



Scott Nicol

Sierra Club Borderlands Team Co-chair

Written Testimony

COMMITTEE ON NATURAL RESOURCES
Subcommittee on Oversight and Investigations

Oversight Hearing, "The Costs of Denying Border Patrol Access: Our Environment and
Security"

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February 15, 2018

Dear Chairman Westerman and Ranking Member McEachin:

My name is Scott Nicol. I am the Volunteer Co-chair for the Sierra Club's Borderlands Team and I live and teach in McAllen, one of the safest cities in the state of Texas. My house is twelve miles north of a section of border wall; the actual border is another mile further south. The wall south of my home cuts off a World Birding Center, established to attract eco-tourism dollars to a community in one of the poorest counties in the United States, from an adjacent U.S. Fish and Wildlife Refuge. Like most of the rest of the 654 miles of border wall that currently stand, it was built without regard for local, state, and federal laws meant to protect the environment and border communities like mine.

The authority given to the Department of Homeland Security to disregard laws it deems inconvenient when it comes to border walls along both the U.S.-Mexico and U.S.-Canada border should not be expanded to cover all enforcement activities on all federal lands within 100 miles of both borders, as has been proposed. This flies in the face of the basic tenet that the United States is a nation of laws, and sets a terrible precedent that could be applied to other destructive federal projects.

But the biggest problem with waiving laws is not judicial or philosophical, it is concrete. The laws that are swept aside are not merely red tape. They are critical protections that were put in place for a reason-- to protect people, their communities, and the environment that we depend upon.

The levee-border wall that stands twelve miles south of my home is a prime example. In 2008, twenty-seven laws were waived to "expedite" construction, and it was completed in 2009. The pre-existing levee was essentially a pile of earth with a gentle slope on either side that terrestrial animals could easily surmount. To convert it into a levee-border wall, the river-facing side was carved away and replaced with an eighteen foot tall vertical concrete slab. It is a barrier that is readily climbed by humans, as the ever-replenishing piles of ladders that still accumulate beside it attest to, but which animals that don't have wings or ladder technology cannot get past.

Like many of the levee-border walls in the Rio Grande Valley, this one cuts off a portion of the Lower Rio Grande Valley National Wildlife Refuge, which was intended to provide habitat for endangered ocelots, a small wildcat with spots resembling a leopard's. With the Endangered Species Act and the National Environmental Policy Act waived, the wall's impact upon ocelots was detrimental.

A year after the levee-wall's completion, the Rio Grande flooded, backing water up to the levees and inundating farmlands and refuge tracts for three to four months. Where sloping levees had been converted to levee-border walls U.S. Fish and Wildlife reported that:

"The floodwall blocked almost all egress for terrestrial wildlife species. [...] Hundreds of shells of Texas Tortoise have been found demonstrating the probability of mortality for species which could not retreat from rising water levels. The Service fears any ocelots or jaguarundi that may have been caught in these areas when water began to rise may have been malnourished, injured, or perished."[1]

The decision to waive laws in order to build border walls has caused harm that might otherwise have been avoided.

Walls have been built without regard for laws that protect people from unnecessary flooding. We have seen devastating floods in communities like Nogales and in protected natural areas such as Organ Pipe Cactus National Monument. When walls are built across our rivers, arroyos and flash flood zones, they catch debris, back up water as much as six feet deep, and cause massive damage.

In 2008 flooding caused by the border wall in Nogales, Sonora, caused millions of dollars of property damage and was responsible for two deaths. Following that event many walls were retrofitted with gates that were intended to allow water and debris to pass through, but in 2011 and 2014 those measures failed to stop debris from piling up, flood water building up, and sections of border wall being washed away.

The Native American Graves Protection and Repatriation Act is, as its title implies, intended to prevent the desecration and destruction of Native American burials, a goal which one might assume would be widely shared. But when waivers were issued for border barrier construction through the Tohono O'odham Nation, the Native American Protection and Repatriation Act was suspended in the project area. The compilation of a list of laws that are to be waived implies a degree of forethought, as there is no reason to waive a law that border barriers or roads are unlikely to violate.

The waiving of the Native American Graves Protection and Repatriation Act proved prescient. In 2008, Tribal Chairman Ned Norris Jr. testified that during the building of border barriers:

“...fragments of human remains were observed in the tire tracks of the heavy construction equipment. Barriers and the border road now cross the site. Imagine a bulldozer parking in your family graveyard, turning up bones.”[2]

The expansion of waivers to cover not only the construction of walls along the border, but any Border Patrol or Customs and Border Protection activity on all federal lands within 100 miles of the U.S.-Mexico and U.S.-Canada border, would add to the unnecessary damage.

In light of the existing Memorandum of Understanding between Customs and Border Protection and the Department of the Interior, granting Border Patrol agents access to federal lands there is no clear need to waive laws, environmental or otherwise, to facilitate Border Patrol activities. In 2011, Ron Vitiello, who is currently the Acting Deputy Commissioner of Customs and Border Protection, testified that:

“In law enforcement, we operate within the confines of the rule of law and regulations. Would our efforts be easier without these legal frameworks? Yes, it would. However, we find a way to reasonably and sensibly solve problems within the parameters of law. Does the Border Patrol face challenges with respect to operating around protected lands when they are in our enforcement zones? Yes, but again, we have been able to establish practical solutions to allow for mission success.”[3]

Since Acting Deputy Commissioner Vitiello made this statement, in a Congressional committee hearing discussing a proposal to waive laws on federal lands very similar to the one being made today, Border Patrol apprehensions have decreased, and seizures of marijuana have plummeted.

It has been alleged that the need to comply with federal laws when new patrol roads are established or existing roads are repaired through protected federal lands undermines Border Patrol interdiction efforts. But in addition to the environmental harm that cutting a road through a refuge or wilderness area can inflict, carving a road through a formerly roadless area can make an area that was previously impassable to smugglers easily accessible. This occurred in the San Bernardino National Wildlife Refuge, where ten miles of barrier and patrol roads were built following the issuance of a waiver. Located in Arizona’s southeastern corner, where the terrain is heavily eroded, with deep fissures that make much of the area impassable to vehicles. Nonetheless, in 2008 Customs and Border Protection proposed the erection of barriers and construction of a graded patrol road through the area. In response a local stakeholder who had been working with the Malpai Borderlands Group (an association of ranchers who work together to restore and maintain natural processes while encouraging ranching and other traditional livelihoods,) warned:

“They are going to open 10 miles – plus of access to illegal vehicles and Border Patrol vehicles through country that has no access now. Where there are barriers west of us, the illegals had already cut them with torches.

The Refuge is being compromised and so is the security of the US.

We are furious that they can't be stopped from building this road and barriers. We can't seem to get anyone to see what the damage will be. Mark my word, within a year there will be so much increase in traffic and damage that it will never be stopped. Then DHS will say they can't figure out how to solve the huge breach in our security.”[4]

Absent the need to comply with federal laws, construction crews inflicted tremendous damage that otherwise might have been avoided. With the Antiquities Act waived, a known archaeological site which refuge managers had asked workers to avoid harming, was destroyed to create an equipment staging area. Two bodies of water that are home to fish listed under the Endangered Species Act were partially filled with loose dirt in an effort to create a roadbed. A bulldozer sank and got stuck in the resulting saturated muck in one of the ponds. As predicted, soon after the barriers and patrol road were constructed through the previously impassable terrain, refuge staff reported that the new “tactical infrastructure” facilitated, rather than deterred, illicit cross-border traffic. The San Bernardino National Wildlife Refuge’s annual report for 2008 stated that this,

“...allow[ed] vehicles loaded with marijuana to drive into the United States using the new system of all-weather roads constructed by DHS. Drive-through drug loads have subsequently increased in the San Bernardino Valley.”[5]

So the waiving of laws has not only proved to be environmentally destructive, by short-circuiting the normal deliberative process, it has allowed for counter-productive activities to be undertaken. It has also hurt borderlands communities. With the waiving of protections like the Clean Water Act and National Environmental Policy Act, towns have flooded and borderlands residents are left with the aftermath. Expanding the waiver to include more federal lands and more types of projects would expand and exacerbate these problems.

Respectfully Submitted:
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[1] *Rationale and Justification for Conservation Measures Rio Grande Valley Sector*. US Fish and Wildlife Corpus Christi Ecological Services Field Office. March 9, 2011.

[2] Norris Jr., Ned. Written testimony of the Honorable Ned Norris Jr., Chairman Tohono O’odham Nation to the to the Subcommittee on Fisheries, Wildlife, and oceans and Subcommittee on National Parks, Forests, and Public Lands of the House Committee on Natural Resources. Joint Oversight Hearing “Walls and Waivers: Expedited Construction of the Southern Border Wall and Collateral Impacts to Communities and the Environment.” U.S. House of Representatives Committee on Natural Resources. Subcommittee on National Parks, Forests and Public Lands. Subcommittee on Fish, Wildlife and Oceans. April 28, 2008.

[3] Vitiello, Ron. "The Border: Are Environmental Laws and Regulations Impeding Security and Harming the Environment?" Joint Hearing before the Subcommittee on National Security, Homeland Defense and Foreign Operations of the Committee on Oversight and Government Reform and the Subcommittee on National Parks, Forests, and Public Lands of the Committee on Natural Resources. April 15, 2011.

[4] "Subject: Natural disaster cancels trip..." Sender redacted. September 17, 2008. Email obtained by the Sierra Club via Freedom of Information Act request.

[5] San Bernardino National Wildlife Refuge, Leslie Canyon National Wildlife Refuge Annual Narrative Report Calendar Year 2008. U.S. Department of the Interior, Fish and Wildlife Service, National Wildlife Refuge System.