

***1047 UNINTENDED CONSEQUENCES: THE ENVIRONMENTAL IMPACT OF BORDER FENCING AND IMMIGRATION REFORM**

INTRODUCTION

On June 27, 2013, the United States Senate passed S. 744, the “Border Security, Economic Opportunity, and Immigration Modernization Act” (“Senate Bill”).¹ This legislation represents the most recent effort at comprehensive immigration reform by federal lawmakers. A key part of the legislation involves measures aimed at improving border security.² The Senate Bill calls for at least 700 miles of fencing along the Southern border of the United States.³ In some areas, newer pedestrian fences would replace older vehicle fences, and double layer pedestrian fencing may be added in other locations.⁴ Although they have clear national security benefits, border fences raise serious environmental concerns that lawmakers may want to address before any bill authorizing new or re-enforced fencing is signed into law.⁵

The recent comprehensive immigration reform debate has focused on the Southwest border of the United States. The effects of increased border security measures on the Southwest’s unique and diverse ecosystems, however, are often overlooked.⁶ The border fencing required by the recently proposed Senate Bill will likely cut across delicate desert plant and wildlife habitats.⁷ For example, the San Pedro Riparian National Conservation *1048 Area is located on the United States’ border with Mexico, and is estimated to be home to eighty species of mammals, forty species of amphibians and reptiles, and two-hundred fifty species of migrant birds.⁸ Unique ecosystems such as the San Pedro Riparian Area are rare in nature.⁹ When border fences are allowed to cut across delicate habitats, without the associated effects being fully understood and properly mitigated, the vitality of unique plant and animal species are placed in danger.¹⁰

I. IMPACT ON THE ENVIRONMENT

Presently, the United States’ border with Mexico is marked by about 670 miles of fencing.¹¹ The majority of this fencing was authorized by the Secure Fence Act (SFA) of 2006, and was built between 2006 and 2009.¹² The current border fences have cut across the natural ranges of many animal species, making the animals vulnerable to natural disasters, such as wildfires.¹³ Also, when not properly constructed, border fences can act as dams during periods of heavy rainfall, which causes severe soil erosion.¹⁴ The full effect of border fencing on the environment, however, is yet to be realized.

Fencing can affect the natural flow of floodwater across the border, in turn causing substantial changes to natural habitats.¹⁵ In the spring of 2008, the Department of Homeland Security (DHS) completed a 5.2-mile border fence near the Organ Pipe Cactus National Monument in Southern Arizona.¹⁶ Prior to the fence being built, Organ Pipe officials expressed concern that the fence may impede the flow of water during heavy monsoon rains.¹⁷ Then, later in 2008, the border fence turned into a dam after several days of rainfall followed by a severe monsoon thunderstorm.¹⁸ The National Park Service *1049 conducted a

study following the incident and found that the pooling of water against the fence had caused soil erosion and damage to riparian vegetation.¹⁹ The study recognized the strategic importance of border fences, but recommended that the design of the fences be reevaluated.²⁰

Furthermore, any additional or reinforced fencing along the Southwest border will continue to disrupt the migratory ranges of important endangered species. For instance, current border fences have already hindered efforts to save the jaguar, which has been listed as an endangered species since 1977.²¹ Jaguars have historically migrated between Southern Arizona and Mexico.²² Restricting the movement of jaguars has hampered their ability to reach traditional breeding areas, in turn slowing down the growth of jaguar populations in the United States.²³ It is estimated that current jaguar breeding areas exist exclusively in Mexico and Central America.²⁴ Unfortunately, the previous laws authorizing the Department of Homeland Security (“DHS”) to build border fences have also allowed them to waive compliance with laws designed to protect endangered species.²⁵

II. DHS WAIVER

Past immigration reform bills have authorized the Secretary of Homeland Security (“DHS Secretary”) to waive compliance with environmental protection laws whenever they interfere with the construction of border fences. The existence of this unlimited waiver authority has raised serious concerns among environmentalists working to preserve the biological diversity of the American Southwest.²⁶

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) allowed the DHS Secretary to waive compliance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).²⁷ This waiver was expanded in the 2005 REAL ID Act, and allowed the DHS Secretary to “waive all legal requirements [...], in such Secretary’s sole discretion, determine [d] necessary to ensure expeditious construction of *1050 the barriers and roads under this section.”²⁸ Furthermore, when Congress passed this waiver, it revoked the federal courts’ jurisdiction to hear any claims against the waiver authority, unless the claims successfully presented a constitutional challenge.²⁹

The Senate’s recently passed immigration bill sustains the use of this broad waiver authority. The Senate Bill, like past immigration laws, allows DHS to waive environmental protection laws and regulations whenever they impede the construction of border fences.³⁰

This broad waiver authority has been used expansively in Arizona in the past. For instance, when DHS built a border fence across the San Pedro Riparian National Conservation Area, it waived compliance with NEPA, Arizona-Idaho Conservation Act, ESA, Clean Water Act, Clean Air Act, National Historic Preservation Act, Administrative Procedure Act, Wild and Scenic Rivers Act, Safe Drinking Water Act, and several other laws.³¹ These critical environmental protection laws were waived in their entirety by DHS.³² The United States District Court for the District of Columbia was asked to rule on this expansive use of DHS waiver authority to build border fences in *Defenders of Wildlife v. Chertoff*.³³ Ultimately, the court found that it lacked jurisdiction to reach the merits of the plaintiffs’ claim.³⁴ The outcome of *Chertoff* is not controversial, as the district court simply followed the law that has been established.³⁵ However, the case is noteworthy because it highlights the challenges faced by those seeking to establish a reasonable balance between environmental protection and border security.

III. RECOMMENDATIONS

The current waiver authority granted to DHS leaves little recourse available to those seeking to harmonize the often-conflicting goals of border security and environmental protection. The immigration bill passed by the Senate would once again grant DHS the broad authority to waive compliance with environmental laws.³⁶ The DHS should ultimately be allowed to defend the nation’s borders through any legal and reasonable means necessary. However, the policy goals behind environmental laws would be best served if DHS was required to study and publish the effects of its undertakings on the Southwest’s ecosystems. *1051 The next immigration reform bill signed into law will give lawmakers a chance to specifically address DHS’s broad authority to waive environmental protection laws.

It is important to recognize that the comprehensive immigration reform bill passed by the Senate may never be signed into

law.³⁷ The US House of Representatives appears to prefer a different approach to immigration reform than the Senate.³⁸ However, both chambers agree that improved border security is a critical component of comprehensive immigration reform.³⁹ Likewise, immigration reform legislation recently proposed in the House also contains provisions that authorize border fencing.⁴⁰ The proposed House legislation also grants DHS the authority to waive compliance with environmental protection laws in order to build border fences.⁴¹ However, the path that any border fence authorization takes into becoming law does not change the previously discussed negative impact that border fences can have on the environment.

If DHS were to comply with environmental protection measures, the construction of fences could still continue, but their environmental impact would be better understood. Proper notice of DHS's undertakings would allow their negative effects on the environment to be mitigated to the maximum possible extent. At a minimum, DHS could be required to comply with NEPA, and prepare an Environmental Impact Statement (EIS) whenever it seeks to construct a border fence across plant and wildlife habitats.⁴² The preparation of an EIS would not defeat DHS's ability to build fences, but it would ensure that Southwest communities have notice of the agency's undertakings, and allow them the best possible opportunity to mitigate environmental damage.

Footnotes

^{a1} Patrick is a second-year law student at the James E. Rogers College of Law, where he serves an Associate Editor on the Arizona Journal of Environmental Law & Policy. He graduated from the University of Michigan-Ann Arbor in 2008 with a Bachelor of Arts in Political Science.

¹ Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013).

² IMMIGRATION POLICY CTR., A GUIDE TO S.744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 5 (July 2013).

³ S. 744 § 3(c)(2)(II)(ii).

⁴ *Id.*

⁵ Tay Wiles, *Immigration Reform Bills Still Gives Feds Rein to Trample Border Ecology*, HIGH COUNTRY NEWS (Oct. 24, 2013), <http://www.hcn.org/blogs/goat/immigration-reform-bills-still-give-homeland-security-environment-border-wall>.

⁶ *Id.*; see also Jill Replogle, *How Environmentalists Lost Their Battle Against the Border Fence*, PBS (Aug. 8, 2013), <http://www.pbs.org/newshour/rundown/2013/08/how-environmentalists-lost-their-battle-against-the-border-fence.html>.

⁷ See, e.g., *Description, San Pedro National Riparian Conservation Area*, BUREAU OF LAND MGMT (Jul. 18, 2013), http://www.blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca.html (describing the diversity of animal species found in the San Pedro Riparian Area).

⁸ *Id.*

⁹ *See id.*

¹⁰ *See Wiles, supra* note 5.

¹¹ Tracy Connor, *Price Tag for 700 Miles of Border Fencing: High and Hard to Pin Down*, NBC NEWS (Jun. 21, 2013), http://usnews.nbcnews.com/_news/2013/06/21/19062298-price-tag-for-700-miles-of-border-fencing-high-and-hard-to-pin-down.

12 Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

13 Michael Jordan, *Border Fence Threatens Wildlife*, NAT'L GEOGRAPHIC (Aug. 9, 2011), <http://newswatch.nationalgeographic.com/2011/08/09/border-fence-threatens-wildlife/>.

14 *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona*, NAT'L PARK SERV. 1 (Aug. 2008), http://www.nps.gov/orpi/naturescience/upload/FloodReport_July2008_final.pdf.

15 *See id.* at 16.

16 *Id.* at 1.

17 *Id.* at 7.

18 *See id.* at 9-11; *see also* *Border Fence Design Blasted as Causing Flooding*, USA TODAY (Aug. 25, 2008), http://usatoday30.usatoday.com/news/nation/2008-08-25-3901692727_x.htm; *see also* Brady McCombs, *Rain Washes Away 40 feet of US-Mexico Border Fence*, ARIZ. DAILY STAR (Aug. 10, 2011), http://azstarnet.com/news/local/border/rain-washes-away-feet-of-us-mexico-borderfence/article_9eaead31-14eb-5474-a5c5-564a980049b2.html.

19 NAT'L PARK SERV., *supra* note 13, at 16.

20 *Id.*

21 H. Hebert, *US Jaguar Plan Foiled by Border Fence, Critics Say*, NAT'L GEOGRAPHIC (Jan. 18, 2008), <http://news.nationalgeographic.com/news/2008/01/080118-AP-jaguars.html>.

22 *Id.*

23 *Id.*

24 *Id.*

25 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 § 102(c) (1996), <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html>; REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) § 102(c)(2)(A).

26 Replogle, *supra* note 7.

27 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 102(c).

28 REAL ID Act of 2005 § 102(c)(1).

29 *Id.* at § 102(c)(2)(A).

30 S. 744 § 3(d).

31 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended
by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60870-01 (Oct. 26,
2007).

32 *See id.*

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

34 *Id.* at 129.

35 *See id.*

36 S. 744 § 3(d).

37 *See* Laura Meckler and Kristina Peterson, *Advocates for Immigration Bill are Taking a New Tack*, WALL ST. JOURNAL (Nov.
12, 2013), [http://
online.wsj.com/news/articles/SB10001424052702304644104579194213348372?](http://online.wsj.com/news/articles/SB10001424052702304644104579194213348372?KEYWORDS=comprehensive+immigration+reform)
KEYWORDS=comprehensive+immigration+reform.

38 Laura Matthews, *House Could Have 7 or 8 Immigration Reform Bills*, INT'L BUS. TIMES (Nov. 20, 2013),
<http://www.ibtimes.com/house-could-have-7-or-8-immigration-reform-bills-1477830>.

39 *See* Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (2013) (proposed Oct. 2,
2013); *see also* Ed O'Keefe, *A Narrow Border-Security Agreement Could Pave the Way for Broad Immigration Reform*, WASH.
POST (Jul. 29, 2013), [http://
articles.washingtonpost.com/2013-07-29/politics/40887375_1_broad-immigration-reform-immigration-bills-border-security](http://articles.washingtonpost.com/2013-07-29/politics/40887375_1_broad-immigration-reform-immigration-bills-border-security).

40 H.R. 15 § 8(b)(2).

41 *Id.* at § 8 (a)(4).

42 Compliance with NEPA would require DHS to “integrate environmental values into their decision making processes by
considering the environmental impacts of their proposed actions and reasonable alternatives to those actions.” *National
Environmental Policy Act*, ENVTL. PROT. AGENCY, [http:// www.epa.gov/compliance/nepa/](http://www.epa.gov/compliance/nepa/) (last updated Sept. 4, 2013). In
order to comply with this mandate, federal agencies must complete an EIS whenever their proposed undertakings will have a
significant environmental impact. *Basic Information*, ENVTL. PROT. AGENCY, [http://
www.epa.gov/compliance/basics/nepa.html](http://www.epa.gov/compliance/basics/nepa.html) (last updated Jun. 25, 2012).