project is implemented, alternatives to the proposed actions, the relationship between short-term use of the environment and maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action, should it be implemented.<sup>32</sup>

Since its enactment, the case law addressing NEPA has identified the "twin aims" of § 102(2)(C), which ensure that the larger purpose of NEPA is met.<sup>33</sup>

First, § 102(2)(C) serves a procedural function by requiring federal agencies to incorporate environmental considerations into their decision-

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27. *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 YALE L.J. 1592, 1594 (1972) (citing hearings on S. 1015, S. 237 & S. 1752 before the U.S. Senate Comm. on Interior and Insular Affairs, 91st Cong., Sess. 1 (1969)).

28. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974).

29. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); Leventhal, *supra* note 28, at 515.

30. See *Kleppe v. Sierra Club*, 427 U.S. 390, 409 n.18 (1976) (explaining the term "action forcing" in relation to § 102(2)(C) originated in the Senate's consideration of NEPA).

31. National Environmental Protection Act of 1969 SC102(2)(C), 42 U.S.C. § 4332(2)(C) (2000).

32. 42 U.S.C. § 4332(2)(C)(i)-(v).

33. *Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981).

making process, not merely “as an abstract exercise,” but “as part of the agency’s process of deciding whether to pursue a particular federal action.”<sup>34</sup> This requirement affirms NEPA’s implicit assumption that changes to the environment affect entire communities and regions and are therefore of great importance.<sup>35</sup> Agency interests often are politically driven and thus short-term in their approach, while environmental concerns often are long-term in their consequences. The procedural requirement of § 102(2)(C) mandates that federal agencies orient their decision-making to a long-term perspective by calling for serious consideration of the effects of proposed action in an EIS.<sup>36</sup> Thus, the fundamental purpose of the procedural requirement is to shape the decision-making process of federal agencies when they undertake significant projects by requiring them to analyze the environmental impact of such projects and any viable alternatives.<sup>37</sup>

Second, § 102(2)(C) serves a disclosure function by requiring that the EIS produced by the agency be made available to the public.<sup>38</sup> The disclosure function of the EIS is significant in several respects. It provides the public with an opportunity to learn of an agency’s proposed action. The disclosure function also provides the general public an opportunity to comment on proposed agency action and thereby influences the agency’s decision-making process.<sup>39</sup> This is important when environmental issues are at stake because local residents and scientists often can provide valuable insights to proposed action based on their familiarity with the geographic area in question.<sup>40</sup> Finally, the disclosure function permits individuals and groups to resort to the legal system when an agency has not complied sufficiently or meaningfully with NEPA requirements. This enforcement mechanism ensures that NEPA does not devolve into a “virtual dead letter.”<sup>41</sup>

34. *Baltimore Gas*, 462 U.S. at 100.

35. See LUTHER, *supra* note 26, at 1, 3.

36. “Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

37. *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768 (1981) (quoting *Robertson*, 490 U.S. at 349).

38. *Weinberger*, 454 U.S. at 143. There may be situations, for example, those involving sensitive national defense information, in which an agency would be unable to comply fully with the disclosure function of § 102(2)(C). See *id.* at 143-44.

39. *Robertson*, 490 U.S. at 349.

40. *Dept. of Transp. v. Public Citizen*, 541 U.S. at 768.

41. “If citizens did not have the right to go to court to enforce NEPA, I think it is fair to presume that the law would quickly become a virtual dead letter.” Robert G. Dreher, Deputy Executive Dir. of

#### IV. A CASE STUDY COMPARISON OF NEPA'S SIGNIFICANCE: THE ALASKAN PIPELINE AND BORDER FENCE CONSTRUCTION

##### *A. The Alaskan Pipeline*

In late 1967, evidence of oil was found in Alaska's North Slopes.<sup>42</sup> By the following spring, the discovery of oil was confirmed to be about 10 billion barrels—the largest ever in the United States.<sup>43</sup> The state of Alaska leased the land to three principle oil companies in 1969, and they wanted to extract oil from the ground as quickly as possible.<sup>44</sup> Others, however, raised concerns that the oil companies' haste could lead to devastating environmental consequences.<sup>45</sup> In particular, conservation and environmental groups opposed the oil companies' plans to transport oil through a pipeline that was to stretch nearly 800 miles from Prudhoe Bay to Valdez. The proposed pipeline was to run through federally controlled land, and thus the oil companies needed permission from the Department of Interior ("DOI") before beginning construction.<sup>46</sup>

Before the permits could be granted, conservation groups filed a complaint for declaratory and injunctive relief based, in part, on NEPA.<sup>47</sup> The district court granted a preliminary injunction on the pipeline construction.<sup>48</sup> In response to the preliminary injunction, the DOI was forced to consider the environmental consequences of pipeline construction and eventually released its findings in a six-volume EIS.<sup>49</sup> The drafting of the EIS also resulted in hearings that permitted members of the general public, including members of

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Georgetown Envtl. Law & Policy Inst., Testimony Before the Task Force on Updating the NEPA, 9 (Nov. 17, 2005), available at [http://www.law.georgetown.edu/gelpi/research\\_archive/nepa/nepa\\_taskforce.cfm](http://www.law.georgetown.edu/gelpi/research_archive/nepa/nepa_taskforce.cfm) (follow "GELPI Testimony" hyperlink).

42. KEN ROSS, ENVIRONMENTAL CONFLICT IN ALASKA 146 (2000).

43. *Id.*

44. *Id.* at 146-47.

45. Environmental and conservation groups primarily were concerned with the possibility of oil spills either once the oil reached the port of Valdez or along the pipeline due to earthquakes. Other environmental concerns included tundra erosion, disturbance of wildlife like caribou and thawing of permafrost. *Id.* at 149-51.

46. *Id.* at 147.

47. The groups included *The Wilderness Society, Friends of the Earth, and the Environmental Defense Fund, Inc. Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

48. *Id.* at 424.

49. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 846-47 (D.C. Cir. 1973).

the Alaskan Conservation Society, the Sierra Club and representatives of commercial fisheries, to voice concerns about the proposed project.<sup>50</sup>

Environmental groups filed another lawsuit in 1971, this time seeking a permanent injunction of the pipeline construction.<sup>51</sup> They were not satisfied that the EIS released by the DOI gave adequate consideration to alternate means of transporting the oil.<sup>52</sup> The district court denied the permanent injunction and dissolved the temporary injunction that had previously been granted.<sup>53</sup> The ruling was appealed to the D.C. Circuit Court of Appeals where the court did not address the NEPA arguments, finding that the NEPA issues were not “ripe for consideration.”<sup>54</sup> The court did, however, grant the permanent injunction on other grounds.<sup>55</sup> World events intervened in 1973 when OPEC imposed an oil embargo and created concerns of an impending energy crisis in the United States.<sup>56</sup> As the international situation changed, supporters of the pipeline shifted the conversation from the environmental impact of the project to concerns about the United States’ energy policy and how growing dependence on foreign oil was “placing our national security in jeopardy.”<sup>57</sup> In 1973, Congress passed an amendment that accepted the EIS submitted by the DOI on the proposed pipeline and prevented further judicial action under NEPA.<sup>58</sup> The bill narrowly passed in the Senate where Vice President Spiro Agnew cast the deciding vote.<sup>59</sup>

Despite the final congressional action that permitted the construction of the pipeline without further judicial review of NEPA compliance, many have

50. ROSS, *supra* note 42, at 153.

51. *Id.* at 151.

52. The groups contended that the EIS did not address the alternative of a pipeline that would run through Canada. This was an attractive alternative for many environmentalists because it would utilize an existing pipeline but was disfavored by the oil companies as well as some politicians and economists who felt that it would subject the companies to more government regulation and Canadian taxes. *Id.* at 152-53.

53. The United States District Court for the District of Columbia issued its unreported decision on the matter on August 15, 1972. *See Morton*, 479 F.2d at 846.

54. *Morton*, 479 F.2d at 889-90.

55. The Court granted the injunction, stating that if the Secretary of the Interior were to grant special land use permits to the oil companies for the pipeline construction § 28 of the Mineral Leasing Act and other Bureau of Land Management regulations would be violated. *Morton*, 479 F.2d at 847. In a partial dissent from the majority, Judge MacKinnon thought that the Court should have ruled on the merits of the NEPA claim and stated that he found that the EIS adequately addressed alternatives to the Prudhoe-Valdez pipeline. *Id.* at 905-12.

56. Peter Coates, *The Trans-Alaska Pipeline’s Twentieth Birthday: Commemoration, Celebration and the Taming of the Silver Snake*, 23 THE PUBLIC HISTORIAN 63, 74 (2001).

57. ROSS, *supra* note 42, at 155 (quoting Sen. Stevens, U.S. Senate Committee on Interior, Hearings: Right-of-Way, Part 3, 71-73, 81).

58. 43 U.S.C. § 1652(c)-(d) (2006).

59. ROSS, *supra* note 42, at 155.

applauded the role that NEPA played in the pipeline construction.<sup>60</sup> The judicial review of NEPA that occurred forced the DOI to produce an EIS and inform the public of its considered actions. Subsequent statements from oil executives involved in the pipeline suggest that the requirements of NEPA influenced their behavior and gave rise to thoughtful planning that otherwise would have been bypassed in favor of the quickest and cheapest means of construction.<sup>61</sup> Two of the most important modifications to the pipeline construction that resulted from NEPA-related litigation, and which were incorporated in the 1973 congressional amendment, were the burying of stretches of the pipeline so as not to disrupt wildlife and directives to “bury pipe in such a way as to lessen the adverse effect on the permafrost.”<sup>62</sup> NEPA led to a balancing of agency interests and environmental concerns in the Alaskan pipeline construction that likely would not have occurred in the absence of the legislation. NEPA, however, is not playing the same role in the construction of a fence along the U.S.-Mexico border, a project that bears similarities to the Alaskan pipeline.

## *B. Fence Construction*

### *1. Environmental Concerns*

Congress mandated the construction of a fence along 700 miles of the U.S.-Mexico border in the Secure Fence Act of 2006.<sup>63</sup> The sheer size of the project is comparable to the 800-mile Alaskan pipeline. Like the pipeline, conservationists have raised concerns about the unique and fragile nature of

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60. See Leventhal, *supra* note 28, at 526-27. *But see generally* LINDSTROM & SMITH, *supra* note 26, at 86-90.

61. One oil executive stated, “the conservationists are one of the best things that could have happened to us . . . [our] aim is to make money. Until recently it was to our advantage to run a sloppy operation because no one was enforcing the rules.” ROSS, *supra* note 42, at 152. “Although the pipeline was ultimately built, following congressional passage of further legislation, the early litigation transformed pipeline planning. Planning, as delayed, became far more deliberate and careful. As industry representatives later acknowledged, if the early plans had been followed, it might well have been an economic and environmental disaster.” See Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 210 (2004).

62. Leventhal, *supra* note 28, at 527.

63. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006). The 2008 presidential candidates, Senators John McCain (R-AZ) and Barack Obama (D-IL), both voted in favor of the Secure Fence Act of 2006. U.S. Senate Roll Call Votes 109th Congress—2nd Session, Sept. 29, 2006, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm?congress=109&session=2&vote=00262](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=109&session=2&vote=00262).

the federal lands where the fence is to be, and in some areas already has been, constructed.<sup>64</sup>

Conservationists fear that a fence would adversely impact animals that inhabit areas along the U.S.-Mexico border. A fence would cut in half the living areas of larger animals such as ocelots, jaguars and Sonoran desert pronghorns.<sup>65</sup> This could be especially devastating to endangered species, like the jaguar, that have only recently reappeared in the United States after a prolonged fifty-year absence.<sup>66</sup> One conservationist has stated that, “[t]he fence would end any chance of natural recovery [of the jaguar] in the U.S.”<sup>67</sup> Another endangered species, the ocelot, could be affected by the construction of a border fence. The current ocelot population is limited to two families in the Lower Rio Grande Valley National Wildlife Refuge, near the southeast section of the border in Texas.<sup>68</sup> Conservationists fear that a fence would restrict mating populations among a species that is already very limited in number.<sup>69</sup> A fence also would cut off some animals from the Rio Grande, which acts as the only source of fresh water in some parts of Texas.<sup>70</sup>

Among smaller animals, conservationists voice concerns about the effects of a fence on birds. The southwestern United States contains one of the most diverse bird populations in the world.<sup>71</sup> In the Rio Grande National Wildlife Refuge alone, there are 500 species of birds.<sup>72</sup> By destroying hundreds of miles of habitat conservationists predict that fencing would interfere with the birds’ nesting and migratory patterns.<sup>73</sup> Bright floodlights placed on top of a border fence could disrupt the migratory patterns of birds that navigate by

64. See *supra* note 13. See generally MEXICAN SECRETARIAT OF ENVIRONMENT AND NATURAL RESOURCES, A BARRIER TO OUR SHARED ENVIRONMENT: THE UNITED STATES-MEXICO BORDER FENCE (2007), [http://www.ine.gob.mx/publicaciones/consultaPublicacion.html?id\\_pub=519](http://www.ine.gob.mx/publicaciones/consultaPublicacion.html?id_pub=519) (discussing the environmental impact of a border fence on the flora and fauna of the border regions).

65. Anne Minard, *U.S. Immigration Law Could Harm Desert Animals, Critics Say*, NATIONAL GEOGRAPHIC, Mar. 31, 2006, available at [http://news.nationalgeographic.com/news/2006/03/0331\\_060331\\_desert\\_fence.html](http://news.nationalgeographic.com/news/2006/03/0331_060331_desert_fence.html).

66. *Id.*; John Roach, *Are Wild Jaguars Moving Back Into the United States?*, NATIONAL GEOGRAPHIC, Nov. 26, 2003, available at [http://news.nationalgeographic.com/news/2003/11/1126\\_031126\\_jaguararizona.html](http://news.nationalgeographic.com/news/2003/11/1126_031126_jaguararizona.html).

67. Minard, *supra* note 65.

68. Cary Cardwell, *Ocelots are Collateral Damage*, SALON.COM, Sept. 13, 2007, [http://www.salon.com/news/feature/2007/09/13/border\\_fence/](http://www.salon.com/news/feature/2007/09/13/border_fence/).

69. Currently there are less than 100 ocelots in the United States. *Id.*

70. *Id.*

71. REPORT, *supra* note 6, at 9-10; Downing, *supra* note 13.

72. Cardwell, *supra* note 68.

73. Downing, *supra* note 13.

means of moonlight and “interfere with the reproduction cycle of the cacti” by “attract[ing] insects that are responsible for pollinating cactus.”<sup>74</sup>

Conservationists also are concerned about the effects of a border fence on the land itself. The fence would disturb existing hydrologic patterns in areas “where the percolation of just inches of water is vital for the maintenance of grasses and plants and different types of cacti.”<sup>75</sup> The fence already has been blamed for two flooding incidents in Arizona in which the natural flow of heavy rainwater was dammed by the fence and up to seven feet of water collected along the structure.<sup>76</sup> The creation of dirt roads to be used by large equipment required to construct the fence could lead to further flooding and erosion problems.<sup>77</sup> Such damage would be devastating to federally owned land near the Rio Grande River in southwest Texas.<sup>78</sup> Over the past two decades, the government has spent roughly \$80 million dollars in attempts to re-vegetate this land and create wildlife refuges, efforts that largely could be reversed if the fence is constructed.<sup>79</sup>

## *2. The Waiver Authority and Fence Construction in San Pedro Riparian National Conservation Area*

Fence construction is under the authority of the DHS, but in San Pedro, because the fence runs through federally operated land, the U.S. Bureau of Land Management (“BLM”) was responsible for conducting the environmental studies involving fence construction.<sup>80</sup> The BLM completed an environmental assessment on the approximately two-mile stretch of proposed fencing in San Pedro, which was subsequently the subject of Secretary Chertoff’s waiver, in a span of three weeks and without public comment.<sup>81</sup> Much like the conservation groups involved in the Alaskan pipeline litigation, the Sierra Club and Defenders of Wildlife filed suit in the federal district court

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74. Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, 14, No. 3 HUM. RTS. BRIEF 33, 37 (2007).

75. GOOD NEIGHBOR ENVTL. BD., *supra* note 6, at 22.

76. Brady McCombs, *Floodwaters Pool up as High as 6 Feet Along Storefronts in Nogales, Sonora*, ARIZ. DAILY STAR, July 16, 2008, at A1, available at 2008 WLNR 13542480; Brady McCombs, *Report: Faulty Design Turned Border Fence Into Dam*, ARIZ. DAILY STAR, Aug. 15, 2008, at A1, available at 2008 WLNR 15952043.

77. GOOD NEIGHBOR ENVTL. BD., *supra* note 6, at 19.

78. Downing, *supra* note 13.

79. *Id.*

80. Howard Fischer, *Chertoff May Void Judge’s Order to Halt Border Fence*, ARIZ. DAILY STAR, Oct. 14, 2007, available at <http://www.azstarnet.com/sn/border/206203>.

81. *Id.*

of the District of Columbia, seeking a temporary injunction to the fence construction on the grounds that the BLM did not prepare an adequate EIS.<sup>82</sup> The temporary injunction was granted.<sup>83</sup> On October 26, 2007, about two weeks after the temporary injunction was granted, Secretary Chertoff announced that he was invoking his waiver authority under the REAL ID Act,<sup>84</sup> thereby permitting construction of the fence to continue without complying with twenty laws, half of which are closely related to environmental concerns.<sup>85</sup>

The exercise of the waiver authority prohibited further judicial review of the case, except for constitutional challenges.<sup>86</sup> The plaintiffs in the original suit amended their complaint subsequent to the invocation of the waiver, arguing that the waiver was an unconstitutional delegation of legislative powers to the executive branch.<sup>87</sup> The district court rejected this argument. It found that the congressional grant of power to the SHS in § 102(c) of the REAL ID Act to waive legal requirements when “necessary to ensure expeditious construction of the barriers and roads under [section 102 of IIRIRA] . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States” articulated an intelligible principle and was therefore constitutional.<sup>88</sup> In June of 2008, the conservation groups exhausted all available forms of judicial review of the waiver when the United States Supreme Court refused to grant writ of certiorari on the question of the constitutionality of the waiver authority given

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82. *Id.*

83. *Id.*

84. Secretary Chertoff made public his invocation of the waiver authority in the Federal Register. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60870-01 (Oct. 26, 2007) [hereinafter Waiver].

85. The twenty laws that Secretary Chertoff waived include: NEPA, the Endangered Species Act, the Federal Water Pollution Control Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Archeological Resources Protection Act, the Safe Drinking Water Act, the Noise Control Act, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Federal Land Policy and Management Act, the Fish and Wildlife Coordination Act, the Archeological and Historic Preservation Act, the Antiquities Act, the Historic Sites, Buildings, and Antiquities Act, the Arizona-Idaho Conservation Act of 1988, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, and the Administrative Procedure Act. *Id.*

86. REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(2)(A), 119 Stat. 231 (2005).

87. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 123 (D.D.C. 2007).

88. *Id.* at 126-30. The Court also rejected the plaintiffs’ argument that the waiver was paramount to the repeal of a duly passed law under *Clinton v. City of New York*, 524 U.S. 417 (1998).

to the SHS in the Secure Fence Act of 2006.<sup>89</sup> Fence construction has continued and as of the end of August 2008, approximately half of the border fence was completed.<sup>90</sup>

While the pipeline ended in favor of federal agencies, NEPA permitted environmentalists to voice valid concerns before the massive pipeline project was undertaken. In the case of the fence, Congress has abolished the careful balancing of agency and environmental interest achieved through NEPA and given the SHS the unilateral power to decide when its objectives should prevail over environmental concerns. While it is true that the DHS must continue to comply with all legal requirements before invoking the waiver, the case of San Pedro demonstrates that this is little consolation to those concerned with the environmental effects of fence construction. The procedural function of NEPA technically was met by BLM in issuing an EIS, but conservation groups lamented that the three weeks taken for the study of the environmental impact of the fence was woefully inadequate. Additionally, the disclosure function of NEPA was not met because the public was deprived of the opportunity to comment on the project.<sup>91</sup>

Through the use of judicial review, conservation groups sought enforcement of NEPA in the courts. Yet, when a federal judge granted a preliminary injunction, which would have required NEPA's balancing of agency and environmental interests, the SHS invoked the waiver. Unlike the case of the Alaska pipeline, where the delay brought about by judicial review of agency compliance with NEPA resulted in concessions by federal agencies and the oil companies, DHS does not need to cooperate with conservationists in finding appropriate concessions that will further the interests of both sides. Advocates of the waiver authority contend that bypassing environmental regulations is justified because of the import of the issues at stake in fence construction.

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89. Dave Montgomery, *U.S. Supreme Court Rejects Challenge Over Border Fence*, THE MIAMI HERALD, June 24, 2008, at A3, available at 2008 WLNR 11837088.

90. <http://www.dhs.gov/xprevprot/programs/border-fence-southwest.shtm>.

91. Press Release, Defenders of Wildlife (Nov. 1, 2007), available at [http://www.defenders.org/newsroom/press\\_releases\\_folder/index.php](http://www.defenders.org/newsroom/press_releases_folder/index.php) (follow "2007" hyperlink; then follow "Conservation Groups Challenge Chertoff's Waiver Power as Unconstitutional" hyperlink).

## V. JUSTIFICATIONS FOR THE WAIVER AUTHORITY?

### A. National Security

The broad waiver authority given to the SHS usually is justified on the grounds of national security.<sup>92</sup> Secretary Chertoff has stated that the contention over the construction of a border fence “. . . is a classic example of how we have a conflict between the needs of national and homeland security on the one hand and environmental concerns on the other.”<sup>93</sup> After the World Trade Center bombings in 1993, and particularly since September 11, 2001, there has been considerable debate about how to prevent terrorists from entering the country. Some have argued that one of the United States’ greatest vulnerabilities in the war against terror is its porous border with Mexico.<sup>94</sup> While the northern border of the United States and its coastlines also provide opportunities of illegal entry for terrorists, the vast number of individuals that illegally enter the United States do so through its southern border, raising fears that terrorists, too, could easily enter the country.<sup>95</sup> These fears are enhanced by the existence of human smugglers who bring individuals to the United States and by increasing ties between terrorist organizations and drug smugglers.<sup>96</sup>

The illegal entry of terrorists via the U.S.-Mexico border certainly is plausible, but evidence collected to date suggests that the northern border of the U.S. is of greater concern in regards to terrorists gaining entry to the United States.<sup>97</sup> A study released by the Nixon Center in September of 2006

92. Similarly, backers of the Alaskan pipeline argued that the project needed to proceed due to the energy dependence of the United States on oil suppliers in the Middle East, which was inextricably linked to issues of national security. ROSS, *supra* note 42, at 155.

93. State of Immigration, *supra* note 11.

94. See generally Justin C. Glon, Note, “Good Fences Make Good Neighbors”: National Security and Terrorism—Time to Fence in Our Southern Border, 15 IND. INT’L & COMP. L. REV. 349, 361-69 (2005).

95. Susan Martin & Philip Martin, *International Migration and Terrorism: Prevention, Prosecution and Protection*, 18 GEO. IMMIGR. L.J. 329, 336 (2004).

96. *Id.*; see generally *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003), available at <http://www.state.gov/p/inl/rls/rm/21129.htm> (discussing the threat posed to the U.S. by the nexus of the drug trade and terrorist organizations).

97. Claudine LoMonaco, Editorial, *Border Security: Lines Blur on Terrorism*, TUCSON CITIZEN, Sept. 11, 2006, available at <http://www.tucsoncitizen.com/daily/local/25753.php>; see Melissa Blair, Note, *America’s Porous Borders, and the Role of the Invasion Clause Post-9/11/2001*, 87 MARQ. L. REV. 167, 171-75 (2003) (arguing that the United States’ northern border poses more of a threat of illegal entry by terrorists because of Canada’s liberal immigration policies and inadequate U.S. Border Patrol presence).

found that “of 373 suspected or convicted terrorists who resided in or crossed national borders in Western Europe and North America since 1993, 26 subjects used Canada as a host country.”<sup>98</sup> The extensive research conducted for the report did not uncover “any mujahideen with ties to al Qaeda entering [the United States] from Mexico.”<sup>99</sup>

The proposition that a fence along the U.S.-Mexico border will do little to protect against the presence of terrorists in the United States also is supported by evidence showing that the presence of terrorists in the United States may be due to lack of interior enforcement, not border enforcement. A study conducted by the Pew Hispanic Center reveals that almost half of the twelve million people in the United States illegally arrived in the country legally and became illegal only after overstaying their visas.<sup>100</sup> All nineteen terrorists involved in the September 11, 2001 attacks entered the United States through ports of entry, not by illegal entry over the border, and at least six of them had overstayed their visas.<sup>101</sup> These statistics further suggest that terrorist exploitation of existing immigration policies and weak interior enforcement are of greater concern than illegal entry into the United States at its southern border.

### *B. Stemming the Flow of Illegal Immigrants*

The contentious nature of the debate over illegal immigration in the United States was reflected in the Senate’s failure to pass comprehensive immigration reform in June of 2007.<sup>102</sup> Opponents of the bill argued that the proposed reforms were meaningless without first securing the nation’s borders.<sup>103</sup> Whether a border fence would significantly strengthen the ability of the U.S. government to secure its borders remains unclear.<sup>104</sup>

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98. Robert S. Leiken, *Europe’s Mujahideen: Where Mass Immigration Meets Global Terrorism*, CENTER FOR IMMIGRATION STUDIES BACKGROUNDER, Apr. 2005, available at <http://www.cis.org/articles/2005/back405.html>.

99. *Id.*

100. *Sometimes Legal Immigrants Becomes Illegal With Time*, VOICE OF AMERICA, June 8, 2006, available at <http://www.voanews.com/english/archive/2006-06/2006-06-08-voa32.cfm>.

101. Audio Recording: Ted Robbins, *Nearly Half of Illegal Immigrants Overstay Visas*, NATIONAL PUBLIC RADIO, June 14, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5485917>.

102. See generally Robert Pear & Carl Hulse, *Immigration Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1, available at WLNR 12294547.

103. *Id.* (quoting Senator David Vitter (R-LA), “The message is crystal clear. The American people want us to start with enforcement at the border and at the workplace and don’t want promises.”).

104. Since construction of the border fence began, illegal immigration has decreased but this decrease has largely been attributed to a slowing of the U.S. economy and increased workplace raids. Miriam Jordan

As stated previously, since 1994 illegal immigration has slowed around targeted urban areas like San Diego, California and El Paso, Texas, but the number of illegal entries in geographically rugged sections of the border has increased.<sup>105</sup> The enforcement policy for remote sections of the border does not require the quick response demanded in more populated areas where illegal immigrants can disappear into an urban environment almost immediately after crossing the border.<sup>106</sup> Secretary Chertoff has stated that the fence is not meant to stop individuals as much as it is to slow them down.<sup>107</sup> However, in desolate areas where border patrol officers may have minutes or hours, rather than seconds, to interdict individuals who cross the border illegally, the advantage of a fence in slowing the progress of illegal immigrants appears to be minimal.<sup>108</sup>

The effectiveness of a fence in preventing or slowing the process of illegal immigration has been criticized on other fronts as well. One difficulty is constructing a fence that will keep individuals from breaching the barrier while still being humane.<sup>109</sup> One type of fence that border agents have found promising is constructed of “double-mesh barrier made of thick welded wires in a tight honeycomb-like design.”<sup>110</sup> The tight design makes it difficult to climb and would take a blowtorch fifteen minutes to cut.<sup>111</sup> A similar design, however, already has been breached by illegal immigrants who have scaled the fence by inserting screwdrivers into the mesh and to use as handholds to get up and over the fence in what one observer has estimated to take only fifteen

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& Conor Dougherty, *Immigration Slows in Face of Economic Downturn*, WALL ST. J., Sept. 23, 2008, at A12, available at [http://online.wsj.com/article/SB122213015990965589.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122213015990965589.html?mod=googlenews_wsj).

105. One author compares the strategy of the INS in the 90s to a person using his fingers to plug leaks in a colander filled with water. Just as the colander is likely to have more holes than the person has fingers, the Border [sic] is more porous than the Border Patrol has resources. Plugging a leak in one place does not stop the flow of water; it only changes the water's course.

Scharf, *supra* note 4, at 165.

106. Lee Bargerhuff, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 569, 576 (2007); Rachel Canty, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 569, 586 (2007).

107. Michael Barone, *Talking Immigration with Secretary Chertoff*, U.S. NEWS AND WORLD REPORT, June 22, 2007, <http://www.usnews.com/blogs/barone/2007/6/22/talking-immigration-with-secretary-chertoff.html>.

108. Bargerhuff, *supra* note 106, at 576.

109. Richard Marosi, *A Fence Without Offense*, L.A. TIMES, Nov. 16, 2007, at 1, available at 2007 WLNR 22700934.

110. *Id.*

111. *Id.*

seconds.<sup>112</sup> Another criticism of the fence is that it may push illegal immigrants to utilize miles of existing drainage tunnels around the border or to create more tunnels.<sup>113</sup>

Finally, some individuals believe that the fence fails to address the fundamental issues that fuel illegal immigration to the United States, and therefore that proponents of the fence grossly underestimate the risks individuals will take to find work in the United States.<sup>114</sup> Former Governor Janet Napolitano (D-AZ), now the SHS in President Barack Obama's administration, aptly summarized this position with this statement, "You show me a 50-foot wall, I'll show you a 51-foot ladder."<sup>115</sup> Supporters of this approach argue that secure borders cannot be achieved without simultaneous comprehensive immigration reform that addresses the underlying economic reasons driving illegal immigration.<sup>116</sup>

In light of the many concerns raised about the effectiveness of a fence, the price tag of 700 miles of fencing is disconcerting. Congress originally authorized \$1.2 billion dollars for fence construction;<sup>117</sup> however, estimates have placed the final cost of the fencing at closer to six billion dollars.<sup>118</sup> Maintenance and repair of the fence will continue to be a source of great expenditure for the federal government. The Corps of Engineers has estimated "that the 25-year life cycle cost of the fence would range from \$16.4 million to \$70 million *per mile* depending on the amount of damage sustained by the fencing."<sup>119</sup> The minimal deterrence to illegal immigration provided by the border fence does not justify its exorbitant cost and provides another incentive, aside from its environmental effects, for the federal government to consider alternative means for addressing illegal immigration.

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112. *Id.*

113. Maurice Hew, Jr., *The Fence and the Wall (Mart) . . . Maginot Line Mentality*, 39 CONN. L. REV. 1383, 1393 (2007).

114. *Id.* at 1390-91.

115. *Lou Dobbs Tonight* (CNN television broadcast Feb. 27, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0602/27/ldt.01.html>).

116. President Bush took this stance in attempting to push comprehensive immigration reform through Congress. President's State of the Union Address, George W. Bush, *Address Before a Joint Session of the Congress on the State of the Union*, 43 WEEKLY COMP. PRES. DOC. 57 (Jan. 23, 2007), available at 2007 WLNR 2681398.

117. Hew, *supra* note 113, at 1392 (clarifying that the money was authorized in the 2007 Department of Homeland Security Appropriations Act).

118. Culotta & Frederickson, *supra* note 12, at 526.

119. NUÑEZ-NETO & KIM, *supra* note 14, at 25 (emphasis added).

## VI. CONCLUSION

In the absence of a compelling governmental purpose for a fence, there is serious reason to question the vast scope of the waiver authority in the REAL ID Act. When dealing with projects as large as a 700-mile fence, DHS should consider the long-term ramifications of its actions. In particular, the geographic location of the fence raises environmental concerns because of the fragility of the ecosystems involved and the potential number of endangered species that will be affected.<sup>120</sup> By circumventing environmental regulations like NEPA there is little incentive, and virtually no legal mechanism, to ensure that agencies consider the long-term impact of their proposed actions. The Alaskan pipeline illustrates the crucial role that NEPA played in bringing about concessions in the pipeline construction that mitigated environmental degradation of the Alaskan wilderness. In the case of the fence, its viability is questionable and there are alternatives that could potentially be as effective and which would reduce the environmental damage a fence would cause.

One alternative to a border fence that has been suggested in areas where the Rio Grande River acts as the border is to increase water levels by building a dam.<sup>121</sup> This would deter illegal immigration by creating a natural boundary, while also preserving water access for local animal populations. Mexican officials have encouraged the use of a natural border, including the use of cacti as “living fences.”<sup>122</sup> Conservationists have promoted the use of certain man-made structures like vehicle barriers as an alternative to a fence. These have been installed in some border areas, like eastern San Diego County and Organ Pipe Cactus National Monument in southern Arizona, and prevent vehicles from entering the land, while still permitting most animals to roam the land and allowing for natural water flow.<sup>123</sup>

Others see technology as providing a more environmentally friendly alternative to a fence. Virtual fencing, including the use of radar, sensors, and cameras, could help border patrol agents monitor miles of the border from a

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120. See generally *supra* note 13.

121. Monisha Bansal, *Texas Mayor Threatens Suit to Block Border Fence*, CYBERCAST NEWS SERVICE, Oct. 2, 2007, available at <http://www.cnsnews.com/public/content/article.aspx?RsrcID=23703>; Ralph Blumenthal, *In Texas, Weighing Life With a Fence*, N.Y. TIMES, Jan. 13, 2008, at 112, available at 2008 WLNR 705229.

122. *US Border Fences an “Eco Danger,”* BBC NEWS, July 31, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6924475.stm>.

123. For a picture of the vehicle barriers that already have been installed see GOOD NEIGHBOR ENVTL. BD., *supra* note 6, at 4.

central location.<sup>124</sup> The new technology that a virtual fence would utilize still faces challenges, although the federal government has given conditional approval for 28 miles of virtual fencing in Arizona, and could prove to be costly.<sup>125</sup> It is unclear where virtual fencing could act as a viable alternative to a fence along the U.S.-Mexico border, but without having to comply with NEPA, DHS does not need to give serious consideration to the question.<sup>126</sup>

Because of the potential environmental effects of a fence, and the minimal advantage it will provide in increasing national security and preventing illegal immigration, Congress should act to amend the unilateral waiver authority given to the SHS in IIRIRA as amended by the REAL ID Act. Congress has shown the political will to construct a fence, but that project should be subject to the same study and consideration that all other federal agency projects are, particularly because of the vast size of a border fence. The fence originally was scheduled to be completed by the end of 2008, but as of September of 2008, doubts remained about the practicality of meeting the deadline, particularly as DHS requested an additional \$400 million from Congress in order to continue with fence construction.<sup>127</sup> The slowing progress of fence construction means that Congress can still act to amend the waiver authority and to permit the balancing of interests that follows from compliance with the NEPA for the portion of the fence that remains to be constructed.

The example of the Alaskan pipeline illustrates the importance of considering environmental effects of federal agency projects *before* they are undertaken. If they are not, long-term or even permanent environmental damage to an area of ecological richness will suffer the consequences of shortsighted agency decisions. Congress should require DHS, and any other federal agencies participating in fence construction, to be subject to NEPA. This should include the reinstatement of full judicial review to ensure NEPA

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124. Randal C. Archibald, *28-Mile Virtual Fence Is Rising Along the Border*, N.Y. TIMES, June 26, 2007, available at <http://www.nytimes.com/2007/06/26/us/26fence.html>.

125. "Virtual" Border Fence Sees Progress, USA TODAY, Dec. 6, 2007, available at [http://www.usatoday.com/news/nation/2007-12-06-border-fence\\_N.htm](http://www.usatoday.com/news/nation/2007-12-06-border-fence_N.htm).

126. In February of 2007, DHS had assured Texas towns along the border that it seriously would consider the use of virtual fencing when possible, but has since reneged and seems to be moving ahead solely with the physical border fence. David McLemore, *Border Residents Fuming Over Fence Plans*, DALLAS MORNING NEWS, June 27, 2007, available at 2007 WLNR 12131392; Lynne Brezosky, "Real" Border Fence Finds Some Texans Caught Off Guard, OAKLAND TRIB., May 2, 2007, available at 2007 WLNR 8367449.

127. Kevin Sieff, *Congress Approves Additional Border Fence Funding*, THE MONITOR, Sept. 22, 2008, available at [http://www.themonitor.com/articles/funding\\_17622\\_\\_\\_article.html/additional\\_approves.html](http://www.themonitor.com/articles/funding_17622___article.html/additional_approves.html).

compliance by relevant federal agencies. NEPA forces federal agencies to consider the concerns of citizens, conservationists, and environmentalists in making their decisions, thereby creating a more balanced approach when projects that significantly affect the environment are undertaken.<sup>128</sup> By amending the waiver authority, Congress would ensure that its objective of constructing a fence is balanced with legitimate environmental concerns and thereby preserve an ecologically unique region of the United States.

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128. Congressman Grijalva (AZ-D) has introduced a bill in the House of Representatives that seeks to conserve federal public land along the southern border of the U.S. by requiring the DHS to seek greater inter-agency input before constructing fencing and also repeals the § 102(c) waiver authority given to the DHS in IIRIRA. Borderlands Conservation and Security Act of 2007, H.R. 2593, 110th Cong. (1st Sess. 2007).

