
Infrastructure Series: Border Wall Litigation Update

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This is the sixth issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from various practice groups at the firm offer their take on issues ranging from permitting reform to financing to litigation, and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure to energy development to infrastructure development on tribal lands.

As discussed in previous issues of WilmerHale's Infrastructure Series, the Trump Administration is examining legislative and executive actions to streamline the permitting of infrastructure projects. Perhaps no project has been higher on the Administration's priority list than a wall along the U.S.-Mexico border. This alert describes the Administration's efforts to fast-track construction of the border wall by waiving dozens of environmental and other regulatory requirements—and the legal challenges that have followed, which may ultimately be resolved by the Supreme Court.

Waiver of Environmental Laws to Expedite Border Wall Construction

Within a week of his inauguration, President Trump issued an [Executive Order](#) on “Border Security and Immigration Enforcement Improvements.” The order directed the Secretary of Homeland Security to take all appropriate steps to immediately plan, design and construct a physical wall along the southern border with Mexico.

In response, in [August](#) and [September](#) 2017 the Secretary exempted certain border-wall construction projects—replacement of different segments of existing fencing—from the requirements of over 30 laws, including the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Clean Water Act, Clean Air Act and Safe Drinking Water Act. The Secretary issued a similar [waiver](#) in January 2018 to upgrade a 20-mile vehicle barrier along the border.

In granting these waivers, the Secretary relied on the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Subsection 102(c) of IIRIRA vests the Secretary with discretionary authority to waive otherwise applicable legal requirements to ensure the expeditious construction of physical barriers and roads “in the vicinity” of the U.S.-Mexico border. Subsection 102(c) originally authorized waiver of only NEPA and ESA requirements, but the REAL ID Act of 2005 expanded the

Secretary's waiver authority to "all legal requirements."¹ The REAL ID Act also curtailed judicial review of waiver determinations. Not only was review restricted to constitutional claims, but the only opportunity for appeal of a district court's decision is a petition to the U.S. Supreme Court.²

District Court Rebuffs Legal Challenges

The Secretary's actions prompted lawsuits from several environmental and public interest organizations, including the Sierra Club and the Animal Legal Defense Fund, seeking to enjoin the border-wall projects. The plaintiffs argued that the Secretary had exceeded the authority granted in Subsection 102 and that the waivers were unconstitutional.

The district court disagreed. In a February 27, 2018 ruling, Judge Curiel of the U.S. District Court for the Southern District of California determined that the Secretary had the statutory and constitutional authority to waive the 30-plus laws to streamline construction of the border wall. *See In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

On the statutory question, the court found that Subsection 102(c) grants the Secretary broad authority to waive the application of any federal law to facilitate construction of any barrier or road project in the vicinity of the border. Indeed, the court held that the Secretary need not even explain the factual basis for waiver determinations; publication of the determination in the *Federal Register* is all the statute requires. The court also determined that, because judicial review is limited to constitutional claims, it lacked jurisdiction to consider the plaintiffs' claims that the Secretary's actions violated NEPA, the ESA, the Administrative Procedure Act and other statutes.

The court went on to reject each of the plaintiffs' constitutional claims as well, including arguments under the non-delegation doctrine, Tenth Amendment, the Take Care Clause and the Presentment Clause. The court also dismissed a due process challenge because, in its view, the plaintiffs had failed to demonstrate that they had a cognizable liberty or property interest in ensuring environmental interests were protected.

Impact of Decision and Potential Supreme Court Review

The district court's decision affirms the Secretary's expansive authority to issue waivers for border-wall construction projects. It also underscores Congress's broad authority to delegate significant power to executive agencies and officials in furtherance of the national interest.

The decision could thus be significant for other infrastructure projects near the border. The border-wall dispute centered on the Secretary's authority based on immigration law, but the court's rationale could apply to other areas, such as national security. Given the Administration's stated goal of "American energy dominance,"³ it is not hard to imagine similar waivers for large-scale energy generation and transmission projects being justified on that basis.

Ultimately, the scope of the Secretary's waiver authority and thus also the types of projects that are covered by it may be decided by the Supreme Court. The plaintiffs have announced their intention to petition for review. There is no guarantee, of course, that the Supreme Court will accept the case; it denies the vast majority of petitions for certiorari. But the plaintiffs will likely emphasize the case's high profile, its important constitutional implications and the fact that the district court's decision

would otherwise entirely escape appellate review. The petition is currently due in late May 2018, so we will likely have to wait until the fall to learn whether the Supreme Court will address these issues.

¹ Pub. 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. § 1103 note).

² *Id.* (“A cause of action or claim may only be brought alleging a violation of the Constitution of the United States,” and a district court decision “may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States”).

³ See, e.g., White House Press Release, “President Trump Vows to Usher in Golden Era of American Energy Dominance” (June 30, 2017).

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