



2-12-2021

The Wall that Trumps Environmental Law: A Review of the Environmental and Legal Implications of the U.S.-Mexico Border Wall

Olivia Merritt

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>

 Part of the [Agriculture Law Commons](#), [Animal Law Commons](#), [Conflict of Laws Commons](#), [Cultural Heritage Law Commons](#), [Disaster Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Immigration Law Commons](#), [Indian and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Land Use Law Commons](#), [National Security Law Commons](#), [Natural Law Commons](#), [Natural Resources Law Commons](#), [Property Law and Real Estate Commons](#), [Science and Technology Law Commons](#), [State and Local Government Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Olivia Merritt, *The Wall that Trumps Environmental Law: A Review of the Environmental and Legal Implications of the U.S.-Mexico Border Wall*, 32 Vill. Envtl. L.J. 91 (2021).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol32/iss1/5>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

THE WALL THAT TRUMPS ENVIRONMENTAL LAW:
A REVIEW OF THE ENVIRONMENTAL AND LEGAL
IMPLICATIONS OF THE U.S.-MEXICO
BORDER WALL

I. HOW THINGS WENT SOUTH: A BRIEF INTRODUCTION TO THE
SOUTHERN BORDER WALL CONTROVERSY

On January 25, 2017, just five days after his inauguration, U.S. President Donald Trump issued an executive order to expand the U.S.-Mexico border wall.¹ The extension would add to the 650 miles of existing border wall between the two countries, which currently runs through parts of California, New Mexico, Arizona, and Texas.² The executive order came as a product of the Trump Administration's promise to end illegal immigration and drug trafficking at the United States's southern border.³ Although the wall's effectiveness at accomplishing these goals has been a sensational topic of debate across the nation, the wall's environmental impact receives much less attention.⁴

Since its construction during the Clinton Administration, the border wall has had a tremendous effect on the ecosystems that call the borderlands home.⁵ The nearly 2,000-mile-long border cap-

1. Catalina Tresky, *Trump's Planned Permanent Border Wall Threatens Wildlife*, DEFENDERS OF WILDLIFE (Jan. 25, 2017), <https://defenders.org/newsroom/trumps-planned-permanent-border-wall-threatens-wildlife> (stating date of presidential executive order).

2. John Schwartz, *Why a Border Wall Could Mean Trouble for Wildlife*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/climate/border-wall-wildlife.html> (discussing current mileage of southern border wall); *see also* Tresky, *supra* note 1 (listing states affected by border wall).

3. Exec. Order No. 13767, 82 C.F.R. 8793 (Jan. 30, 2017) (President Trump's official order to secure the border by building border wall); Justin Worland, *The Problem With President Trump's Wall That No One Is Talking About*, TIME (Jan. 26, 2017, 11:44 AM), <https://time.com/4650178/donald-trump-border-wall-environment/> (discussing Trump Administration's political agenda to build physical wall in response to illegal immigration).

4. Caitlin Meagher, *The Ecological Impacts of a Border Wall*, ENVTL. L. INST. (Apr. 3, 2017), <https://www.eli.org/vibrant-environment-blog/ecological-impacts-border-wall> (emphasizing lack of media attention to environmental impact of border wall).

5. Alisa Cromer, *Brief History: A Timeline of the U.S. Border Wall*, WORLDSTIR (Jan. 28, 2017), <http://www.worldstir.com/history-u-s-mexico-border-wall/> (discussing Clinton Administration's efforts to construct physical border between United States and Mexico); *see also* Meagher, *supra* note 4 (discussing current and potential impact border wall construction has on surrounding ecosystems).

tures some of the most biologically diverse areas in the nation.⁶ The borderlands also include many national refuges, environmental conservation areas, tribal lands, and private property.⁷ The border wall's extension into the Lower Rio Grande Valley of Texas alone would result in construction on a "federal wildlife refuge, a state park, Native American grave sites, and the National Butterfly Center."⁸ In Arizona, the current border wall runs through three million acres of protected public land and converging mountainous ecosystems, which are home to a plethora of wildlife.⁹ Bioscience conducted an expansive study – signed and supported by over 2,500 scientists from forty-three different countries – that estimates the border wall impacts the ecosystems of over 1,500 animal and plant species, including sixty-two species on the critically endangered or vulnerable list.¹⁰

Since the beginning of the wall's construction, environmental law agencies have raised numerous red flags in response to the executive and legislative branch granting its extension.¹¹ A legal analysis of the construction project reveals over forty federal laws must be waived to build the massive artificial border.¹² These laws include some of the most significant environmental legal protections, namely the Endangered Species Act, the Clean Water Act, the Na-

6. See Meagher, *supra* note 4 (stating diverse biological systems present along borderlands).

7. *Id.* (discussing types of property that are adversely affected by border wall); see also *Damage Caused by the Border Wall*, SIERRA CLUB, https://content.sierraclub.org/grassrootsnetwork/sites/content.sierraclub.org/activistnetwork/files/teams/documents/DAMAGE_CAUSED_BY_BORDER_WALL_FACTSHEET.pdf (last visited Sept. 26, 2020) (listing locations, specifically environmentally protected areas, that are damaged by southern border wall).

8. Eliza Barclay & Sarah Frostenson, *The ecological disaster that is Trump's border wall: a visual guide*, Vox (Feb. 5, 2019, 11:22 AM), <https://www.vox.com/energy-and-environment/2017/4/10/14471304/trump-border-wall-animals> (discussing specific property dedicated to wildlife and environmental conservation through which extended border wall would run).

9. See Tresky, *supra* note 1 (discussing how current border wall slices through Arizona ecosystems and protected land).

10. Robert Peters ET AL., *Nature Divided, Scientists United: US-Mexico Border Wall Threatens Biodiversity and Binational Conservation*, 68 *BIOSCIENCE* 740, 740 (July 24 2018), <https://doi.org/10.1093/biosci/biy063> (discussing implications of border wall on surrounding plant and animal life in borderlands).

11. *Id.* (discussing history of environmentalist efforts against construction of border wall).

12. Adam Skolnick, *The Environmental Threat of Trump's Wall*, *OUTSIDE* (Dec. 13, 2019), <https://www.outsideonline.com/2406786/border-wall-species-threat-or-gan-pipe> (referencing environmental laws which will be waived to construct border wall).

tional Environmental Policy Act (NEPA), and the National Historic Preservation Act.¹³

Although the wall is extensively intertwined with state-specific environmental laws, its existence and continued extension technically remains within the bounds of federal law.¹⁴ Section 102 of the Real ID Act of 2005 grants the Department of Homeland Security (DHS) the power to waive any federal, state, or local law to build barriers at the border.¹⁵ This provision allowed President Bush to pass the Secure Fence Act of 2006 and begin constructing 700 miles of the border wall.¹⁶ The Real ID Act, also encompassing the Secure Fence Act, has allowed the DHS to issue eight waivers in four U.S. border states since 2005.¹⁷ Three of the eight waivers have been granted to the Trump Administration.¹⁸

President Trump's dedication to border security, however, comes with a price.¹⁹ In 2018, Congress budgeted \$1.3 billion to, inter alia, expand the border wall another thirty-three miles.²⁰ Again in 2019, the President's border wall agenda was a national government financial concern.²¹ The wall's budget was an issue of such contention that it forced the government into a shutdown lasting from December 22, 2018 until January 25, 2019.²² The shut-

13. For a full list of environmental laws to be waived for construction of border wall, see *Border Wall Environmental Impacts*, SIERRA CLUB, <https://content.sierraclub.org/grassrootsnetwork/sites/content.sierraclub.org/activistnetwork/files/teams/documents/border%20wall%20enviro%20handout.pdf> (last visited Sept. 26, 2020).

14. David Roche, *Environmental Law and the Border Wall*, ENVTL. L. INST. (Apr. 5, 2017), <https://www.eli.org/vibrant-environment-blog/environmental-law-and-border-wall> (discussing legal background used by presidents to construct physical border wall).

15. See Tresky, *supra* note 1 (discussing specific provision within Real ID Act that allows executive branch to secure border with artificial barriers).

16. *US-Mexico Border Wall*, AY MARIPOSA, <https://www.aymariposafilm.com/border-wall-a-brief-history> (last visited Sept. 26, 2020) (explaining Bush Administration's use of Secure Fence Act to mandate 700 miles of new border wall).

17. See Peters ET AL., *supra* note 10, at 740 (mentioning number of waivers granted to DHS since 2005).

18. See *id.* (discussing number of waivers granted to President Trump).

19. See Barclay & Frostenson, *supra* note 8 (explaining projected budget for Trump's proposed wall).

20. *Id.* (reviewing past budget granted by Congress to expand border wall).

21. See *id.* (highlighting budget concerns for building border wall).

22. See Nicholas Fandos, *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html> (documenting border wall budget as source of government shutdown and President Trump's continued effort to build wall despite financial roadblocks).

down was a reaction to President Trump's unwavering demand for another \$5 billion to complete 215 miles of border wall.²³

The President's commitment to build the border wall despite the government shutdown encouraged him to take another legislative route.²⁴ On February 15, 2019, the President triggered the National Emergencies Act by declaring that the state of the southern border was a national emergency.²⁵ President Trump's decision to harness his executive power and invoke the National Emergencies Act had substantial implications for the wall's budget.²⁶ The President's declaration of a state of emergency at the border allowed him to seize money from other Congressionally-approved funds for projects such as military spending.²⁷

Since President Trump's inauguration, strong opponents of the border wall have filed multiple lawsuits challenging the legality of the wall's construction.²⁸ Environmental groups – including the Sierra Club, the Center for Biological Diversity, and the Defenders of Wildlife – acted as parties challenging the Trump Administration's border wall agenda.²⁹ Lawsuits filed by environmental groups generally emphasized arguments grounded in the abuse of executive power, the violation of multiple environmental laws, and the illegal use of government funds.³⁰

23. See Barclay & Frostenson, *supra* note 8 (explaining presidential demand for Congress to allocate five billion dollars towards border wall construction).

24. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> (stating president's decision to declare state of emergency at border)

25. See *id.* (reasoning President's decision to declare state of emergency at border is to increase budget for border wall project).

26. See *id.* (describing effect of declaring national emergency on congressional allocation of funds).

27. Peter Baker ET AL., *As Congress Passes Spending Bill, Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/trump-national-emergency-border.html> (discussing ability for president to relocate funds originally intended for military projects towards border wall emergency).

28. See Ellen Gilmer, *Environmental Groups Challenge Border Wall on Multiple Fronts*, BLOOMBERG ENV'T (Nov. 13, 2019), <https://news.bloombergenvironment.com/environment-and-energy/environmental-groups-challenge-border-wall-on-multiple-fronts> (explaining current legal controversies between environmental agencies and Trump administration over border wall).

29. *Id.* (listing environmental groups with pending lawsuits against President Trump and Department of Homeland Security).

30. See *id.* (highlighting different arguments used by environmental organization affected by wall construction).

II. THE LEGISLATIVE BUILDING BLOCKS AT THE WALL'S FOUNDATION

The construction of artificial barriers at the U.S.-Mexico border dates back to the early 1900s, but building barriers as a solution to illegal immigration became paramount during the Clinton Administration.³¹ In 1996, President Clinton signed the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) to address illegal immigration in accordance with his “prevention by deterrence” agenda.³² The IIRAIRA imposed harsher criminal penalties for illegal immigration by banning illegal immigrants from re-entering the United States for up to ten years before allowing them to apply for a waiver.³³ The IIRAIRA’s passing kickstarted a chain of legislative reaction to the crisis at the border.³⁴ To address issues of border security in Southern California, President Clinton ordered twenty-four miles of fencing to be built in San Diego from 1994 to 1999.³⁵ While the fence reduced some border security concerns felt by residents of San Diego County, immigrants began flooding to other areas, such as the neighboring Imperial County, where “illegal immigration apprehensions increased by 500 percent.”³⁶

Following the September 2001 terrorist attacks, the government’s elevated concern for national security encouraged President Bush to sign the Real ID Act of 2005.³⁷ The Act empowered the DHS to take proactive measures to secure the nation’s southern border.³⁸ Section 102 of the Real ID Act gives the DHS power to

31. See Jean Guerrero, *Decades-long struggle to secure U.S.-Mexico border*, INEWSOURCE (Nov. 13, 2017), <https://border.inewsource.org> (illustrating historical significance of U.S.-Mexico physical border).

32. See *US-Mexico Border Wall*, *supra* note 16 (emphasizing deterrence policy used by Clinton administration to tackle illegal immigration at south-western border).

33. See *Illegal Immigration Reform and Immigration Responsibility Act Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act (last visited July 14, 2020) (reviewing IIRAIRA imposed criminal implications on illegal migrants).

34. See Cromer, *supra* note 5 (discussing impact of IIRAIRA on future with U.S.-Mexico border legislation).

35. See Guerrero, *supra* note 31 (explaining measures taken by President Clinton to construct artificial barrier between U.S. and Mexico in California).

36. *Id.* (stating impact physical wall had on illegal immigration during Clinton administration).

37. See *US-Mexico Border Wall*, *supra* note 16 (emphasizing impact of 9/11 terrorist attack on Bush’s immigration policy at border).

38. *Id.* (discussing Real ID Act’s significance regarding federal law and regulation to secure border).

waive laws as necessary to secure the border.³⁹ Subsequently, President Bush signed the Secure Fence Act of 2006 to construct fencing at the border, using the Real ID Act to waive numerous federal and state environmental laws and regulations.⁴⁰ The Secure Fence Act “mandate[d] the construction of about 700 miles of border walls and other barriers”, including a virtual wall across the entire 2,000 mile border.⁴¹

Following the border wall’s extension in 2006, numerous environmental agencies voiced concern that encouraged the DHS to take protective environmental measures.⁴² The DHS responded to these concerns by signing a Memorandum of Understanding with the Department of the Interior and the Department of Agriculture (the Memorandum).⁴³ The Memorandum, entitled “Cooperative National Security and Counterterrorism Efforts on Federal Lands Along the United States’ Borders,” outlined the precautionary efforts the DHS would take to reduce environmental impact at the border.⁴⁴ Although the Memorandum symbolized the DHS’s commitment to implement environmentally-friendly procedures, the recent efforts to expand the wall have encouraged activists to expose the indelible environmental consequences of the border wall and its potential to cause more environmental havoc.⁴⁵

During the 2016 election, security concerns at the U.S.-Mexico border prompted Trump’s promise, if elected, to build a substantial artificial border between the two countries.⁴⁶ Following his inaugu-

39. See Tresky, *supra* note 1 (identifying specific section responsible for granting DHS permission to waive laws in furtherance of constructing border wall).

40. See Roche, *supra* note 14 (discussing legal implications of Real ID Act resulting in signing Secure Fence Act of 2006 into law).

41. See Cromer, *supra* note 5 (emphasizing Secure Fence Act’s purpose in furthering artificial barrier construction along southern border).

42. See Tresky, *supra* note 1 (discussing response to Secure Fence Act of 2006).

43. Memorandum of Understanding Among U.S. Dep’t of Homeland Sec. and U.S. Dep’t of the Interior and U.S. Dep’t of Agric. On Coop. Nat’l Sec. Regarding Cooperative National Security and Counterterrorism Efforts on Fed. Lands along the U.S. Border (Mar. 31, 2006) (on file with U.S. Dep’t of Homeland Sec.), <https://www.hsdl.org/?view&did=769336> (documenting agreement between DHS and multiple environmental government agencies during border wall construction in response to Secure Fence Act).

44. *Id.* at 1 (listing title of Memorandum).

45. Jimmy Tobias, *The Little-Known Law That the Trump Administration Is Using to Build a Border Wall*, PAC. STANDARD (Jan. 21, 2019), <https://psmag.com/environment/the-little-known-law-that-the-trump-administration-is-using-to-build-a-border-wall> (discussing National Resources Committee’s efforts to join environmentalists in fight against border wall).

46. See Cromer, *supra* note 5 (emphasizing Trump’s presidential campaign strategy to rally support for constructing border wall).

ration, President Trump invoked his executive power to mandate expansion and improvements to the existing wall.⁴⁷ In his executive order, the President cited the Immigration and Nationality Act, the Secure Fence Act, and the IIRAIRA as sources of his authority.⁴⁸ When President Trump declared a national emergency along the border, he gained directive power to respond quickly to the “national crisis.”⁴⁹ Consequently, the President had the power to acquire funds initially committed to other government projects and redirect them toward alleviating the emergency situation.⁵⁰ The President’s national emergency declaration triggered instant backlash from environmentalists who raised numerous constitutional concerns about executive power.⁵¹

At a press conference, President Trump justified declaring a national emergency by identifying the border as a source of “drugs and criminals coming into our country.”⁵² The President’s strategy behind declaring a state of emergency stemmed from his disapproval of Congress’s budget for wall construction.⁵³ By declaring a state of emergency, President Trump was granted control of military funds and redirected them toward building the wall, a project he believes is an effective response to the nation’s illegal immigration crisis.⁵⁴ Multiple federal statutes grant the President power to direct military funds toward projects dedicated to a crisis, such as the purported border wall crisis.⁵⁵ Funds can be pulled from mili-

47. Exec. Order No. 13767, 82 C.F.R. 8793 (Jan. 30, 2017) (textualizing executive order mandating border wall expansion).

48. *Id.* (listing President Trump’s stated legal authority for granting executive order concerning border wall).

49. Charlie Savage, *National Emergency Powers and Trump’s Border Wall, Explained*, N.Y. TIMES (Jan. 7, 2019) <https://www.nytimes.com/2019/01/07/us/politics/trump-national-emergency.html> (discussing reallocation of military funds following Trump’s emergency declaration concerning border wall).

50. *Id.* (stating Trump’s funding strategy for border wall).

51. Brian Segee, *D.C. Judge to Hear Legal Challenge to Trump’s Border-wall Emergency*, CTR. FOR BIOLOGICAL DIVERSITY (Dec. 12, 2019), <https://biologicaldiversity.org/w/news/press-releases/dc-judge-to-hear-legal-challenge-to-trumps-border-wall-emergency-2019-12-12/> (mentioning pending lawsuit involving environmental groups, including Ctr. for Biological Diversity, against Trump administration claiming constitutional violations to build border wall).

52. *See Baker, supra* note 24 (emphasizing President’s reasoning for declaring state of emergency at border).

53. *Id.* (suggesting emergency declaration correlated with Congress’s disapproval of original wall budget).

54. *Id.* (explaining consequences of national emergency declaration on wall’s budget).

55. Margaret Taylor, *Declaring an Emergency to Build a Border Wall: The Statutory Arguments*, LAWFARE (Jan. 7, 2019), <https://www.lawfareblog.com/declaring-emergency-build-border-wall-statutory-arguments> (discussing statutory provisions which allow for President and Secretary of Defense to redirect funds to build border

tary construction projects, which helped increase the Congressionally-approved border wall budget from \$5.7 billion to \$8 billion.⁵⁶ The newly acquired funds will augment the time and resources available to structure hundreds of miles of new border wall.⁵⁷

III. A HISTORY OF HARM: THE DOCUMENTED ENVIRONMENTAL IMPACT OF THE EXISTING BORDER WALL

From the beginning of construction, environmental activists and agencies have documented the wall's harmful effects on surrounding ecosystems.⁵⁸ The Sierra Club, a grassroots environmental organization, reported the current wall causes "[d]isturbance, displacement and mortality to wildlife from artificial night lighting, increased vehicular access, and walls shifting migrant traffic patterns and enforcement activities."⁵⁹ The wall's existence also has severe implications for neighboring communities, including wildlife refuges, conservation areas, parks, native communities, and protected land.⁶⁰

The wall has severed property dedicated to the conservation and maintenance of borderland ecosystems.⁶¹ Public land sitting on the border, such as the Organ Pipe Cactus National Monument in Arizona and the Rio Bosque Wetland Parks in Texas, are negatively impacted by the physical barrier.⁶² The wall further accelerates erosion and impedes animals from intermingling and traveling to vital food and water sources.⁶³

wall); *see also* 10 U.S.C. § 2808 (2017) (listing statutory provisions which allow for allocation of funds to aid emergency situations).

56. *See Baker, supra* note 24 (discussing military programs from which funds can be redirected towards wall construction).

57. *Id.* (stating consequences increasing funding will have on construction timeline).

58. *Damage Caused by the Border Wall, supra* note 7 (listing historical environmental impact of wall on protected borderlands).

59. *Id.* at 1 (stating current wall's impact generally).

60. *Id.* (noting most impacted lands which consist of protected wildlife refuges and conservation areas).

61. *Id.* at 2 (documenting border's impact on dividing borderland communities).

62. *Id.* at 1-2 (listing protected areas that have experienced negative impacts of wall).

63. *Damage Caused by the Border Wall, supra* note 7, at 1 (discussing impacts on wildlife access to natural resources).

A. Impact on Wildlife and Surrounding Ecosystems

While the wall's original purpose was to prevent human migration, it also affects animal migration.⁶⁴ The constructed barrier severed many animal habitats, some of which are home to animals listed on the Endangered Species List.⁶⁵ Species identified as being the most affected by the border wall are those with small populations that range over a specific radius of land.⁶⁶ The Cabeza Prieta National Wildlife Refuge in Arizona and the El Pinacate area in Mexico are connected along the border.⁶⁷ Before construction, species such as the Sonoran pronghorn, a relative of the antelope family, were able to freely move between both protected lands.⁶⁸ Since the wall's construction, however, species' inability to cross the border area has impeded their access to food and water on either side.⁶⁹ In Texas, the wall acts as a barrier to wildlife seeking food and water from the Rio Grande River.⁷⁰ Similarly, the wall currently divides the Rio Bosque Wetlands Park in El Paso from rivers and floodways that are essential to wildlife and wetlands in the area.⁷¹

B. Damage Caused by Harsh Weather Conditions Exacerbated by the Wall

In addition to harming animals' migratory patterns, the wall burdens surrounding neighborhoods with serious consequences in certain weather conditions.⁷² In the summer of 2008, the Mexican border town of Nogales, which is just south of Arizona, experienced a monsoon rain storm.⁷³ During the storm, the concrete border prevented the natural flow of rainwater, causing massive flooding.⁷⁴

64. *Border Wall Environmental Impacts*, *supra* note 13 at 1 (stating consequences to animal migration).

65. *Id.* (emphasizing presence of endangered species living on border path).

66. *See* Barclay & Frostenson, *supra* note 8 (discussing most vulnerable species).

67. *Id.* (discussing specific locations wall will impact).

68. *Id.* (explaining impact on mobility of native borderland species).

69. *See* Worland, *supra* note 3 (discussing importance of maintaining species' mobility).

70. *See* Tresky, *supra* note 1 (mentioning wall's impact on Rio Grande River in Texas).

71. *See* *Damage Caused by the Border Wall*, *supra* note 7 (listing additional waterways that will be impacted by construction).

72. *Id.* (noting wall's historical impact on surrounding communities).

73. *Id.* (discussing event that revealed consequences of improper wall construction).

74. Brady McCombs, *Mexico ties flooding in Nogales to U.S. Border Patrol-built wall*, ARIZ. DAILY STAR (Jul. 23, 2008), <https://tucson.com/news/local/border/mexico->

In the flood's aftermath, Mexican officials from the International Boundary and Water Commission attributed the damage to the wall's construction.⁷⁵ Officials discovered a portion of the wall built in a storm-water tunnel beneath the city, which prevented proper drainage during the storm.⁷⁶ A National Park Service report found that the wall "did not meet hydrologic performance standards."⁷⁷ The flooding killed two civilians and caused an estimated eight million dollars' worth of damage.⁷⁸

In January 2020, a portion of the wall along the California-Mexico border collapsed.⁷⁹ The newly renovated wall failed to withstand high winds and collapsed onto the Mexican side of the California-Mexico border.⁸⁰ Having only recently been installed, the collapsed wall's cement was still curing.⁸¹ The wall's collapse set back the construction schedule while local officials in Mexico cleaned up the impacted area.⁸² Conservationists are concerned about the wall's potential to cause environmental damage, specifically during times of intense weather conditions, such as flooding and high winds.⁸³ Environmentalists have also noted that when the wall experiences heavy floods and natural damage, the successive debris could contaminate and debilitate surrounding ecosystems.⁸⁴

ties-flooding-in-nogales-to-u-s-border-patrol/article_a11265b0-17c3-5bed-b50a-72e5d17e1369.html (documenting effects of Nogales flooding on local communities).

75. *Id.* (mentioning Mexican government officials' response to wall's contribution to flood damage).

76. *Id.* (discussing wall infrastructure that caused flooding).

77. *See Damage Caused by the Border Wall*, *supra* note 7 at 1 (discussing National Park Service's acknowledgement of wall's contribution to Nogales flood).

78. *Id.* at 2 (discussing consequence of flooding on surrounding community including amount in damage and known casualties).

79. Andy Rose & Paul LeBlanc, *Portion of US border wall in California falls over in high winds and lands on Mexican side*, CNN (Jan. 29, 2020, 8:56 AM), <https://www.cnn.com/2020/01/29/politics/us-border-wall-falls-over-high-winds/index.html> (stating condition of border wall after storm).

80. *Id.* (suggesting wall's ability to fall in high winds could present more complications as construction continues).

81. *Id.* (detailing wall's vulnerability to local weather conditions).

82. *Id.* (suggesting severe weather can delay construction).

83. Barclay & Frostenson, *supra* note 8 (highlighting potential impacts of construction on surrounding communities due to hazardous weather conditions).

84. *Id.* (emphasizing wall's potential to cause flooding).

IV. THE BARRIER TO A HEALTHY ECOSYSTEM: THE PROJECTED
ENVIRONMENTAL IMPACTS OF THE NEW BORDER WALL
CONSTRUCTION

From the start of Trump's political campaign to his presidential declaration of a national emergency at the border, the consequences of border wall expansion have been at the forefront of conservationists' agendas.⁸⁵ Environmental scientists and activists predict numerous consequences of extending the border wall along the 2,000-mile border.⁸⁶ Ecological impacts include harm to animal habitats, the abuse of natural resources during construction such as increased water usage, and the elevated CO₂ omissions when producing concrete to build the wall.⁸⁷ In addition, the extension of the wall will continue to divide and degrade wildlife refuges and parks.⁸⁸

A. Projected Impact Wildlife and Vegetation

The borderlands consist of some of the most biodiverse regions in the nation.⁸⁹ The Coronado National Forest, located just north of the Arizona-Mexico border, is the most ecologically diverse forest in the nation.⁹⁰ Additionally, the Lower Rio Grande Valley attracts numerous terrestrial and aquatic animals, plants, and insects.⁹¹ Wildlife in the borderlands consists of a wide range of mammal, fish, bird, and plant species, many of which are listed as endangered.⁹² Over 1,500 native animal and plant species, sixty-two of which are either endangered or vulnerable, may lose their

85. Brian Owens, *Trump's border-wall pledge raises hackles*, NATURE (Aug. 16, 2016), <https://www.nature.com/news/trump-s-border-wall-pledge-threatens-delicate-desert-ecosystems-1.20431> (discussing general environmentalist reactions to expanding border wall); *see also* Barclay & Frostenson, *supra* note 8 (mentioning border wall debate generally).

86. Tobias, *supra* note 45 (referencing environmentalist projections of potential ecological harm to borderlands); *see also* Meagher, *supra* note 4 (listing environmental consequences of wall's construction).

87. *See* Meagher, *supra* note 4 (listing environmental consequences of wall construction).

88. *See* Skolnick, *supra* note 12 (emphasizing construction's perpetuation of environmental harm).

89. *Id.* (illustrating biodiversity of borderlands).

90. Barclay & Frostenson, *supra* note 8 (mentioning specific region in Arizona where biodiversity remains abundant).

91. *Id.* (emphasizing diversity of wildlife in borderlands).

92. *See* Owens, *supra* note 85 (listing wide range of species native to borderland, many of which are endangered).

habitats and migratory routes because of the border wall's construction.⁹³

Lack of genetic diversity among animal species could be another consequence of the artificial severance of the borderlands.⁹⁴ One study evaluating the effects of the border wall on animal migratory patterns found that nearly forty-five species will be impacted by restriction in movement.⁹⁵ Scientists researched the wall's impacts on low-flying and land animals that require "transboundary" movement.⁹⁶ In Arizona, both the ferruginous pygmy-owl, a low-flying, endangered bird, and the desert bighorn sheep, an especially mobile species, rely on transboundary movement to connect their "small and fragmented" populations.⁹⁷

Conservationists are especially concerned about the wall's impact on some of the nation's most at-risk animal populations, including Mexican gray wolves, jaguars, and ocelots.⁹⁸ Confining these populations to certain areas without the ability to move freely and access other members of their population could harm the existence of each species as a whole.⁹⁹ For instance, the black bear population living in Big Bend National Park in West Texas would be restricted from interacting with the Mexican black bear population, thereby decreasing mating pool sizes and jeopardizing the black bear population altogether.¹⁰⁰ Similarly, a wall built in Northern Mexico through the Northern Jaguar Reserve will disconnect the populations of jaguar existing along the border.¹⁰¹ Populations in this space could experience challenges to colonizing when

93. John Schwartz, *supra* note 2 (providing exact number of species potentially impacted by construction); Peters ET AL., *supra* note 10 (mentioning number of species documented on endangered species list to emphasize risk wall poses towards vulnerable animal populations).

94. See Worland, *supra* note 3 (emphasizing wall's ability to diminish genetic diversity amongst species by physically preventing species interaction).

95. Barclay & Frostenson, *supra* note 8 (mentioning number of species most vulnerable to barriers preventing movement).

96. Aaron D. Flesch ET AL., *Potential Effects of the United States-Mexico Border Fence on Wildlife*, 24 CONSERVATION BIOLOGY 171, 172 (2010) (highlighting species impacted when physical barrier restricts movement).

97. *Id.* at 72-73 (emphasizing height of wall as main challenge for ground-restricted animals).

98. Worland, *supra* note 3 (specifying most vulnerable endangered species at border).

99. See Barclay & Frostenson, *supra* note 8 (identifying threat immobility has on native species).

100. Norma Fowler ET AL., *Border wall: bad for biodiversity*, 16 ECOLOGICAL SOCIETY OF AMERICA: FRONTIERS IN ECOLOGY AND THE ENV'T 137, 138 (2018) (using black bear population as example of wall's potential negative impacts on biodiversity).

101. See Barclay & Frostenson, *supra* note 8 (discussing potential impacts of wall on population of jaguar present along border).

groups on the other side of the border become inaccessible.¹⁰² Climate change is an additional concern for restricted movement of borderland wildlife, making it harder for animals to adapt to new migratory weather patterns when a barrier restricts them to one space.¹⁰³ For example, the recent impacts of climate change have caused some species to travel north for cooler climates, but a barrier would restrict animals south of the border from traveling north.¹⁰⁴

Researchers project plant-life indigenous to the borderlands will suffer a similar fate to wildlife.¹⁰⁵ In Southern Texas, an endangered species of wildflower grows in the same location where the President plans to build the new barrier.¹⁰⁶ In Western Texas, an endangered cactus species – the coryphantha ramillosa – grows along the wall’s new projected route.¹⁰⁷ The barrier can also change the flight patterns of bees and butterflies and, in turn, disrupt the amount of pollen spread to plant species.¹⁰⁸

B. Projected Impact on Natural Resources and Air Quality

The materials necessary to construct the new portions of the border wall are sourced from local natural resources and, consequently, influence surrounding environments.¹⁰⁹ The construction of a proposed fifty-foot border wall requires “tens or hundreds of thousands of gallons of groundwater” and 275 million cubic feet of concrete.¹¹⁰ Conservationists in areas such as the San Bernardino

102. *Id.* (emphasizing barrier’s potential to halt jaguar population increase).

103. Adam Wernick, *Trump’s wall will harm wildlife along the US southern border, say environmental experts*, THE WORLD (Feb. 22, 2019, 6:30 PM), <https://www.pri.org/stories/2019-02-22/trumps-wall-will-harm-wildlife-along-us-southern-border-say-environmental-experts> (mentioning current climate crisis’s impact on movement of animal populations to emphasize potential impacts of barrier restricting movement could have on populations seeking compatible weather conditions).

104. *Id.* (discussing recent pattern of animal movement towards southern regions to seek warmer climates and connecting this recent finding to wall’s potential restriction on animal migration).

105. See Fowler ET AL., *supra* note 100 (discussing general risks wall poses to plant species).

106. *Id.* (mentioning specific plant species at risk if border wall construction continues).

107. *Id.* (emphasizing existence of volatile plant species along border).

108. See John Schwartz, *supra* note 2 (indicating potential physical border has in preventing spread of pollen and thus presenting health risk to plant species along border).

109. See Roche, *supra* note 14 (hinting at risk wall construction poses to surrounding natural resources).

110. Nina Lakhani, *Water-guzzling demands of Trump’s border wall threaten fish species*, THE GUARDIAN (Dec. 29, 2019), <https://www.theguardian.com/envirom->

Wildlife Refuge in Southern Arizona fear for the depletion of natural water that sustains wildlife, especially vulnerable fish species distinct to the area.¹¹¹

The construction project will inevitably require massive amounts of water.¹¹² An agricultural ecologist projects the new barrier will use up to fifty million gallons of water along the Arizona route alone.¹¹³ In the Tucson barrier region, one of nine wells supplying this water is already empty.¹¹⁴ The wall's size and stature can obstruct the natural flow of springs, rivers, and flood water.¹¹⁵ In the event of a storm, the obstruction can cause severe flash flooding, similar to the disastrous event in Nogales.¹¹⁶

Plans for a portion of the proposed wall's infrastructure require mass amounts of cement.¹¹⁷ "The cement industry is already responsible for about 5% of the world's annual carbon dioxide emissions," and the wall's construction is projected to exacerbate this figure.¹¹⁸ If one thousand miles of wall were constructed, producing the necessary concrete would emit an estimated 1.9 million metric tons of carbon dioxide, the equivalent of "adding over 400,000 cars to the road every year."¹¹⁹ The production of cement consumes 400 pounds of coal to be used for every single ton of

ment/2019/dec/29/trump-border-wall-water-fish-species-threatened (projecting amount of water necessary to build wall). *See also* Meagher, *supra* note 4 (mentioning specific impact wall will have on water usage and CO₂ omissions); *Scientists warn Trump's border wall will be bad for the planet*, BLOOMBERGNEF (Jan. 26, 2017), <https://about.bnef.com/blog/scientists-warn-trumps-border-wall-will-be-bad-for-the-planet> (listing projected amount of water and concrete necessary to build proposed wall).

111. *See* Lakhani, *supra* note 110 (documenting general concern of draining natural sources of water during construction project).

112. *Id.* (emphasizing projected water usage).

113. *Id.* (presenting estimated millions of gallons builders may use in Arizona border construction).

114. *Id.* (detailing rapid depletion of water as construction continues).

115. *See* Meagher, *supra* note 4 (suggesting major consequence wall will have on environment during times of flooding).

116. *See id.* (proposing major consequence wall will have on environment during times of flooding). *See also* Barclay & Frostenson, *supra* note 8 (mentioning flash flooding events involving poor wall infrastructure).

117. *See Scientists warn Trump's border wall will be bad for the planet*, *supra* note 110 (explaining physical makeup of proposed wall would consist mostly of cement).

118. *See* Meagher, *supra* note 4 (emphasizing cement industry's contributions to global climate crisis).

119. *Id.* (correlating wall construction's potential cement usage with national increase in CO₂ emissions). *See also Scientists Warn Trump's Border Wall Will Be Bad for the Planet*, *supra* note 110 (comparing wall construction's potential CO₂ emissions to current annual household emissions in Pittsburgh, Pennsylvania).

cement produced.¹²⁰ The harmful effects of depleting natural resources, and the greenhouse gases emitted by concrete production, are potentially worsened by the hundreds of miles of border wall yet to be constructed.¹²¹

C. Projected Impact on Surrounding Wildlife Refuges and Other Protected Lands

The border's surrounding area encompasses nearly twenty-five million acres of protected land.¹²² Within this range sits "six wildlife refuges, six national parks, tribal lands, wilderness areas, and conservation areas."¹²³ Within these environmentally impressive areas exists three mountain chains, the two largest deserts in North America, the Rio Grande, and vast farmland.¹²⁴ In Texas alone, the proposed route of the new border wall will cut through federally protected wildlife refuges, state parks, a National Butterfly Center, and other culturally significant sites.¹²⁵ By severing ecologically rich parks, wetlands, refuges, and sanctuaries, the wall not only threatens wildlife and plant life, but also deters the general public from visiting these tourist attractions.¹²⁶

Biologists from the University of Texas at Austin determined that Texas will bear the heaviest burden from wall construction.¹²⁷ Since Texas encompasses the largest portion of borderlands between the U.S. and Mexico, many wildlife refuges and sanctuaries that run along the border in Texas are at risk.¹²⁸ Thirty-three miles of border wall will be erected along the Lower Rio Grande Valley

120. See also *Scientists Warn Trump's Border Wall Will Be Bad for the Planet*, *supra* note 110 (noting wall construction's additional environmental impact of increased natural resource consumption).

121. *Id.* (emphasizing severe potential environmental impact by referencing size of proposed border wall).

122. See Barclay & Frostenson, *supra* note 8 (referencing amount of federally protected land within border region).

123. *Id.* (listing types of protected borderland).

124. *Id.* (mentioning natural landmarks existing within protected borderland).

125. *Id.* (mentioning Texas's environmentally significant locations impacted by impending border construction).

126. *Id.* (discussing construction's impact on environmental tourism industry).

127. April Reese, *As Work Begins on Trump's Border Wall, a Key Wildlife Refuge Is at Risk*, *YALE ENVIRONMENT* 360 (Feb. 28, 2019), <https://e360.yale.edu/features/as-work-begins-on-trumps-border-wall-a-key-wildlife-refuge-is-at-risk> (mentioning Texas is particularly vulnerable state to wall impacts).

128. *Id.* (referencing Texas's size to demonstrate most borderland exists within state).

National Wildlife Refuge.¹²⁹ This portion of the refuge is specifically dedicated to enhancing and rehabilitating the Tamaulipan Brushland, ninety-seven percent of which was destroyed by prior public use and construction.¹³⁰ The Lower Rio Grande Valley is one of the “four pearls” of the wildlife corridor, along with the Bentsen-Rio Grande Valley State Park, the El Monrillo Banco tract of the Lower Rio Grande Valley, and the National Butterfly Center.¹³¹ Notably, the privately-owned National Butterfly Center in Mission, Texas will lose up to seventy acres of property from the invasive border wall.¹³²

The border wall has significantly impacted these refuges, sanctuaries, and parks that depend on visitors to maintain operations.¹³³ Despite being one of Texas’s most coveted bird-watching locations, the Sabal Palm Sanctuary experienced a fifty percent decrease in visitors since the wall’s construction.¹³⁴ The wall also impedes the Hidalgo Pumphouse and Birding Center, where it obstructs visitors’ visibility and affects the area’s general environmental aestheticism.¹³⁵ A 2011 study “estimated that bird watching and other forms of environmental tourism brought more than \$344 million in economic activity” to Texas, stimulating the state’s economy and providing over four thousand jobs.¹³⁶

Other border states – such as Arizona, New Mexico, and California – are experiencing similar challenges faced by refuges and sanctuaries along the borderlands in Texas.¹³⁷ The Coronado National Forest is of particular concern for New Mexico and Arizona

129. *Id.* (noting number of miles wall will span along Texas’s Rio Grande region).

130. *Id.* (discussing ecosystems already affected by negative human impact).

131. *Id.* (likening landmarks to environmental gems along borderland).

132. See John Schwartz, *supra* note 2 (highlighting amount of land National Butterfly Center will surrender for border wall expansion).

133. *Id.* (suggesting most wildlife refuges rely on tourism funds for operation).

134. See *id.* (discussing wall construction’s impact on tourist-related income from national birding community). For further information on the sanctuary, see *Sabal National Audubon Sanctuary*, NAT’L AUDUBON SOC’Y, <https://tx.audubon.org/sabal-palm-audubon-sanctuary> (last visited July 7, 2020) (mentioning birding community’s prevalence at sanctuary).

135. See Reese, *supra* note 127 (correlating wall’s impact on visibility with decreased environmental tourism).

136. See John Schwartz, *supra* note 2 (describing wall’s potential impact on state economy and local job market).

137. See Barclay & Frostenson, *supra* note 8 (mentioning states similar to Texas experiencing consequences of wall’s impact).

conservationists.¹³⁸ The forest is home to the largest quantity of threatened and endangered species in the country.¹³⁹ The forest also encompasses most of the “sky islands” that run through both Arizona and New Mexico, which are a series of mountain ranges home to some of the most diverse populations of species in North America.¹⁴⁰

V. AN IRONIC GESTURE: THE LAWS BROKEN TO ADVANCE THE TRUMP ADMINISTRATION’S ANTI-CRIME INITIATIVE

The Real ID Act and the IIRAIRA have been crucial in legitimizing the DHS’s waiver of environmental laws to expedite wall construction.¹⁴¹ Under Section 102 of the IIRAIRA, the DHS, acting under executive order, has broad authority to authorize building projects dedicated to national security initiatives even if those projects fail to comport with environmental laws.¹⁴² With the powers granted to the DHS under the Real ID Act, the government may waive environmental laws that require in-depth environmental impact analyses.¹⁴³ The Real ID Act also authorizes the DHS to suspend laws dedicated to the continued preservation of borderland ecosystems.¹⁴⁴ Some of the most noteworthy laws currently waived to make way for the border wall include NEPA, the Endangered Species Act, the Clean Air Act, and the Clean Water Act.¹⁴⁵

138. *Id.* (recognizing joint concern of Arizona and New Mexico in preserving Coronado National Forest).

139. *Id.* (discussing environmental significance of Coronado Forest).

140. *Id.* (acknowledging “sky islands” and their biologically diverse environments).

141. Matthew Schwartz, *Government Can Waive Environmental Laws to Build Border Wall Prototypes*, *Court Rules*, NPR (Feb. 12, 2019), <https://www.npr.org/2019/02/12/693777466/government-can-waive-environmental-laws-to-build-border-wall-prototypes-court-ru> (discussing IIRAIRA at source of wall’s legal controversy). *See also* Roche, *supra* note 14 (mentioning Real ID Act grants DHS broad authority to waive certain laws to aid national security efforts).

142. *See generally* *In re Border Infrastructure Envtl. Litig. v. Dep’t of Homeland Sec.*, 915 F.3d 1213, 1217 (9th Cir. 2019) (explaining legislative source of DHS’s authority to waive laws to construct barrier wall).

143. *See* Schwartz, *supra* note 2 (mentioning lack of environmental impact analysis as consequence of DHS waiving environmental laws to expedite border wall construction).

144. *See* Tobias, *supra* note 45 (noting types of laws DHS will waive to guarantee wall’s progression along border).

145. For a detailed list of all laws that will be waived by the DHS to build the border wall, see *supra* note 13 and accompanying text.

NEPA establishes specific requirements that government projects must satisfy in order to reduce environmental impact.¹⁴⁶ Both Environmental Assessments (EA) and Environmental Impact Statements (EIS), which are significant portions of the NEPA process, will be waived to build the border wall.¹⁴⁷ The Wilderness Act and the Endangered Species Act (ESA) are just two examples of legislation that will be waived by the DHS to expedite wall construction.¹⁴⁸ Both Acts are specifically dedicated to protecting wildlife and preserving land that government-mandated projects jeopardize.¹⁴⁹

The DHS has also utilized the Real ID Act and the IIRAIRA to bypass laws that protect lands with cultural significance.¹⁵⁰ Specifically, the DHS has waived legislation dedicated to protecting and preserving Native American land that falls within the wall's path.¹⁵¹ The American Indian Religious Freedom Act of 1978 and the Native American Graves Protection and Repatriation Act (NAGPRA) are two laws established to protect and preserve Native American land and culture.¹⁵² In Papago, Arizona, the Tohono O'Odham

146. *Summary of the National Environmental Policy Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last visited July 8, 2020) (citing 42 U.S.C. § 4321 (1969)) (containing NEPA provision dedicated to preserving environmentally significant regions).

147. *Id.* (discussing NEPA language requiring EAs and EISs for each government project that has potential to impact environment).

148. For information on the Wilderness Act, see *The Wilderness Act*, THE WILDERNESS SOC'Y, <https://www.wilderness.org/articles/article/wilderness-act> (last visited July 8, 2020) (explaining brief history of Act and its purpose in protecting natural habitats). For further information on the ESA, see Endangered Species Act, 16 U.S.C. § 1531 (2003) (mentioning key purposes and policy of ESA).

149. 16 U.S.C. § 1531(a) (proclaiming federal initiatives to protect endangered species); see also *The Wilderness Act*, *supra* note 149 (explaining key purpose of Act to further environmental initiatives).

150. See Reese, *supra* note 127 (suggesting wall's impact goes beyond just environmental concerns and impacts native culture).

151. Laiken Jordhal, *Trump Administration Waives Laws to Build 100 Miles of Border Wall Across Arizona National Monument, Wildlife Refuges*, CTR. FOR BIOLOGICAL DIVERSITY (May 14, 2019), <https://biologicaldiversity.org/w/news/press-releases/trump-administration-waives-laws-to-build-100-miles-border-wall-across-arizona-national-monument-and-refuges-2019-05-14/> (discussing DHS's waiver of certain laws specific to Native American communities who call borderlands home).

152. For more information on the American Indian Religious Freedom Act of 1978, see *Protecting Indigenous Peoples' Patrimony*, NAT'L PARK SERV., <https://www.nps.gov/ethnography/aah/AAheritage/HPNe.htm> (last visited July 8, 2020) (discussing key concepts of Act which are vital to protecting Native American communities and their intersection with protected parks). For more information on the Native American Graves Protection and Repatriation Act, see Francis P. McManamon, *The Native American Graves Protection and Repatriation Act (NAGPRA)*, ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA (2000), <https://www.nps.gov/archeology/tools/laws/nagpra.htm> (discussing brief history of NAGPRA and defining key terms located within text of legislation).

Nation Reserve neighbors the Organ Pipe Cactus National Monument to the west and straddles the U.S.-Mexico border to the south.¹⁵³ The vice chair of the Tohono O’Odham Nation spoke out against construction, arguing that a seventy-five-mile wall along tribal lands would violate tribal sovereignty.¹⁵⁴ The neighboring protected land – the Organ Pipe Cactus National Monument – awaits the construction of a portion of wall that would restrict wildlife access to a communal watering hole.¹⁵⁵

VI. ACTIVISTS’ ATTEMPTS TO PREVENT FURTHER CONSTRUCTION DEMONSTRATES JUST HOW STEEP THE WALL IS TO CLIMB

The controversial construction project has elicited concern from environmental and cultural groups across the nation.¹⁵⁶ In response to the wall, environmental advocates and multiple states filed lawsuits challenging the Trump Administration’s building plans.¹⁵⁷ Anti-wall activists who are joined as parties to litigation have asked courts to consider abuse of executive power, illegal appropriation of funds, and the misapplication of constitutional law.¹⁵⁸ Although activists continue to use legal resources to oppose further construction, the majority of these legal outcomes have maintained the wall’s progression.¹⁵⁹

In August 2018, the Animal Legal Defense Fund, Defenders of Wildlife, and the Center for Biological Diversity filed a petition for a writ of certiorari in the Supreme Court challenging a Ninth Circuit decision upholding the DHS’s authority to waive environmen-

153. See Skolnick, *supra* note 11 (discussing geographical region that neighbors Organ Pipe Cactus National Monument).

154. See Roche, *supra* note 14 (mentioning Tohono O’Odham Tribe’s refusal to permit wall construction on Native American protected land).

155. See Skolnick, *supra* note 11 (discussing impact wall will have on diverse borderland wildlife when cutting through Organ Pipe).

156. See Tobias, *supra* note 45 (discussing concerns from conservatists and civil rights activists that Trump Administration’s use of Real ID Act “has effectively turned parts of the U.S. – Mexico border into a region without civil and environmental rights.”).

157. See Gilmer, *supra* note 28 (mentioning lawsuits challenging President Trump’s executive order to build wall).

158. Charlie Savage & Robert Pear, *16 States Sue to Stop Trump’s Use of Emergency Powers to Build Border Wall*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/us/politics/national-emergency-lawsuits-trump.html> (discussing general legal arguments directed at Trump Administration in reference to wall).

159. See Roche, *supra* note 14 (noting challenges to successfully arguing against border wall in court).

tal laws for construction.¹⁶⁰ Initially, a U.S. District Judge sitting in California had dismissed the case.¹⁶¹ The petitioners requested review of the DHS's ability to waive environmental laws under IIRAIRA.¹⁶² Nine members of the House of Representatives wrote in support of petitioners.¹⁶³ In their amicus brief, the representatives argued the DHS violated the Constitution by allowing unelected officials to waive laws enacted by Congress.¹⁶⁴ The Court found the representatives' constitutional arguments unconvincing and denied certiorari.¹⁶⁵

Just a few months after the Supreme Court declined to review the petition, the Sierra Club and Defenders of Wildlife filed a lawsuit in the Ninth Circuit challenging the DHS's authority on similar grounds.¹⁶⁶ The court disagreed with the plaintiffs' argument and upheld the wall's constitutionality.¹⁶⁷ The court reasoned the IIRAIRA authorized the DHS to waive certain laws to further a national security initiative.¹⁶⁸

Sixteen states – including California and New Mexico – sued President Trump in the Northern District of California claiming the President abused his powers when he “manufactured” a crisis to trigger the national emergency doctrine.¹⁶⁹ The states' success depended on the court's interpretation of certain constitutional provi-

160. David Schultz, *Border Wall's Environmental Opponents Want Supreme Court Review*, BLOOMBERG LAW (Aug. 23, 2018, 3:42 PM) https://www.bloomberglaw.com/document/XCT1Q05G000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001656814d8baabfdee5e1b1e0000#jcite (mentioning legal battle brought by environmental organizations against DHS for waiving environmental laws in furtherance of wall construction).

161. *See id.* (referencing procedural history to demonstrate complications faced by environmentalists in legal battles directed towards wall).

162. *See id.* (discussing parties' argument that DHS exceeded its power under IIRAIRA when agency waived numerous environmental laws to expedite wall construction).

163. Brief of Nine Members of House of Representatives as Amici Curiae in Support of Petitioners, Animal Legal Defense Fund, et al. vs. Dep't of Homeland Security, et al., No. 18-247 (U.S. Sept. 27, 2018) (referencing House of Representatives writing in support of petitioners concerning DHS's power under IIRAIRA).

164. *Id.* at 4 (explaining summary of argument brought by nine House of Representatives members attacking DHS's authority under IIRAIRA).

165. *See* Schultz, *supra* note 160 (summarizing outcome of case despite brief filed in support of petitioners).

166. *See* Schwartz, *supra* note 141 (mentioning Ninth Circuit case brought by Sierra Club arguing against DHS power to waive environmental laws).

167. *Id.* (mentioning decision of court generally).

168. *Id.* (explaining court's general reasoning against granting decision in favor of plaintiffs).

169. *See* Savage & Pear, *supra* note 158 (suggesting President's strategy in declaring national emergency was to access funds originally denied by Congress).

sions regarding the emergency powers and federal funding.¹⁷⁰ In December 2019, a judge issued a lengthy decision addressing the constitutional concerns brought by the states.¹⁷¹ The court granted declaratory judgement, ruling the government's use of military funds to build the border wall in specified areas was unlawful.¹⁷² The decision contains a thorough analysis of 10 U.S.C. § 2808, ultimately concluding that the government could not use the national emergency doctrine as an alternative avenue to access funds for the wall without Congressional budget approval.¹⁷³ Although the government have since appealed, this judgment marks a victory for advocates challenging the wall's constitutionality.¹⁷⁴

The city of El Paso, Texas has experienced similar success in a legal battle challenging the Trump Administration's construction of the border wall in Texas.¹⁷⁵ The city claimed President Trump's use of military funds was an illegitimate extension of executive power.¹⁷⁶ Similarly, in October of 2019, the Western District of Texas concluded President Trump had violated the Consolidated Appropriations Act when he began financing the wall with money already dedicated to other government projects.¹⁷⁷ The Trump Administration appealed the judgement to the Fifth Circuit, extending the life of the case in federal court.¹⁷⁸

170. *Id.* (discussing possibility of success for plaintiffs relies on court's interpretation of administrative law).

171. *See generally* Cal., et al. v. Trump, et al., 407 F. Supp. 3d 869 (N.D. Cal. 2019) (referencing court's decision generally).

172. *Id.* at 908 (concluding defendant's seizure of military funds is not within executive power under NEPA).

173. *Id.* at 893 (citing 10 U.S.C. § 2808 as source of funding controversy since it permits President and Secretary of Defense to reallocate military funds during national emergencies).

174. *See* Brief for Defendants-Appellants, Cal., et al. v. Trump, et al., No. 20-15044 (9th Cir. Jan. 9, 2020), 2020 WL 736066 (providing defendant's appeal).

175. Ephrat Livni, *A Texas federal court says Trump's border wall funding is illegal*, QUARTZ (Oct. 12, 2019) <https://qz.com/1726898/texas-federal-court-finds-trumps-border-wall-emergency-order-illegal/> (mentioning recent case in El Paso County regarding wall construction).

176. *Id.* (discussing court's holding in favor of plaintiffs).

177. *Id.* (discussing court's reasoning for categorizing appropriation of wall funds from other government programs as illegal).

178. Peter Blumberg, *Federal Judge Blocks Trump from Using \$3.6 Billion in Military Funds to Build Border Wall*, FORTUNE (Dec. 11, 2019) <https://fortune.com/2019/12/11/federal-judge-blocks-border-wall-david-briones/> (mentioning ongoing nature of case pending appeal).

VII. BREAKING DOWN THE BARRIERS TO COMPROMISE: POTENTIAL SOLUTIONS TO QUELL THE WALL DEBATE

As the political debate regarding the U.S.-Mexico border wall continues, environmentalists are proposing alternative solutions to mitigate the wall's ecological impact.¹⁷⁹ These solutions consist of environmentally-friendly building plans that could eliminate unnecessary environmental harm.¹⁸⁰ For example, conservationists have requested the DHS to conduct thorough environmental impact reports in alignment with NEPA pending further construction.¹⁸¹

Other solutions include the DHS prioritizing construction tactics that eliminate unnecessary environmental impact.¹⁸² In areas where environmental risk due to animal immobility is especially high, the DHS could construct the barrier in a way that makes it more permeable by species.¹⁸³ Proposed solutions to limit animal immobility ask the DHS to place vehicle barriers instead of physical, permanent infrastructure whenever possible.¹⁸⁴ Some environmental agencies have also proposed the use of electronic sensors to detect human movement in place of physical barriers.¹⁸⁵

Although environmentalists have achieved some success in postponing construction, building the wall in certain regions along the border remains inevitable.¹⁸⁶ With this in mind, environmentalists are requesting government officials to provide resources to support wildlife conservation in areas where the wall's ecological impact is especially harmful.¹⁸⁷ Tactics the DHS can adopt to further this initiative include increasing funds for impacted wildlife refuges, educating U.S. Border Patrol agents on environmentally-conscious procedures, and facilitating scientific research in im-

179. See Reese, *supra* note 127 (mentioning general environmentalist efforts to lessen impact of wall where construction is most likely to continue).

180. *Id.* (discussing possibility of alternative building solutions to lessen environmental impact).

181. See Peters ET AL., *supra* note 10 (expressing plea from conservationists to have DHS comply with NEPA requirements).

182. *Id.* (discussing possible alternative building solutions to lessen environmental impact).

183. *Id.* (mentioning environmentalist request for DHS to construct barriers that encourage rather than impede animal mobility).

184. *Id.* (mentioning alternative vehicle barrier instead of concrete infrastructure).

185. See Reese, *supra* note 127 (discussing possibility for officials to use advanced motion detection technology in place of physical barriers).

186. See Peters ET AL., *supra* note 10 (mentioning ongoing wall construction).

187. *Id.* (referencing possibility for government to financially support areas which have been most affected by wall construction).

pacted areas.¹⁸⁸ Environmentalist groups can continue advocating in the legal space for the adoption of such measures, as courts across the nation are asked to explore the rocky constitutional terrain upon which the wall will be constructed.¹⁸⁹

*Olivia Merritt**

188. *Id.* (suggesting potential benefits from educating Border Patrol agents on environmental conservation and encouraging scientific studies along borderlands).

189. *See Savage & Pear, supra* note 158 (referencing legal challenges when bringing constitutional claims against parties responsible for border wall).

* J.D. Candidate, May 2021, Villanova University Charles Widger School of Law; B.A., English, 2018, College of the Holy Cross. I would like to thank my family, especially my parents who have repeatedly scarified their time and happiness so I could pursue my academic goals. I dedicate this Comment to them and my two sisters, Charlotte and Deirdre, whose love and encouragement means everything. I would also like to thank the Journal's Editorial Board and Staff for their help in completing this Comment.