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Hidden in Plain Sight: The Dangers of Environmental Protections Waivers

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Hidden in Plain Sight: The Dangers of Environmental Protections Waivers

OLIVIA STEVENS*

When enacting both statutory and regulatory environmental protections, Congress and various agencies have recognized that emergency situations could arise that would require flexibility in the application and enforcement of those protections. Incorporating waivers into such protections provides that flexibility. However, the current state of waivers leaves them vulnerable to abuse. In this Note, I explore how a lack of procedural and substantive safeguards allows the inappropriate use of waivers to further administrative agendas in a way that poses serious risks to both environmental and human health. I then suggest remedial measures available to Congress that would strengthen environmental protections while still allowing for effective responses to emergencies.

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INTRODUCTION

Since the passage of major environmental statutes in the 1960s–1980s, environmental legislation has continued to adapt—expanding, in some ways, and retracting, in others. One major retraction has been accomplished through the legislative delegation of waiver authority, which permits agency heads to lift the applicability of certain regulations under a variety of circumstances.

This Note focuses on the invocations of waiver authorities in the context of environmental regulations and argues that there are serious concerns with the potential for their abuse. Part I sets the stage with a brief discussion contextualizing the use of waiver authorities in 2020. Part II introduces waiver authorities in general, where they are found and how they are invoked, and includes a brief overview of the current constitutional analysis of those waiver authorities. Part III highlights three potential concerns embedded in the use of environmental waivers, and Part IV presents suggestions for legislative reform of waivers to address those concerns. This Note is not an attempt at exhaustive analysis of the history, constitutionality, benefits, or concerns of waiver authorities, but instead merely presents a foundational introduction to waivers and offers scrutiny as to their efficacy.

I. WAIVERS IN THE TIME OF COVID-19

A. Waivers as a Response to the COVID-19 Pandemic

The COVID-19 pandemic has altered the collective human understanding of normal life. Some of those changes have been immediately recognizable; other changes will only be made clear through the passing of time. The pandemic, and our response to it, has not merely affected human life. The environment has also experienced significant changes as a reaction to our changed way of life.

One cause for concern in the environmentalist community has been the relaxed compliance with environmental regulations intended to protect both public health and welfare as well as the planet.¹ The provisions allowing federal and state agencies to waive application of environmental regulations during times of emergency have been invoked,² and, as the pandemic endures, the extent to which those waiver provisions appropriately serve public needs demands a closer look.

In the United States, the first COVID-19 case was reported on January 21, 2020.³ By January 31, the Trump administration had declared the U.S. outbreak a public

1. *Environmentalists Object to Broad EPA Waivers for Polluters During Coronavirus Crisis*, ENV'T INTEGRITY PROJECT (Mar. 26, 2020), <https://environmentalintegrity.org/news/environmentalists-object-pollution-waivers-during-coronavirus-crisis/> [https://perma.cc/XNQ2-PR4E].

2. See ENV'T PROT. AGENCY, COVID-19 IMPLICATIONS FOR EPA'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecammooncovid19implications.pdf> [https://perma.cc/R4LL-6YY7].

3. Press Release, Ctr. Disease Control & Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [https://perma.cc/S553-

health emergency,⁴ and on March 13, President Donald Trump declared a national emergency.⁵ State and local responses to the emergency declaration varied but included school closures, cancellations of sporting events and other entertainment, and workplaces moving to at-home, online operations.⁶ As a result, human movement slowed and social gatherings vastly decreased.⁷

This major global socioeconomic disruption quickly resulted in positive environmental trends, both directly and indirectly, including improved air and water quality, noise reduction, and restoration of ecology.⁸ The diminished human industrial activity in the early days of the pandemic, including both manufacturing and transportation, resulted in significantly lowered emissions of greenhouse gases.⁹

By April, ecological resiliency was on full display throughout the world. In parts of India, residents of Jalandhar joyously reacted to being able to see parts of the Himalayan mountain range for the first time in decades, since the view is normally obscured by air pollution.¹⁰ In Venice, Italy, the typically congested canals became clear and abundant with fish and other aquatic life as the number of marine vessels stirring up sediment and polluting the waters was brought to a near-zero percentage of the ordinary total.¹¹ In the United States, a significant decline in anthropogenic air pollution resulted in nearly unprecedented improvement in air quality: nitrogen dioxide and fine particulate matter decreased by as much as approximately twenty-five percent during the weeks immediately following President Trump's March 13 emergency declaration.¹²

CWW2].

4. Press Release, Health & Hum. Servs., Determination that a Public Health Emergency Exists (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/3EZ4-B9FT>]

5. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,337 (Mar. 18, 2020).

6. See LIBR. CONG., UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 10–20 (Nov. 20, 2020), <https://tile.loc.gov/storage-services/service/ll/llgldr/2020725113/2020725113.pdf> [<https://perma.cc/585G-92S3>].

7. See *State Action on Coronavirus (COVID-19)*, NAT'L CONF. STATE LEGISLATURES (Nov. 24, 2021), <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx> [<https://perma.cc/R4XE-F3LR>].

8. Tanjena Rume & S.M. Didar-UI Islam, *Environmental Effects of COVID-19 Pandemic and Potential Strategies of Sustainability*, U.S. NAT'L LIBR. MED. (Sept. 17, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7498239/> [<https://perma.cc/69RA-29GD>].

9. See *infra* text accompanying note 12.

10. Rob Picheta, *People in India Can See the Himalayas for the First Time in 'Decades,' as the Lockdown Eases Air Pollution*, CNN TRAVEL (Apr. 9, 2020), <https://www.cnn.com/travel/article/himalayas-visible-lockdown-india-scli-intl/index.html> [<https://perma.cc/L8LQ-BU86>].

11. *Nature is Flourishing in Venice as the Coronavirus Pandemic Keeps Tourists Away*, CBS NEWS (May 13, 2020, 11:52 AM), <https://www.cbsnews.com/news/venice-tourists-coronavirus-nature-flourishing/> [<https://perma.cc/MQ6L-VKYF>].

12. Jesse D. Berman & Keita Ebisu, *Changes in U.S. Air Pollution During the COVID-19 Pandemic*, 739 SCI. TOTAL ENV'T 139,864 (2020), at <https://www.sciencedirect.com/science/article/abs/pii/S0048969720333842> [<https://perma.cc/JDB5-6U3R>].

B. EPA's Hiatus on Prosecuting Noncompliance

However, as the pandemic marched on, many Americans began noticing a perceptible worsening of environmental conditions, corresponding to a significant relaxation of Environmental Protection Agency (EPA) enforcement of various environmental regulations.¹³ For example, oil and gas companies wishing to delay what would otherwise be considered mandatory repairs to pollution-causing and soot-releasing equipment were granted exemptions to the normal timeframes; water treatment facilities were allowed to pause the sampling of residential wells identified as containing dangerously contaminated water; and livestock industries were able to increase capacity in feedlots despite risking contamination of local waterways.¹⁴ In addition to EPA industry waivers, federal and state environmental agencies also issued a general hiatus on prosecuting noncompliance among the private sector.¹⁵

C. Trump Administration's Emergency Declaration

The Trump administration did not merely relax compliance standards for the private sector. Rather, the administration also released itself from conforming to the standards established by Congress and various federal environmental agencies,¹⁶ which allowed it to take steps to further other policy aims.¹⁷ This was not a terribly surprising turn of events. President Trump's campaign platform emphasized a commitment to deregulate, and his administration demonstrated success in achieving deregulation across several sectors.¹⁸ Responding to the COVID-19 pandemic by

13. Ellen Knickmeyer, Cathy Bussewitz, John Flesher, Matthew Brown & Michael Casey, *Thousands Allowed to Bypass Environmental Rules in Pandemic*, AP NEWS (Aug. 24, 2020), <https://apnews.com/article/3bf753f9036e7d88f4746b1a36c1ddc4> [<https://perma.cc/9JN6-MB5B>].

14. *Id.*

15. See Press Release, Off. Enf't & Compliance Assurance, EPA Announces Enforcement Discretion Policy for COVID-19 Pandemic (Mar. 26, 2020), <https://www.epa.gov/newsreleases/epa-announces-enforcement-discretion-policy-covid-19-pandemic> [<https://perma.cc/7ZMD-X6M6>]. In defense of these waivers, the EPA stressed the prioritization of social distancing, human health, and human welfare over environmental concerns, the essential services provided by these industries, and the nation's economic reliance on the ability of such industries to continue operations. *Id.*

16. The Institute for Policy Integrity tracks "the suspension and altered enforcement of environmental laws and policies by federal, state, and city agencies in response to the COVID-19 pandemic" at *Tracker: Weakened Environmental Laws and Policies in Response to COVID-19*, INST. FOR POL'Y INTEGRITY (Mar. 17, 2021), <https://policyintegrity.org/covid-19-concession-tracker> [<https://perma.cc/5MKM-8VKM>].

17. For instance, President Trump pushed waivers of environmental impact statements for public infrastructure projects, including roads and bridges. In 2016, he campaigned on promises to invest heavily in such projects. Proclamation No. 13927, 85 Fed. Reg. 35,165 (June 4, 2020).

18. Remarks on Rolling Back Regulations to Help All Americans (July 16, 2020, 4:17 PM), available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-rolling-back-regulations-help-americans/> [<https://perma.cc/4FST-K28B>].

further relaxing ecological and conservation protections, then, was consistent with its campaign promises and prior conduct.

Furthermore, this was not the first time the Trump administration relaxed environmental regulations due to an “emergency.” In February 2019, President Trump declared a national emergency at the southern U.S. border as a way to construct a wall between the United States and Mexico.¹⁹ To facilitate expedited construction of this massive and contentious project, the Secretary of the Department of Homeland Security (DHS) issued a notice that waived compliance with any potentially applicable environmental statutes and corresponding regulations under a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).²⁰

Given that context and history, Trump’s June 2020 executive order commanding executive agencies to “take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency” by expediting projects to facilitate the nation’s economic recovery was not a surprise.²¹ Having invoked the Stafford Act in March 2020 to declare a state of emergency,²² Trump’s executive order authorized agency heads to use their emergency authorities to circumvent environmental safeguards for economic reasons, rather than for what could be more classically considered a true emergency. Stating as much, on June 9, 2020, just five days after Trump issued his executive order, the Center for Biological

19. Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States (Feb. 15, 2019), available at <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/> [<https://perma.cc/X35Y-9LPH>].

20. “Accordingly, pursuant to section 102(c) of IIRIRA, I hereby waive in their entirety . . . all of the following statutes, including all federal, state, or other laws, regulations, and legal requirements . . . : The National Environmental Policy Act . . . ; the Endangered Species Act . . . ; the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) . . . ; the National Historic Preservation Act . . . the Migratory Bird Treaty Act . . . ; the Migratory Bird Conservation Act . . . ; the Clean Air Act . . . ; the Archeological Resources Protection Act . . . ; the Paleontological Resources Preservation Act . . . ; the Federal Cave Resources Protection Act . . . ; the Noise Control Act . . . ; the Solid Waste Disposal Act . . . ; the Comprehensive Environmental Response, Compensation, and Liability Act . . . ; the Archaeological and Historic Preservation Act . . . ; the Antiquities Act . . . ; the Historic Sites, Buildings, and Antiquities Act . . . ; Farmland Protection Policy Act . . . ; National Fish and Wildlife . . . ; Fish and Wildlife Coordination Act . . . ; the National Trails System Act . . . ; the Administrative Procedure Act . . . ; the Rivers and Harbors Act . . . ; the Wild and Scenic Rivers Act . . . ; the Eagle Protection Act . . . ; the Native American Graves Protection and Repatriation Act . . . ; and the American Indian Religious Freedom Act” Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended 85 Fed. Reg. 29,472, 29,472–73 (May 15, 2020).

21. See *supra* note 17.

22. Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act (Mar. 13, 2020), available at <https://trumpwhitehouse.archives.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/> [<https://perma.cc/8Q4R-UKZH>].

Diversity sent Trump a notice of intent to sue for violations of the Endangered Species Act.²³

The likelihood of a successful suit against Trump for such an order, however, is difficult to predict—partly because of the statutory ambiguity surrounding environmental emergency waiver applicability and partly because of the limited case law litigating the subject.

In fact, discussion of waiver authorities, environmental regulations, and statutes is remarkably lacking. Therefore, Part II includes an introduction to waiver authorities in environmental regulations, both where they are found and how they are invoked. Much of the analysis of waivers up to this point has emphasized questions of constitutionality,²⁴ so Part II only provides a brief overview of current constitutional analysis.

II. A BACKGROUND ON WAIVERS

In this Note, “waiver authorities” or “waivers” refer to those legislative delegations of authority granted to agency heads to lift the applicability of certain regulations under a variety of circumstances.²⁵ In other words, after passing a law, Congress has granted authority to some part of the executive branch to say that the law does not apply. Waivers are generally, though not categorically, designed to be implemented or invoked during extraordinary and disastrous circumstances, and litigation opposing their invocation in such instances is minimal.²⁶

Waivers can be categorized as “internal” or “external,” a helpful distinction this Note borrows from an article by Kate R. Bowers.²⁷ “External waivers” are “more open-ended and permit the executive branch official who has been delegated authority to suspend the requirements of other laws if certain substantive and procedural requirements are met.”²⁸ Significantly, Bowers points out that “[e]xternal waiver delegations located in laws having little or nothing to do with the environment may nonetheless have environmental implications if they permit the suspension of

23. Press Release, Ctr. Biological Diversity, Unprecedented Lawsuit Launched Against President Trump for Order ‘Expediting’ Fossil Fuel Project Approvals (June 9, 2020), https://biologicaldiversity.org/w/news/press-releases/unprecedented-lawsuit-launched-against-president-trump-for-order-expediting-fossil-fuel-project-approvals-2020-06-09/email_view/ [<https://perma.cc/Z85H-8URT>].

24. See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

25. Black’s Law Dictionary defines a waiver within the administrative law context as “[a]n administrative agency’s discretionary decision to refrain from enforcing an existing statutory requirement.” *Waiver* 4, BLACK’S LAW DICTIONARY (11th ed. 2019). “An agency’s waiver of a statute is often viewed as effectively conferring an immunity on all parties otherwise covered by the requirement.” *Id.*

26. Other types of waivers, which are not limited to immediate responses to emergencies or other timely issues, are more likely to incite challenges in court. For instance, the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, was invalidated by *Clinton v. City of New York*, 524 U.S. 417 (1998).

27. Kate R. Bowers, *Saying What the Law Isn’t: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENV’T L. REV. 257, 259 (2010).

28. *Id.* at 264.

environmental laws.”²⁹ Meanwhile, “internal waiver” provisions are those that “only lift the applicability of the laws of which they are a part.”³⁰

Attempts to exhaustively identify the location and applicability of all environmental waivers, then, is complicated by the existence of both internal and external waiver authorities. Indeed, while some grants of waiver authority are straightforward and lift only the law within which they are contained, those waivers are often not the most relevant ones because wider-sweeping provisions contained in outside grants of authority can subsume, complement, or expand those internal waivers.³¹

Most statutes authorizing environmental regulations include some sort of waiver, either within the statutory language or the corresponding regulatory language.³² For example, the Coastal Zone Management Act (CZMA) facilitates the partnership between the federal government and state governments as it pertains to management of coastal areas.³³ Under the CZMA, states establish policies to manage land and water use, as well as to protect natural resources within their coastal zones.³⁴ Federal agencies taking actions affecting any land use, water use, or natural resources within a coastal zone must carry out those activities, “to the maximum extent practicable,” in a manner consistent with the state’s enforceable policies.³⁵ However, the CZMA also states that the President may “exempt from compliance . . . [f]ederal agency activity . . . inconsistent with [the state policy], if the President determines that the activity is in the paramount interest of the United States.”³⁶ Additionally, the “Ocean Dumping Act” (Marine Protection Research and Sanctuaries Act) permits industrial wastes to be dumped if the EPA determines emergency circumstances so mandate;³⁷

29. *Id.* at 264–65.

30. *Id.* at 264.

31. See Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, 20 NAT. RES. & ENV'T 10, 13 (2006) (describing the procedures of overarching acts that provide waivers of narrower, more specific acts. Those procedural overlays impact substantive laws that contain their own internal waivers).

32. For a more thorough list of environmental waivers, see *id.* at 13–14.

33. 16 U.S.C. § 1452(2) (stating the purpose of the CZMA is “to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs . . . giving full consideration to ecological, cultural, historic, and esthetic values”).

34. 16 U.S.C. § 1455b(a)(1).

35. 16 U.S.C. § 1456(c)(1)(A).

36. 16 U.S.C. § 1456(c)(1)(B).

37. 33 U.S.C. § 1412a.

the Clean Air Act includes nine exemptions and waivers,³⁸ and the Clean Water Act contains six.³⁹

Beyond these internal waivers, however, there are also several external waivers that are more wide sweeping. Some of these waivers are written into laws that seemingly have nothing to do with environmental regulation, such as the IIRIRA.⁴⁰ Regardless, the IIRIRA authorizes sweeping power to waive compliance with all environmental regulations.⁴¹ Another external waiver invoked to lift applicability of environmental compliance is the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which not only gives emergency powers to the Federal Emergency Management Agency (FEMA) but also a National Environmental Policy Act (NEPA) exemption for immediate response actions to natural disasters and other emergencies.⁴²

As Bowers highlighted in 2010, there is surprisingly little analysis regarding the propriety of delegations of waiver authority,⁴³ although a pretty strong case for their constitutionality has been made by at least a few authors.⁴⁴ The following Section offers a brief constitutional analysis, and the bulk of this Note explores potential policy concerns.

38. 42 U.S.C. § 7410(f) (exemption from emission standards during energy emergencies); 42 U.S.C. § 7412(i)(4) (exemption from emission standards in the interests of national security); 42 U.S.C. § 7418(b) (waiving requirements for federal emission sources when “in the paramount interest of the United States”); 42 U.S.C. § 7545(c)(4)(C) (exemption from fuel additive requirements during emergencies); 42 U.S.C. § 7588(e) (exemption for defense vehicles); 42 U.S.C. § 7606(d) (exemption for federal procurement of national security interests); 42 U.S.C. § 7671c(f) (exemption for noxious gas phase-out for national security interests); 40 C.F.R. § 51.853(d)(2) (2008) (exemption from transportation requirements in emergencies); 40 C.F.R. § 61.145(a)(3) (2011) (exemption from asbestos requirements).

39. 33 U.S.C. § 1321(f)(1) (excusing private operators from liability for costs associated with hazardous substance discharges where such discharges were caused, for example, by an “act of God” or war); 33 U.S.C. § 1321(c) (exempting from liability any damages caused by actions taken by the President in responding to the threat of an oil discharge); 33 C.F.R. § 325.2(e)(4) (1997) (allowing for expedited permit processing by U.S. Army Corps of Engineers (USACE) during times of emergency); 33 C.F.R. § 337.7 (2011) (allowing for expedited direct action by USACE in emergencies); 40 C.F.R. § 122.3(d) (2013) (waiving liability for exigent discharges); 40 C.F.R. § 122.41(n)(1)–(2) (2002) (acknowledging temporary, unintentional noncompliance).

40. See *supra* note 20 and accompanying text. The IIRIRA is an immigration reform act, yet its waiver authority encompasses environmental regulations.

41. See *id.*

42. 42 U.S.C. § 5159; 44 C.F.R. § 10.8 (2011). NEPA provides the procedural requirements for most federal actions that might affect the environment, so waiving those procedural regulations expedites FEMA action.

43. Bowers, *supra* note 27, at 258.

44. See, e.g., Barron & Rakoff, *supra* note 24; Yair Sagy, *A Better Defense of Big Waiver: From James Landis to Louis Jaffe*, 98 MARQ. L. REV. 697 (2014).

A. Constitutional Analysis

At first glance, waivers might appear to run headlong into a nondelegation doctrine issue.⁴⁵ After all, the U.S. Supreme Court struck down a law permitting the President to essentially undo Congress's actions in *A.L.A. Schechter Poultry Corp. v. United States*,⁴⁶ and laws granting the Executive permission to lift compliance with congressionally passed laws seem to commit the same kind of violation.⁴⁷ But *Schechter Poultry* was one of only two instances in the Court's history of striking down laws based on the principle that Congress cannot delegate its legislative powers to other branches.⁴⁸ Since then, the nondelegation doctrine's import has been minimized by the remarkably lenient standard used by the Court in finding an "intelligible principle" supplied by Congress to guide agencies in execution of its legislative charges.⁴⁹

Bowers suggests that there are compelling reasons to question the constitutionality of broad waivers, including the fact that many delegations of waiver authority expressly limit or eliminate judicial review.⁵⁰ For instance, under the CZMA, the President may waive federal compliance with a state's coastal management program if he or she determines that decision to be of "paramount interest" to the nation—but the President may only make this call after an adverse judicial ruling finds that the federal action impermissibly violates the CZMA.⁵¹ Interestingly, this is the only instance of Congress essentially requiring a judicial opinion to be a "first draft" before a waiver may be invoked,⁵² and, troublingly, the President's determination is not subject to judicial review.⁵³

45. The nondelegation doctrine is an administrative law principle based on separation of powers and arising from Article I of the U.S. Constitution, stating that legislative branches are not permitted to delegate their exclusive legislative authority to other branches of the government. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress . . .").

46. 295 U.S. 495 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

47. After all, waivers lift applicability of a law passed by Congress.

48. The other case was *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In that case, the Supreme Court held that the President's executive order prohibiting the transport of petroleum products was an unconstitutional exercise of legislative power that Congress was without authority to delegate.

49. The Court will search long and hard to find an intelligible principle, leveraging methods of statutory interpretation in its pursuit. See *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001).

50. Bowers, *supra* note 27, at 284 ("Two separation of powers problems can arise with the use of waiver provisions and accompanying limitations on judicial review: unconstitutional delegations of legislative authority to the executive branch, and unconstitutional usurpations of judicial authority by the executive branch.").

51. 16 U.S.C. § 1456(c)(1)(A)–(B).

52. Bowers, *supra* note 27, at 296–97.

53. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the President's performance of statutory duties cannot be reviewed for abuse of discretion without express statements from Congress). Decisions made by the President may still be reviewed for constitutionality. *Id.*

However, as the administrative state has grown, advocates of “big waivers” in general, not specifically pertaining to environmental law, have argued that for Congress to effectively legislate it must rely on waiver authority.⁵⁴ They argue that legislative power is enhanced by the flexibility of including waivers, allowing Congress to regulate according to its policy ideals and freeing the legislative branch from anticipating every scenario in which application of those ideals would compromise competing, higher-priority goals.⁵⁵ Their constitutional analysis concludes that waiver authority will continue to be upheld by the Supreme Court: “As long as the Supreme Court continues to express confidence in ‘various statutes authorizing regulation in the “public interest,”’ it is hard to see how giving an agency power to waive specific provisions set forth in a statute” could be found unconstitutional.⁵⁶

Overall, the general consensus among legal academics is that waivers as a whole will not run into constitutional problems.⁵⁷ However, this does not mean that individual waivers could not be challenged in specific circumstances. Nor does it in any way suggest that current waivers are not in need of reform.

III. THE PROBLEMS WAIVERS POSE

Notwithstanding the likelihood that the U.S. Supreme Court would find waivers to generally be constitutionally permissible,⁵⁸ there are several reasons to be concerned about their present state. Part III highlights three potential areas for concern: (1) waivers are overly vulnerable to abuse; (2) waivers are incongruent with certain international bilateral and multilateral agreements of which the United States is a party; and (3) waivers ultimately risk harming the groups they are designed to protect.

A. Waivers Are Overly Vulnerable to Abuse

Probably the most significant concern, in light of recent events, is the increasingly apparent fact that waivers are overly vulnerable to abuse. The goal of environmental law is to mitigate injuries and risks that are often noneconomic and nonimmediate.⁵⁹ Human nature, in contrast, tends to prioritize immediate rewards and quick solutions to present problems, thus delaying or denying future risk—perhaps out of optimism, or, more cynically, out of calculated apathy.⁶⁰

Of course, there are times when emergency situations demand quick action, and U.S. citizens often turn to their president for guidance during times of war or disaster.

54. See, e.g., Barron & Rakoff, *supra* note 24, at 265 (“By allowing Congress to take ownership of a detailed statutory regime—even one it knows may be waived—big waiver allows Congress to codify policy preferences it might otherwise be unwilling to enact.”).

55. *Id.* at 303.

56. *Id.* at 315 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001)).

57. See, e.g., Sagy, *supra* note 44.

58. See *id.*

59. See Richard J. Lazarus, Essay, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENV’T L.J. 231, 233–34 (2005).

60. *Id.* at 238–39.

But when environmental laws impede an administration from achieving its policy goals, application of a waiver solely to “get around” restrictions is dangerous to those long-term interests environmental regulations were designed to protect. Unfortunately, the current deferential judicial approach to executive agency determinations⁶¹ leaves this option widely available to administrations wishing to proceed with projects without complying with congressionally mandated and agency-developed laws and regulations.

Arguably, both internal and external waivers are subject to abuse. However, where internal waivers are inherently limited to lifting only the laws of which they are a part, external waivers are much vaster in their reach.⁶² External waivers also tend to be more extensive in their scope and less attached to the mission of the legislation they lift.⁶³

Consider the external waiver in the IIRIRA: The language articulating the IIRIRA’s waiver authority is shockingly broad, with Section 102(c) stating that “[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.”⁶⁴

Waiving all legal requirements is clearly a tremendous power. And, under the Administrative Procedure Act (APA),⁶⁵ judicial review is set aside for decisions committed to the agency head’s discretion, as the IIRIRA clearly establishes. Thus, this is a power that is virtually unchecked. In fact, the DHS Secretary is permitted to waive the APA itself under the IIRIRA’s waiver authority, and he did so on May 15, 2020.⁶⁶

Because the IIRIRA only permits judicial review of questions of constitutionality,⁶⁷ the controversies surrounding the IIRIRA-authorized construction of the border wall have not primarily concerned the environmental effects of its construction. Independent, private examination has identified detriments to safe drinking water access for humans and animals, minimization of endangered species’ habitats, limitations on migratory abilities for vulnerable species, and other negative effects resulting from construction,⁶⁸ but discussion of

61. For a closer look at judicial deference to executive agency action, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

62. See *supra* text accompanying notes 27–30.

63. See *supra* text accompanying notes 26–30.

64. REAL ID Act 8 U.S.C. § 102(c)(1).

65. Administrative Procedure Act § 701, 5 U.S.C. § 551.

66. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended 85 Fed. Reg. 29,472 (May 15, 2020), (“I hereby waive in [its] entirety . . . the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) . . .”).

67. REAL ID Act § 102(c)(2)(A) (“A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.”).

68. Samuel Gilbert, *Trump’s Border Wall Construction Threatens Survival of Jaguars in the U.S.*, THE GUARDIAN (Dec. 1, 2020, 4:44 PM), https://www.theguardian.com/environment/2020/dec/01/trump-border-wall-threatens-jaguars-revival-arizona-sky-islands?CMP=oth_b-aplnews_d-1 [<https://perma.cc/U76G-ECYC>].

such environmental impacts is effectively cut off in court.⁶⁹ Instead, litigation is focused on the constitutionality of funding for the project.⁷⁰

This Note is not attempting to fully explore the Trump administration's intentions, nor accuse it of leveraging the IIRIRA waiver irresponsibly and without cause. The fact remains that an emergency declaration by the President is sufficient to trigger a subsequent declaration by the DHS Secretary waiving every legal requirement, law, or regulation ever passed—without exploring the potential effects of such a declaration. Furthermore, this decision is subject to judicial review only insofar as a plaintiff with standing could allege a plausible constitutional violation. This possibility is troubling. And whether that accurately describes what did, in fact, happen, it is sufficient to acknowledge that this sort of exploitation would be possible, demonstrating that broad waivers are vulnerable to abuse.

B. Incongruity with International Agreements

In addition to national federal-state relationships, U.S. international agreements also risk deterioration if overly broad waivers of environmental regulations are abused. International environmental law largely relies on multilateral and bilateral agreements among nations,⁷¹ and the United States risks rendering hollow those promises with its peers and allies by carving out exceptions that have been incorporated into agreements to which it is a party without an enforcement option for other countries.

Although the United States has been notably resistant to entering into multilateral environmental agreements, current trends in trade agreements increasingly include language regarding environmental concerns and policies.⁷² This is, in part, due to the fact that in the last seventy years, it has become increasingly obvious that the actions of individual nations affect the well-being of other nations and, further, that efforts to support global health require some international agreement about general environmental principles.⁷³ Climate change, in particular, is a threat that most experts agree will require international cooperation to address.⁷⁴ Both the scientific community and U.S. case law indicate that individual contributions from countries, particularly large, developed nations, can make an impact on the overall state of global warming;⁷⁵ thus, it is undeniably clear that this is an area where the actions of one nation will have an effect on the well-being of other countries. Water and air

69. See *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

70. See *id.*

71. David Hunter, *International Environmental Law*, AM. BAR ASS'N (Jan. 5, 2021), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/ [<https://perma.cc/HY6B-YDYN>].

72. Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 618–19 (2004) (suggesting that the United States' resistance to entering international environmental treaties is a result of the United States' preference to lead, rather than follow, other nations).

73. See Hunter, *supra* note 71.

74. *Id.*

75. *Massachusetts v. EPA*, 549 U.S. 497, 524–25 (2007).

pollution, overconsumption of mineral resources, and indiscriminate destruction of plant and animal habitats pose a risk to the entire planet, but accountability among nations for environment-destroying conduct is limited.⁷⁶

Tort law has filled in some of these gaps but is generally considered inadequate to the task.⁷⁷ But the effort to regulate the environment before damage occurs faces significant obstacles. The capacity of international environmental law to regulate environmental standards is limited by the sovereignty of nations.⁷⁸ National sovereignty maintains that each nation has absolute control over the activities conducted within its own borders, unless a nation consents to relinquish some of that control.⁷⁹ The abrogation of control in an environmental context can be found in international treaties.⁸⁰ But even efforts to engage in such agreements in widespread capacities are limited by the differing values and economic inequality among nations.⁸¹ Furthermore, the inconsistency among U.S. federal administrations limits the environment-specific agreements to which the United States is party.⁸² While the United States is engaged in several environmental agreements, most of them pertain to conduct outside the borders of the United States.⁸³

Accordingly, the United States exerts most of its influence, and agrees to much of its environmental cooperation, in the form of trade agreements.⁸⁴ Trade agreements often incorporate certain environmental principles but generally refrain from empowering parties to engage in environmental law enforcement activities within the territories of other parties.⁸⁵ Since these agreements generally do not authorize

76. See Hunter, *supra* note 71.

77. See, e.g., Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 763 (2011) (“Simply put, tort law never was intended as a remedy for the type of harms associated with a global environmental issue such as climate change, which requires an international collaborative approach that tort law does not provide.”).

78. See Hunter, *supra* note 71.

79. *Id.*

80. *Id.*

81. *Id.*

82. For instance, the United States joined the Paris Climate Agreement in 2016, the year it was adopted. In 2020, the United States departed the Agreement, and, as early as 2021, then-President-elect Biden committed to re-entry. Helen Santoro, *The United States Will Rejoin the Paris Agreement. What's Next?*, *AUDUBON* (Dec. 8, 2020), <https://www.audubon.org/news/the-united-states-will-rejoin-paris-agreement-whats-next> [https://perma.cc/7WWN-A2Y7].

83. For instance, the Antarctica Treaty commits the United States to peaceful, scientific exploration of the Antarctic continent. Antarctica Treaty, Oct. 15, 1959, 12.1 U.S.T. 794, 402 U.N.T.S. 71. Agreements under the Cartagena Convention commit the United States to refraining from polluting the Caribbean. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, TIAS 11085, 22 I.L.M. 227.

84. Although this is the trend, scholars question whether it is the appropriate way to further environmental policies. See Josh Ederington, *Should Trade Agreements Include Environmental Policy?*, 4 *REV. ENV'T ECON. & POL'Y* 84 (2010), <https://gatonweb.uky.edu/faculty/Ederington/survey.pdf> [https://perma.cc/M4RG-6PLQ].

85. *Id.*; see also Dale Colyer, *Environmental Provisions in Trade Agreements*, 2 (2004),

prosecution of a nation that fails to fulfill its agreed upon commitments, consistent abdication of those responsibilities undermines the strength of the trade agreement.⁸⁶

Because trade agreements often do not include specific regulations but instead contemplate within their provisions the existing regulations of each party nation, it is all the more imperative for the United States to exercise caution in lifting applicability of its own laws through the use of overly broad waiver provisions. Take, for example, the new United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020.⁸⁷ This trade agreement replaced and updated the North American Free Trade Agreement (NAFTA), as well as NAFTA's side agreement, the North American Agreement on Environmental Cooperation.⁸⁸ While the USMCA specifically acknowledges "the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly," the parties have also committed to improving the levels of environmental protection.⁸⁹

But even as this agreement entered into force, the United States continued construction on the border wall between the United States and Mexico—an act that appears to undercut promises made in the USMCA.⁹⁰

<https://core.ac.uk/download/pdf/7055451.pdf> [<https://perma.cc/3F6A-F3PC>] ("Many MEAs [multilateral environmental agreements] tend to be weak and unenforceable.").

86. See Colyer, *supra* note 85.

87. Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020, Office U.S. Trade Rep., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/53NG-7F6P>] [hereinafter USMCA].

88. *Id.*

89. *Id.* at ch. 24, art. 24.3, ¶ 1.

90. Many conversations regarding the agreement and border wall construction have centered around identifying whether Trump's promise that "Mexico will pay for the border wall" through provisions of the USMCA is true. See, e.g., Alex Lockie, *Trump Offers Bold New Interpretation of Mexico Paying for the Border Wall*, BUS. INSIDER (Dec. 13, 2018, 8:30 AM), <https://www.businessinsider.com/trump-mexico-paying-for-us-border-wall-with-usmca-2018-12> [<https://perma.cc/R8MC-KXL5>]. One thing is clear: nature, on both sides of the wall, is certainly paying a steep price. See Marshal Garbus, *Environmental Impact of Border Security Infrastructure: How Department of Homeland Security's Waiver of Environmental Regulations Threatens Environmental Interests Along the U.S.-Mexico Border*, 31 TUL. ENV'T L.J. 327, 330–31 (2018) (outlining the ways "habitat fragmentation, water pollution, soil damage and compaction, destruction of vegetation, and wildlife disturbance" all are increasing along with border wall construction activities); see also Vanda Felbab-Brown, *The Damage Trump's Wall Causes in Mexico*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/07/20/the-damage-trumps-wall-causes-in-mexico/> [<https://perma.cc/T8M9-ADVL>] (detailing how "[t]he construction of the wall threatens some of North America's most biologically diverse regions, where southern species such as jaguars, ocelots, jaguarundis, and coatis reach their northernmost edge and northern species, such as black bears, wolves, bison, and pronghorn, their southernmost"). Further, the many negative environment effects

include threats to species survival; habitat fragmentation that further compounds threats to biodiversity in multiple ways; interruption of hydrological and natural

Meanwhile, the new USMCA states that “[e]ach Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection, and shall strive to continue to improve its respective levels of environmental protection.”⁹¹ But where the USMCA has established clear expectations around environmental commitments, it fails to include any enforcement provisions: indeed, it makes clear that such is not the intent nor the effect of the treaty by stating “[n]othing in this Chapter shall be construed to empower a Party’s authorities to undertake environmental law enforcement activities in the territory of another Party.”⁹²

Essentially, while the United States has committed to “strive to continue to improve its respective levels of environmental protection,”⁹³ the country has simultaneously engaged in conduct that not only is immediately damaging within its own borders but also negatively impacts the ecosystems of Mexico’s northern border—and the USMCA does not grant Mexico the right to compel the United States to cease such action.

Of course, none of this is new in international environmental treaties involving the United States; many of these environmental agreements include what are considered “soft laws.”⁹⁴ Soft laws refer to “rules that are neither strictly binding nor completely lacking in legal significance” and, within the context of international law, are generally “[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.”⁹⁵

Treaties such as the USMCA are not only (theoretically) influential in the establishment of new policies, but they also contemplate existing environmental regulations among nations. But in this case, the environmental commitments contemplated within the USMCA rang hollow from the moment the treaty entered

vital micro-climate processes; obstruction of animal access to water; water depletion; soil erosion, threats to animal dispersion and migratory movements, interruption of genetic exchange; proliferation of noxious and invasive fauna and flora; electric lighting and noise contamination. Altogether, some 93 endangered or threatened species of animals will be severely affected and may be pushed to extinction by the wall; so will unique plant species, such as precious organ pipe, saguaro, and coryphantha werdermannii cacti. Many of these disruptions, such as interference with the nocturnal movements of pollinators, also have negative effects on local agriculture.

Id.

91. USMCA, *supra* note 87, at ch. 24, art. 24.3, ¶ 2.

92. *Id.* at ch. 24, art. 24.4, ¶ 4.

93. *Id.* at ch. 24, art. 24.3, ¶ 2.

94. For instance, the Rio Declaration includes twenty-seven principles to which 175 countries, including the United States, agreed. But these principles are not “hard” laws; they consist of such statements as “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Rio Declaration on Environment and Development, princ. 4, June 14, 1992, U.N. Doc. A/CONF. 151/5/Rev.1, 31 I.L.M. 874, <https://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf> [<https://perma.cc/34YC-YATG>].

95. *Soft Law*, BLACK’S LAW DICTIONARY (11th ed. 2019).

into force, as the United States was actively in the process of waiving environmental laws directly affecting Mexico.

In fact, many Mexican groups and activists pushed Mexican President Andrés Manuel López Obrador to “defend the rights of Mexican citizens and demand compensation from the U.S. government for the damage the . . . destructive wall will cause to them and to natural environments and biodiversity in Mexico.”⁹⁶ Attorneys from the International Boundary and Water Commission, which regulates water distribution between the United States and Mexico, echoed the condemnation for border wall construction, citing the damage to waterways, flooding of adjacent areas, and massive soil erosion.⁹⁷

The USMCA is far from the only relevant international agreement containing environmental commitments. In fact, the EPA identifies two dozen international treaties, protocols, and other agreements to which the United States is a party.⁹⁸ While entry into these treaties does not provide a means for other parties to enforce environmental compliance, these treaties do symbolize and signify the commitments the United States has made as a party existing on a shared planet. The details of these agreements contemplate and rely on U.S. adherence to its own stated regulations—violating the trust of other nations risks irreparable harm, especially due to the inherently collaborative nature of environmental law.

Clearly, the kinds of expansive waivers permitting noncompliance with environmental regulations that currently exist do not account for potential impacts to other nations, nor do they include language contemplating the commitments the United States has made.

C. Waivers Ultimately “Kick Victims While They Are Down”

Even when not being abused, waivers of environmental regulations can have the effect of unintentionally harming the groups they are invoked to protect. As Michael Gerrard points out in several of his articles, much of environmental regulation is borne out of disasters.⁹⁹ Two goals of environmental regulation, then, are the support and promotion of human life and well-being.¹⁰⁰ In pursuit of those very same goals, Congress has included emergency waiver provisions applicable to many environmental regulations, anticipating that in times of emergency, adherence to environmental regulations could delay the immediate disaster relief warranted by the circumstances due to the time-consuming procedural and limiting substantive parameters of environmental regulations.¹⁰¹ Thus, emergency waiver provisions provide escape valves allowing for expedited relief during emergency circumstances.

96. Felbab-Brown, *supra* note 90.

97. *Id.*

98. *Selected Multilateral Environmental Instruments in Force for the U.S.*, EPA (AUG. 2, 2021), <https://www.epa.gov/international-cooperation/selected-multilateral-environmental-instruments-force-us> [<https://perma.cc/QA33-PFMY>].

99. *E.g.*, Gerrard, *supra* note 31, at 10.

100. *See Our Mission and What We Do*, EPA (July 2, 2021), <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> [<https://perma.cc/NX7R-MJZZ>] (“The mission of the EPA is to protect human health and the environment.”).

101. *See generally* Gerrard, *supra* note 31, at 10.

In times of disaster (for example, major hurricanes or the events of 9/11), the immediate goal of saving human lives should not be hamstrung by regulations designed to save human lives. But the invocation of waivers in more recent disasters illustrates how failing to comply with environmental regulations can exacerbate the circumstances those waivers are intended to mitigate.

After Hurricane Katrina devastated the city of New Orleans and the surrounding areas in August 2005, environmental regulations were waived in an effort to expedite disaster relief and facilitate reconstruction efforts.¹⁰² In many areas, flooding persisted for weeks.¹⁰³ In an effort to address those challenges, waivers of air pollution requirements and open burning bans had been invoked.¹⁰⁴ Individual relief workers were not required to wear the usually mandatory personal protective equipment, and waste was being carted away to disposal sites that did not comply with standard regulations.¹⁰⁵

On September 29, 2005, Erik D. Olson, a senior attorney with the Natural Resources Defense Council (NRDC), testified before the U.S. House of Representatives Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce.¹⁰⁶ He was asked to present his findings, based on his role coordinating the NRDC response to Hurricane Katrina's devastation, regarding the potential effects of toxins in the affected area.¹⁰⁷ He focused on "known and potential human health effects of the widespread releases of raw sewage, petroleum, and other toxins into the environment."¹⁰⁸ In other words, even as an environmental law attorney, his emphasis was not the effects of the hurricane and its aftermath on the environment, but on human health.

Olson testified that numerous and widespread spills and leaks of oil and toxic chemicals posed a significant threat to human welfare.¹⁰⁹ The toxins threatening the

102. See Christine Rushton, *Timeline: Hurricane Katrina and the Aftermath*, USA TODAY (Aug. 28, 2015, 2:10 PM), <https://www.usatoday.com/story/news/nation/2015/08/24/timeline-hurricane-katrina-and-aftermath/32003013/> [<https://perma.cc/37SX-T6MV>].

103. *Id.*

104. *Hurricane Katrina: Assessing the Present Environmental Status: Presented Before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives*, NAT. RES. DEF. COUNCIL 7 (Sept. 29, 2005), <https://www.nrdc.org/sites/default/files/0509291a.pdf> [<https://perma.cc/G9RQ-KZGZ>] (statement of Erik D. Olson, Senior Attorney, Natural Resources Defense Council).

105. *Id.* at 3–5, 7.

106. *Id.* at 1–2.

107. *Id.* at 2.

108. *Id.*

109. *Id.* at 2–3 ("We are receiving regular, albeit anecdotal, reports of police, rescue workers, and ordinary people who have returned to or stayed in flooded areas and have become ill after contact with the flood water or muck. Reports of rashes and blisters where skin has contacted polluted water, infected sores that are not responsive to antibiotics, nausea, and vomiting are legion. Respiratory problems – including asthma among many people exposed to fumes in contaminated areas – also are being reported. One woman's brother returned to his home to try to recover a few belongings, only to vomit three times upon entering the home due to the stench of sewage, decay, and chemicals. I spoke to the mother of a young man who wore hip waders into floodwaters, but whose skin came in contact with the toxic water. The same day, he developed a rash and blisters where his skin had touched the water. We have

New Orleans area came from a combination of eleven oil spills resulting from the hurricane; hundreds of thousands of vehicles caught by flooding; four destroyed hazardous waste sites; and underwater toxic sediment built up over decades of industrial spills, newly re-suspended into moving water.¹¹⁰ Furthermore, Olson testified that the removal of an estimated 100 million cubic yards of debris was posing a significant challenge to recovery efforts.¹¹¹

Olson also argued that recovery and waste disposal efforts, though tremendous in scope, still required strong cleanup and pollution standards to remain intact.¹¹² He cautioned that waivers being implemented regarding the open burning of waste were putting already vulnerable populations at risk. The incineration of waste materials and debris, he testified, was “likely to generate large amounts of toxic gases and particulate matter.”¹¹³ Indeed, he stated that “[w]aivers of environmental laws would kick hurricane victims while they are down,”¹¹⁴ pointing to reports that open burning led to increased respiratory and other health problems, that operating without normally mandated personal protective equipment exposed people to toxic chemicals, and that improper waste disposal shortcuts only set communities located close to those compromised waste sites up for disaster in the event of future natural catastrophes.¹¹⁵

This warning has been echoed by others who have studied the impact of noncompliance with regulations in cleanup efforts.¹¹⁶ The message is clear: sweeping waivers of environmental protections seemingly provide short-term solutions to immediate crises but do not ultimately serve the population they are invoked to protect.¹¹⁷

heard from many local citizens about police officers and other emergency workers who have come into contact with the polluted flood water, only to develop rashes and other symptoms. The long-term effects of this toxic exposure are unknown, and of profound concern to us and to many local citizens.”).

110. *Id.* at 3. All in all, those combined sources of chemical spills total approximately ten million gallons of gasoline and other toxic fluids.

111. *Id.* at 6–7.

112. *Id.* at 7 (“Throughout this effort, cleanup standards and other health safeguards must be kept strong, to assure that people made vulnerable by the storm are not further threatened by inadequate cleanups or irresponsible reconstruction practices. Accordingly, we and the local citizens with whom we have been in constant contact strongly oppose proposals to weaken cleanup or pollution standards . . .”).

113. *Id.*

114. *Id.*

115. *Id.* at 4, 6–7 (“Waste industry experts report that waste is being hauled to staging areas across Mississippi and Louisiana, and that Katrina waste disposal will occur not only in these states but also throughout the South. . . . As we plan the disposal strategy for wastes left by Katrina, we must consider the very real possibility that *future* storms will similarly inundate local disposal sites.”).

116. See Julia C. Webb, *Responsible Response: Do the Emergency and Major Disaster Exceptions to Federal Environmental Laws Make Sense from a Restoration and Mitigation Perspective?*, 31 WM. & MARY ENV'T L. & POL'Y REV. 529 (2007).

117. *Id.* at 568.

More recently, Puerto Rico experienced the worst natural disaster in its recorded history when Hurricane Maria ravaged the island in September 2017.¹¹⁸ In that case, experts argued that the environmental waivers preceding Hurricane Maria exacerbated the total devastation experienced by the island: aggressive construction had been permitted along fragile coastlines, jeopardizing the island's natural protection against tropical storms and resulting in the destruction of coastal ecosystems.¹¹⁹ Environmental impact statement waivers meant that not only were potentially risky constructions permitted to continue but also there was no required notification to impacted parties.¹²⁰

Officials authorizing these waivers defended these decisions as justified by the need to protect the economy and promote industry in a territory that already experiences poverty.¹²¹ But the devastation wrought by Hurricane Maria likely could have been significantly mitigated by compliance with environmental regulations, and arguments that it was in Puerto Rico's best interests to waive those regulations fall short when considering the damage the island experienced as an indirect result.

Waivers pose risks of both exacerbating the effects of disasters after they strike and increasing the devastation that can be wrought when those disasters occur. Whether the benefits they pose are offset by those risks is not established, but those risks should not be ignored.

IV. A FEW REMEDIAL OPTIONS

As discussed in Part II, waivers are unlikely to be found unconstitutional.¹²² But as Part III indicates, there are at least three reasons that the current state of waivers is problematic. Part IV, then, suggests four general ways for legislative reform to address those concerns to mitigate the potential abuse of waivers and facilitate their full usefulness.

A. Reduce Ambiguity Around Waiver Invocation, Application, and Availability

After Hurricane Harvey devastated parts of Texas in 2017, Texas Governor Greg Abbott created the Governor's Commission to Rebuild Texas, an initiative oriented toward supporting state recovery.¹²³ In addition to examining how the storm

118. Richard Harris, *Study Puts Puerto Rico Death Toll from Hurricane Maria Near 5,000*, NPR (May 29, 2018, 10:10 AM), <https://www.npr.org/sections/health-shots/2018/05/29/615120123/study-puts-puerto-rico-death-toll-at-5-000-from-hurricane-maria-in-2017> [https://perma.cc/4RWE-UMLR].

119. Alexa S. Dietrich, Adriana María Garriga-López & Claudia Sofía Garriga-López, *Hurricane Maria Exposes Puerto Rico's Stark Environmental and Health Inequalities*, Soc. SCI. RES. COUNCIL (Oct. 3, 2017), <https://items.ssrc.org/just-environments/hurricane-maria-exposes-puerto-ricos-stark-environmental-and-health-inequalities/> [https://perma.cc/2ZL9-XEVD].

120. *See id.*

121. *Id.*

122. *See supra* text accompanying notes 56–58.

123. JOHN SHARP, *EYE OF THE STORM: REPORT OF THE GOVERNOR'S COMMISSION TO REBUILD TEXAS*, at iv (2018), <https://www.rebuildtexas.today/wp->

developed and how it affected the state, the Commission assessed federal, state, and local reactions to Hurricane Harvey, identifying where and how those responses could be improved.¹²⁴ Among the recommended improvements included the suggestion to “[c]ompile and maintain a comprehensive list of all the regulatory waivers needed during a disaster to expedite suspensions in any future event.”¹²⁵

The waivers available to the Governor and other state agencies and federal partners were not immediately clear when disaster struck.¹²⁶ In order to maximize their usefulness, waivers should be made clear and organized well. No doubt this is a common issue with legislation—thousands of law review articles are written about the complexity of various codes, from the tax code to healthcare law.¹²⁷ Environmental law is a particularly complicated area of law, which many argue is a major cause of noncompliance.¹²⁸ But the very nature of waivers demands clear, quick application in order to be useful.¹²⁹ Clearer legislation offering waivers to specific laws would support this effort, so that rather than spending time hunting for the correct tool to waive an unduly burdensome regulation, federal agencies can get to work providing relief to those who need it in emergency situations.

*B. Narrow, Specific, Unambiguous Single-Application Waivers Requiring
Interagency Cooperation*

However, this quest for clarity and immediacy must be balanced with protections against abuse. One rather straightforward way to reduce potential for abuse of broad external waivers is simply to do away with them by mandating that congressional committees find a way to contemplate the limits to which a law or regulation can be lifted and incorporate that flexibility into the statute itself. Realistically, this solution might be too optimistic: a gridlocked and highly partisan Congress tends to stagnate when forced to particularize such details and limitations.¹³⁰ Congress has adopted a

content/uploads/sites/52/2018/12/12-11-18-EYE-OF-THE-STORM-digital.pdf
[<https://perma.cc/RV7M-CVZZ>].

124. *Id.*

125. *Id.* at 99.

126. *Id.*

127. A quick search on LexisNexis revealed over 10,000 results for secondary sources discussing the complexity of legislation.

128. See David M. Driesen, *Complexity and Simplicity in Law: A Review Essay*, 45 ENV'T L. 181, 202 (2015) (reviewing CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013)).

129. A waiver with complicated or time-consuming procedural provisions is unlikely to provide the immediate relief warranted by time-sensitive emergency situations. See Gerrard, *supra* note 31, at 10, for an illustration of how exemptions from regulatory compliance allowed for the expeditious clean-up of Ground Zero after 9/11, “without delays caused by environmental permitting requirements.” In other words, “the environmental laws worked as they should have under the extreme circumstances—they got out of the way.” *Id.*

130. See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (discussing the current state of the legislative process and how congressional gridlock results in significant deviation from conventional legislative processes).

strategy that, in order to move forward, they will delegate the finer points to agencies, particularly when it comes to relatively controversial issues.¹³¹

Instead, a more realistic solution requires interagency cooperation in any waiver—particularly those extremely broad delegations of waiver authority. To revisit the IIRIRA, for example, the DHS Secretary was able to cast aside no fewer than twenty-six environmental and conservation regulations, including the Clean Water Act, Endangered Species Act, and those developed to protect the rights and dignity of Native American burial sites.¹³² These laws not only guard against permanent damage to environmental and anthropological interests but also require impact statements to determine what potential damage might occur.¹³³ By bypassing this step, concerned groups lacked awareness of the scope of prospective injury. And this was a decision the DHS Secretary was authorized to make unilaterally.

Numerous agencies had their regulations waived, and numerous laws governing a myriad of policies have become inapplicable with a single executive actor's determination.¹³⁴ Intuitively, this suggests a power imbalance, as Bowers highlighted in her article.¹³⁵ An executive officer's discretion to affect several laws across multiple agencies not under her purview—and, significantly, for which actions she is not considered accountable—should be narrower, not wider. Instead, the opposite is true: the executive officer in this case is fully authorized to lift all legal requirements, with no procedural or substantive safeguards guiding this determination other than her own discretion.

Moreover, to become effective, the IIRIRA only requires publication in the Federal Register.¹³⁶ The conditions authorizing an external waiver's invocation could similarly be discretionary calls afforded to the same official, triggering external waiver application if the official determines that a state of "emergency" exists or that such application is of "paramount interest" for the United States. In that case, it would be difficult to identify any limiting principles—especially if, as in many external waivers, judicial review is limited or eliminated altogether.¹³⁷

Many waivers already require some level of interagency cooperation. One example that could serve as a model for such a requirement is the Migratory Bird Treaty Act (MBTA), which statutorily prohibits the "taking"¹³⁸ of migratory birds

131. See, e.g., Barron & Rakoff, *supra* note 24, at 268 (listing two recent instances of waivers permitting Congress to move forward with contentious legislation: "These include another provision of the [Patient Protection and Affordable Care Act] that empowers an independent board to revise in substantial fashion the statutes governing reimbursement under Medicare . . . and a measure in the National Defense Authorization Act authorizing the President to waive all manner of statutory strictures on his treatment of enemy detainees.").

132. See *supra* note 20 and accompanying text.

133. Endangered Species Act, 16 U.S.C. § 1531(b); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251(a); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(a–d). The National Environmental Policy Act provides the procedural overlay articulating the requirement for an environmental impact statement at 42 U.S.C. § 4332(C).

134. See *supra* note 20.

135. Bowers, *supra* note 27, at 297.

136. REAL ID Act, 8 U.S.C. § 102(c)(1).

137. See Bowers, *supra* note 27, at 288.

138. A "taking" generally refers to the harassment, hunting, capturing, or killing of a

within protected zones, but its corresponding regulations allow for the taking of migratory birds incidental to military readiness activities.¹³⁹ However, the MBTA empowers the Secretary of the Interior to withdraw or suspend this authorization if the Armed Forces do not comply with agreed upon measures to mitigate adverse effects.¹⁴⁰ This sort of waiver contains procedural safeguards and limited applicability that promotes the underlying policy of the MBTA while still acknowledging the realities of national defense needs. It also requires interaction between agency heads, each with their own missions to advance, and allows the opportunity for each to protect their charged interests.

Furthermore, both transparency and accountability interests are better served through interagency cooperation. Agencies are generally considered to be comprised of experts in their respective fields. It makes little sense, then, to operate without that expertise in waiving laws or regulations that have been developed for specific reasons by those agencies. Too much can fall through the cracks when agency regulations can merely be bypassed by one party without those agencies having the ability to explore implications or offer arguments against a waiver.

C. Contemplate Commitments Under International Agreements

If a cooperative interagency framework is established, it will take little additional effort to ensure that the U.S. commitments under international environmental agreements are at least contemplated before significant waivers are invoked. The EPA is the federal agency responsible for international cooperation in environmental agreements, which includes ensuring the United States adheres to its various environmental agreements.¹⁴¹ Before waiving compliance with an environmental regulation that has been contemplated within the context of the numerous trade agreements, the EPA could review the extent to which such a waiver might compromise a commitment.

Furthermore, international agreements are not separate from congressionally passed legislation. When the United States enters into a bilateral or multilateral agreement, the provisions of that agreement are often made public law.¹⁴² Attaching

protected animal. 50 C.F.R. § 10.12 (2020).

139. 16 U.S.C. § 703(a); 50 C.F.R. § 21.15 (2020).

140. “Authorization of take incidental to military readiness activities” includes a requirement for the Armed Forces to confer and cooperate with the Service, specific guidelines of when record retention is required, and under what circumstances the Secretary may suspend or withdraw take authorization (i.e., if a significant adverse effect on the migratory bird populations will result *and* at least one other factor is met regarding implementation of conservation measures, monitoring of effects, or provision of reasonably available information to the Secretary). § 21.15.

141. See *International Cooperation*, EPA (updated Sept. 13, 2021), <https://www.epa.gov/international-cooperation> [<https://perma.cc/X8ME-8YLP>].

142. *Missouri v. Holland*, 252 U.S. 416 (1920) is a landmark case declaring the constitutionality of federal statutes made to effectuate the promises of international treaties. *Holland* expressly addressed federalism challenges under the Tenth Amendment to the Migratory Bird Treaty Act, a federal statute enacted to reflect commitments under the Migratory Bird Treaty between the United States and Canada. *Id.* at 432.

or limiting waiver provisions to that text would mitigate the potential for those regulations being lifted without due scrutiny.

The United States is extremely divided when it comes to prioritizing environmental policies.¹⁴³ But international commitments merit attention. It is possible that an administration might, reflecting the policy preferences of its constituency, determine that a law must be waived to realize a competing policy goal. In that case, choosing to withdraw from an international environmental agreement, or to renegotiate a trade agreement based on shifting U.S. politics, at least grants respect to U.S. allies and partners. Simply failing to meet implicit commitments degrades trust that the rest of the world has in the United States.

D. Layer in Protections Emphasizing Mitigation and Preparedness, and Expand to Allow for Expedited Protections of the Environment

In addition to recommending better clarity around waivers available for use in emergencies, the Governor's Commission to Rebuild Texas in the wake of Hurricane Harvey also identified a strong need to "future-proof" the state, advocating for a long-term commitment and investment from the federal government to develop more resiliency along Texas's coastline.¹⁴⁴ The Natural Resources Defense Council, in its 2005 report about how to best support recovery efforts after Hurricane Katrina, recommended a similar emphasis toward restoration and mitigation.¹⁴⁵ The NRDC's advice was to maintain a "no excuses" cleanup policy, while recognizing the possibility of a short-term need for waivers: "Although some limited common-sense waivers may be warranted on a temporary, emergency basis, the disaster should not be an excuse to create sweeping exemptions or to authorize even more unnecessary health and environmental problems—exacerbating existing environmental justice issues and perhaps creating new ones."¹⁴⁶

As a reminder, environmental regulations are not merely in place to protect ecological interests. While protections of flora, fauna, water, and air are integral to the health of the planet, many environmental regulations are in place to maintain human health.¹⁴⁷ When those regulations are waived during times of disaster or

143. The divide is more than just a matter of political party and also varies depending on which aspect of conservation policy is being considered. Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/>.

144. SHARP, *supra* note 123, at v ("Future-proofing the state's coastal areas requires a long-term commitment and investment to improve the resiliency of our communities and institutions. To succeed, the task needs both the continued partnership and financial support of the federal government.").

145. KAID BENFIELD ET AL., NRDC, AFTER KATRINA: NEW SOLUTIONS FOR SAFE COMMUNITIES AND A SECURE ENERGY FUTURE (2005), <https://assets.nrdc.org/sites/default/files/hk.pdf> [<https://perma.cc/F6UX-GT4Z>].

146. *Id.* at 6.

147. As former EPA Administrator Gina McCarthy put it, "The link between the health of our planet and the health of our families is inextricable. The quality of our environment dictates the quality of our well-being, and our lives." Gina McCarthy, Speech, *Keynote Remarks at the University of Michigan Environmental Law and Public Health Conference*, 3 MICH. J. ENV'T & ADMIN. L. 243, 244 (2014).

emergency, the end result is that, too often, access to clean air and water for the sake of public health is at risk of being compromised.¹⁴⁸

Certainly, flexibility is required during times of emergency. But, given the risk of allowing noncompliance in already devastated areas, waivers do not need to necessarily lessen protections. Instead, they can provide for an influx of resources to those who need them. There are waivers that operate this way. For instance, the Federal Land Policy and Management Act (FLPMA) outlines and permits, under extraordinary measures, the expenditure of additional funding for protective measures against forest fires or for the cancellation of permits and leases without the usual notice period.¹⁴⁹ This easily applied, clearly directed waiver contemplates future needs and allocates to the relevant agency necessary resources to save human lives and property. Similarly, after Hurricane Katrina hit New Orleans, the U.S. Army Corps of Engineers was able to expedite direct action to rebuild certain infrastructure projects through a waiver of the Clean Water Act,¹⁵⁰ which included both procedural and substantive requirements¹⁵¹ protecting against abuse but still allowed for quick action to fortify and implement environmental protections.

Increasing grants of authority to agency heads responding to emergency situations permits those agency heads to take extra precautions that will protect humans, property, land, water, vegetation, and species. And building those waivers into legislation, rather than externally applying them, helps the waiver being implemented reach the same goals as the mission of the legislation. Perhaps the biggest paradigm shift to effect this change is recognizing that, in the long term, neglecting to take proper steps in disaster cleanup is likely just delaying the inevitable, whereas investing adequate resources to mitigate future harms through more expansive protections is more consistent with the intended purpose of environmental legislation.

CONCLUSION

Legislative grants of waiver authority permitting the Executive Branch to lift compliance with environmental regulations have proved vulnerable to abuse, particularly in recent years. Waivers are not inherently unconstitutional, although specific invocations of waivers may run afoul of constitutional doctrines. But rather than waging a piecemeal fight in the courts, those pushing for the federal government to more firmly enforce environmental protections and to adhere to those regulations in federal projects would do better to take this fight to Congress, where legislative reform could help cure the defects of the current waivers.

Clarifying waivers' applicability and fortifying environmental regulations through specific, narrow applications of waivers with procedural safeguards can help support their proper usage and mitigate the potential for abuse. Furthermore,

148. *See supra* Part III.C.

149. 43 U.S.C. § 1748a; 43 U.S.C. § 1752.

150. JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 33107, EMERGENCY WAIVER OF EPA REGULATIONS: AUTHORITIES AND LEGISLATIVE PROPOSALS IN THE AFTERMATH OF HURRICANE KATRINA 4 (2005).

151. 33 C.F.R. § 337.7 (2020).

contemplating important international agreements within the invocation of waivers could guard against the risk of hollowing out those bilateral and multilateral agreements. Finally, a significant reform in the approach to waivers to emphasize the overall goal of protecting human health and well-being, and leveraging lessons learned through recent natural disasters, could help Congress deliver waivers that actually serve the groups they are intended to protect.