

**August 26, 2019**

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CC:

Kevin K. McAleenan  
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**Re: Coalition Response to “FY19 Rio Grande Valley Levee/Border Wall System Construction Projects Request for Input”**

Dear Mr. Enriquez,

These comments on the proposed construction of 95 miles of border wall in the United States Border Patrol (USBP) Rio Grande Valley Sector are submitted on behalf of the undersigned conservation, human rights, public interest, and faith-based organizations.

According to the Customs and Border Protection (CBP) “request for input” letter dated June 27, 2019:

“CBP proposes to design and construct approximately 95 miles of new border and levee wall system in Starr, Hidalgo, and Cameron counties, including the design and construction of (1) approximately 52 miles of border wall system in Starr County, Texas; (2) approximately 24 miles of levee wall system in Hidalgo County, Texas; and (3) approximately 19 miles of levee/border wall system in Cameron County, Texas.”<sup>1</sup>

The construction of 18 to 30ft-high border barriers in the locations proposed in CBP’s letter would damage the environment and negatively impact the culture, commerce, and quality of life for communities and residents located near the project area. Similar border wall projects have damaged and destroyed protected landscapes, interfered with binational conservation efforts, obstructed the movement of wildlife, and impacted neighboring communities. We request that

CBP carefully review and respond to the numerous concerns raised within the following sections of this letter before moving forward with any aspect of border barrier construction in the Rio Grande Valley Sector. CBP must assess potential harms that the proposed project would have on the environment, the economy, endangered species, air quality, water quality, water supply, cultural resources and public health before moving forward.

### **Lack of Meaningful Public Outreach or Input**

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We underscore our strong concerns and objections to the essentially nonexistent public comment process used for border wall projects in the Rio Grande Valley. CBP has not responded in any way to comments submitted on August 3, 2018, when the agency solicited input regarding the planned construction of 25 miles of levee-border wall in Hidalgo County and 8-12 miles of bollard border wall in Starr County. CBP's refusal to respond demonstrates the agency's complete lack of commitment to meaningfully engage the public and incorporate public input into its planning. The August 3, 2018 comments, which have not been addressed or responded to in any way by CBP, are attached to this document as Appendix A.

CBP has made minimal effort to alert the general public to this project, as would typically be required for a proper public process pursuant to the National Environmental Policy Act (NEPA). Based on inadequacies in the public comment process, it is almost certain that key stakeholders have been disregarded and federal requirements for coordination and/or consultation with other federal agencies, such as those within the Endangered Species Act (ESA), NEPA, and other relevant federal laws, have been ignored.

On May 28, 2019, one month prior to the issuance of this "request for input," CBP announced that it had awarded a contract for 3 miles of border wall, in tracts of the Lower Rio Grande Valley National Wildlife Refuge (NWR) in Starr County.<sup>2</sup> The location of these border walls falls within the project area covered by CBP's "request for input." On June 26, 2019, the day before the "request for input" letter was dated, CBP awarded another contract in Starr County, this time covering 4 miles, again within the project area.<sup>3</sup> And on August 7, 2019, after the "request for input" had been sent out but weeks before the deadline for comments to be received, CBP announced that it had awarded a contract for 11 miles of levee-border wall in Hidalgo County, also within the project area.<sup>4</sup> This clearly illustrates that CBP has no intentions of modifying or changing the proposed course of action based on input received.

This comment period appears to be a meaningless exercise, as CBP has already settled on a course of action and awarded multiple construction contracts before receiving or analyzing any input from the public. The waiver of laws to expedite this project further proves CBP's complete disregard for engaging with and addressing concerns of communities that will be harmed by the project. CBP must put the existing contracts on hold until all relevant stakeholders have been consulted, public forums have been held, and public comments and concerns with the project—including the consideration of alternative courses of action—have been analyzed.

CBP has neglected to hold even a single public meeting for local stakeholders and affected communities. This complete denial of a transparent public process strongly suggests that CBP has no sincere interest in obtaining thoughtful comments and/or broadly engaging with the

diverse constituencies affected by the project. To gather sufficient, meaningful public input, CBP must host multiple public comment forums in English and Spanish in the affected areas regarding the construction of border barriers through communities and protected lands.

It should also be noted that the information provided within CBP's "request for input" is wholly inadequate to solicit meaningful public comment. The maps contained in the notice lack basic landmarks, simple cadastral data, and even a rudimentary map legend and scale. To meaningfully comment on the impacts of this project, the public must first understand the specifics of the proposal, including a detailed and accurate description of where the proposed wall and associated infrastructure would be placed. It is impossible for the public to provide thoughtful comments when CBP's plans remain unarticulated and detailed maps of the proposed project have not been released.

As discussed in comments submitted on August 3, 2018, we strongly urge CBP to conduct this project in compliance with NEPA. NEPA is a clear and well-established method of soliciting public comment, for which there is no substitute. Though CBP has elected to waive NEPA in its entirety, the public interest and the ultimate decision-maker would benefit from reinstating NEPA and moving this process forward under NEPA with the completion of an Environmental Impact Statement (EIS). Importantly, a NEPA-compliant EIS would ensure that the process is transparent and publicly accessible by providing notice to comment via Federal Register publication, local newspapers, and other means that are necessary to reach the communities that the proposed action would impact. The NEPA process would also cure the numerous and significant shortfalls with CBP's effort to solicit public comment for this project including the selective distribution of the "request for input" and the inadequate maps included within the notice.

Lastly, a NEPA-compliant EIS would allow CBP to analyze the true purpose and need for the project and consider alternatives to the proposed project, including such alternatives that would be less costly to taxpayers and less harmful to the environment and neighboring communities. CBP has recently stated that the agency would conduct environmental planning and produce Environmental Stewardship Plans (ESPs) for border wall construction projects that would "look exactly like Environmental Assessments (EAs)" and "mirror" the intent of NEPA.<sup>5</sup> We note, however, that ESPs are not and will never be an adequate substitute for the NEPA process. ESPs fail to meet the rigor set forth by NEPA in numerous ways.

As stated in the Council on Environmental Quality's regulations implementing the procedural provisions of NEPA, alternatives are "the heart of the environmental impact statement."<sup>6</sup> Furthermore, whether in the context of an EIS or an EA, NEPA requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."<sup>7</sup> Prior ESPs prepared by the Department of Homeland Security (DHS) and CBP do not examine alternatives, and instead have been used to justify decisions already settled on for projects that were undertaken long before the drafting or release of an ESP. This is most clearly evidenced by DHS's August 1, 2017 decision to waive 37 environmental, public health, and cultural resource protection laws and break ground on 8 border wall prototypes and 16 miles of "primary" border wall construction in San Diego before conducting any sort of assessment on the potential harms

of the project. CBP did not complete an ESP for this project until 10 months after virtually all applicable environmental, public health, and cultural resource protection laws had been waived and construction was nearly complete.

For these reasons, before CBP moves forward with the proposed construction, we request that CBP (1) immediately cancel or place on hold the contracts for border wall construction in the Rio Grande Valley Sector; (2) host multiple public forums in English and Spanish in impacted communities; (3) release information to the public, including accurate, detailed maps, that would allow for informed public comment; and (4) conduct this project in compliance with federal laws including, but not limited to, NEPA, ESA, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Archaeological and Historic Preservation Act, the Religious Freedom Restoration Act, the Native American Graves Protection and Repatriation Act, the National Wildlife Refuge System Administration Act, and the Administrative Procedure Act. CBP can start with the publication of a notice to comment on the proposal in the Federal Register that provides at least a 60-day comment period.

## **Walls in the Rio Grande Floodplain**

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### *Border Walls Erected in the Rio Grande Floodplain Would be a Treaty Violation:*

Mexican officials of the International Boundary Water Commission (IBWC) have long voiced concern over the construction of border walls in the Rio Grande floodplain. Luis Antonio Rascón Mendoza, the principal engineer of the Mexican section of the IBWC, iterated concerns about border walls worsening flooding by pushing floodwaters into Mexico in 2008, stating:

“The location, alignment and design of the proposed fence represent a clear obstruction of the Rio Grande hydraulic area, since in the towns of Rio Grande City and Roma, TX, the fence would occupy nearly all of the hydraulic area on the U.S. side, causing the deflection of flows towards the Mexican side. If you consider that, given the design characteristics, the fence obstructs 60-70% of the hydraulic area in a direction perpendicular to the flow, and if you add to that the effect of the current retaining trash and debris, the significant length that is located in the floodplain, and the position of the fence relative to the direction of flow, the fence constitutes a serious obstruction and deflection of the Rio Grande flows towards Mexico. [...] We reiterate our opposition to the construction of the proposed fence in the Rio Grande floodplain given the impacts stated above.”

As demonstrated by Rascón’s comments, border walls constructed in the floodplain worsen flooding by redirecting floodwaters away from the U.S. and into Mexico, creating a disproportionate burden to be borne by Mexican communities. Just as the border wall in Nogales, Arizona flooded Nogales, Sonora, leading to millions of dollars in damages and two deaths, CBP’s proposed border walls in Rio Grande Valley could again lead to the inundation of Mexican communities with deadly and damaging floodwaters.

Beyond this being a clear issue of environmental injustice, redirecting dangerous floodwaters into Mexico, as CBP’s proposed project would almost certainly do, is also an international treaty

violation. In 1970, pursuant to the treaty entitled: *Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary*, both nations agreed to “prohibit the construction of works... which, in the judgement of the commission, may cause deflection or obstruction of the normal flow of the river or of its flood flows.”<sup>8</sup> This treaty, signed with “a close spirit of friendship and mutual respect” between nations, was enacted to prohibit actions that would adversely impact either nation’s floodplain or interfere with natural river flows, just as CBP’s proposed project would do.

During the 2008 construction of bollard border walls in Cameron County, the IBWC required that CBP build walls north of the levees and outside of the Rio Grande floodplain so as to not deflect waters into Mexico and violate the 1970 treaty. Mexico and the Mexican section of the IBWC continue to object that any unilateral action from the U.S. to build a border wall in the floodplain would be a violation of the treaty.

The bollard walls CBP is proposing to construct in Starr County fall within the Rio Grande floodplain (see Figure 1, below), which would constitute a violation of the treaty. CBP must either change the route and location of the planned bollard walls wall by moving them out of the floodplain or abandon the project altogether. Moving the wall out of the floodplain would mean walling off significant portions of towns such as Roma, and leaving homes and businesses trapped in no-man’s land between the border wall and the Rio Grande. For this and other reasons we recommend CBP halt the project altogether.

The levee wall CBP is proposing, with a vertical concrete slab built to the levee's existing height, topped with 18 foot-high bollards, would also violate the treaty. The levees built in the U.S. and Mexico are intended to be precisely the same height, ensuring that if a flood overtops one nation's levee it will simultaneously overtop that of the other. Like the prohibition of installing obstructions such as walls in the floodplain, this mirroring of height is intended to ensure that infrastructure constructed by one country does not deflect water and worsen flooding in the other. Bollards atop a levee border wall are just as likely to be clogged with debris as bollards erected in the floodplain, and thereby likely to become impermeable barriers that deflect water. This issue should be taken up with the Mexican section of the IBWC, and their response should be made publicly available.

As we have described, CBP’s proposal will deflect water into Mexico and worsen the severity of flooding in Mexican communities such as Ciudad Aleman. If water is deflected south, the river could also settle into a new channel, effectively moving the international boundary. At a bare minimum, no construction should begin without extensive IBWC input regarding the design, placement, and impacts to flood control, and until Mexican IBWC officials’ concerns are fully addressed and compliance with the treaty is achieved.

### **Flooding Concerns:**

CBP’s planned route for border walls in Starr County appear to follow the exact route that was shown in a May 2018 map (Figure 1, below) produced by Baker Engineering as part of a border wall flood model that was leaked to the press in early 2019. This map shows that the Starr County border walls will repeatedly intrude into the Rio Grande floodplain.

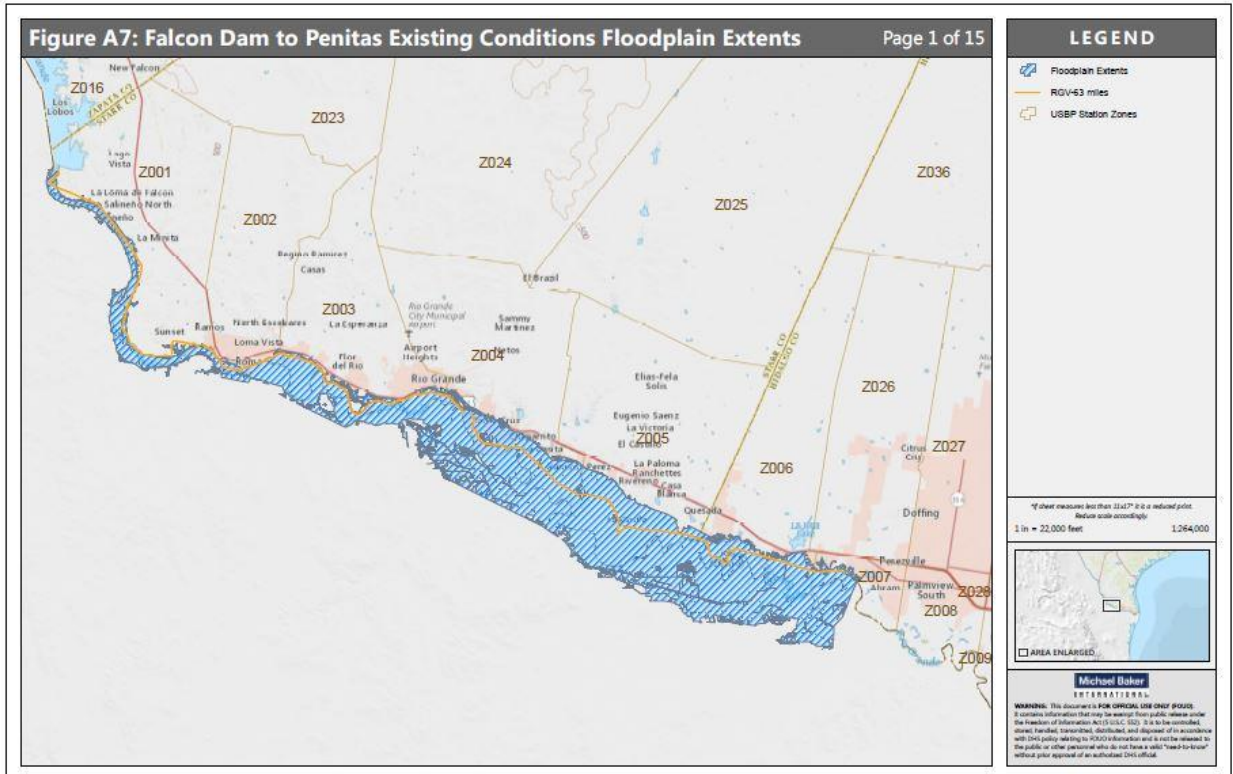


Figure 1: Map of proposed border wall in the Rio Grande floodplain from May 2018 Baker Engineering flood model.

Building walls in the floodplain will cause severe flooding danger and put communities, property, and wildlife habitat on both sides of the border in harm's way. On the U.S. side water will be obstructed by the border wall and prevented from draining into the river, which will worsen flooding events and cause dammed up water to inundate U.S. communities for longer periods. The maps in CBP's "request for input" do not include topography, thereby leaving out the many arroyos and drainages that convey rainwater from towns such as Roma and Rio Grande City into the Rio Grande. No information whatsoever is included in CBP's request for input to suggest CBP will undertake measures to address flooding caused by walls built across these drainages or in the floodplain, which will unavoidably obstruct the flow of water, create debris dams, and cause flooding.

Prior federal documents obtained through Freedom of Information Act (FOIA) requests, shed light on the numerous planning and design shortcomings of CBP's plans to construct border walls in the floodplain. CBP should immediately release detailed documentation (including unredacted flood studies of potential border walls in the RGV Sector produced in 2008, 2009, 2010, 2011, and 2018) and host open public forums in English and Spanish focused on the clear flood dangers border wall construction would cause in Roma, Rio Grande City, La Grulla, and other Starr County communities.

Baker Engineering produced a flood model for CBP in 2018 which purports to examine the flooding impacts of border walls in the Rio Grande floodplain in Starr County. CBP has not released this flood model to the public, but a copy was leaked to the press in early 2019. Like

the “request for input” it describes the planned bollard border walls as composed of 6” X 6” steel bollards which would stand 20-30 feet tall. CBP’s “request for input” does not say how far apart these bollards would be, but the flood model asserts that in most instances they would be spaced 4 inches apart. This is essentially the same design (though taller) than existing border walls in Cameron County and throughout Arizona and California.

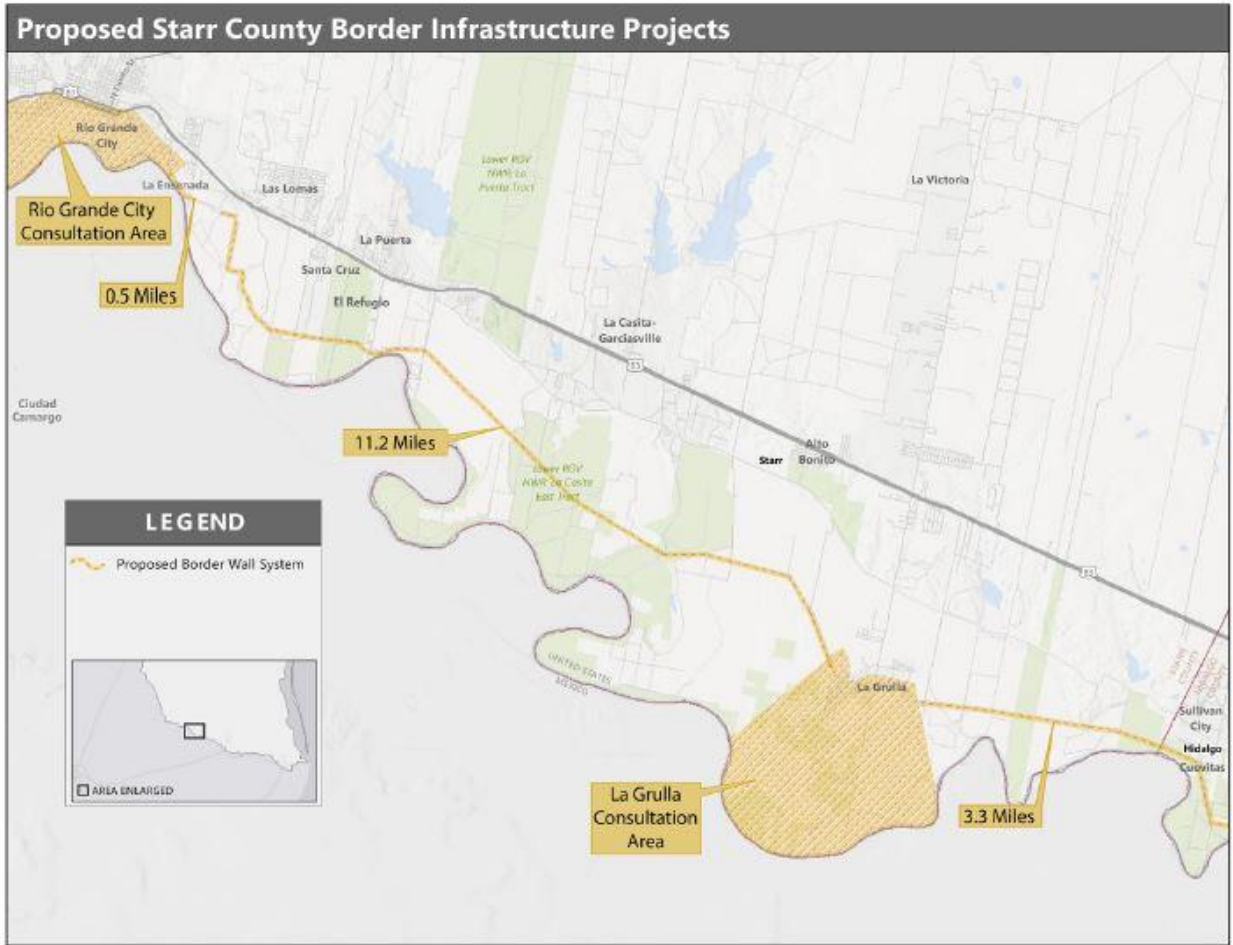
As discussed in the above section, existing bollard border walls in Arizona have already been documented to cause significant flooding and erosion. In many locations bollard border walls have caused debris dams and in some locations this has even caused the wall to collapse. Following the 2008 flood event in Nogales, Arizona, which caused millions of dollars in damage and killed two people, CBP hired Baker Engineering to examine drainage and flooding concerns resulting from all existing border walls from El Paso to San Diego.

Baker found that, “fencing obstructs drainage flow every time a wash is crossed. With additional debris build-up, the International Boundary Water Commission’s (IBWC’s) criteria for rise in water surface elevations (set at 6” in rural areas and 3” in urban areas) can quickly be exceeded.”<sup>9</sup> CBP seemed to accept the basic fact that bollard walls clog with debris during floods and act as dams. Thus when CBP erected bollard walls in Cameron County in 2009 and 2010 they built them north of the IBWC levees, keeping these walls out of the Rio Grande floodplain to alleviate major flooding concerns.

Unlike Cameron and Hidalgo Counties, Starr County has no levees along the Rio Grande. Keeping border walls outside of the floodplain would mean building them miles inland from the Rio Grande, resulting in hundreds of homes and businesses being walled off. Building border walls in Starr County means either intruding into the Rio Grande floodplain, which would endanger communities with severe flooding and violate the 1970 treaty, or building walls north of the floodplain, which would put hundreds of homes and businesses in what locals refer to as the “no man’s land.” Neither of these options is in any way viable. CBP should abandon plans to build border walls in Starr County.

In the same leaked 2018 flood model, CBP indicated that rather than installing flood gates in border walls where they cross arroyos and drainages (as has been done in California and Arizona), the space between bollards would be increased from 4 inches to 5 inches. A 5 inch wide gap will not take much longer to clog with debris than a 4 inch wide space. This proposed mitigation is wholly inadequate and not based in any factual flood modeling.

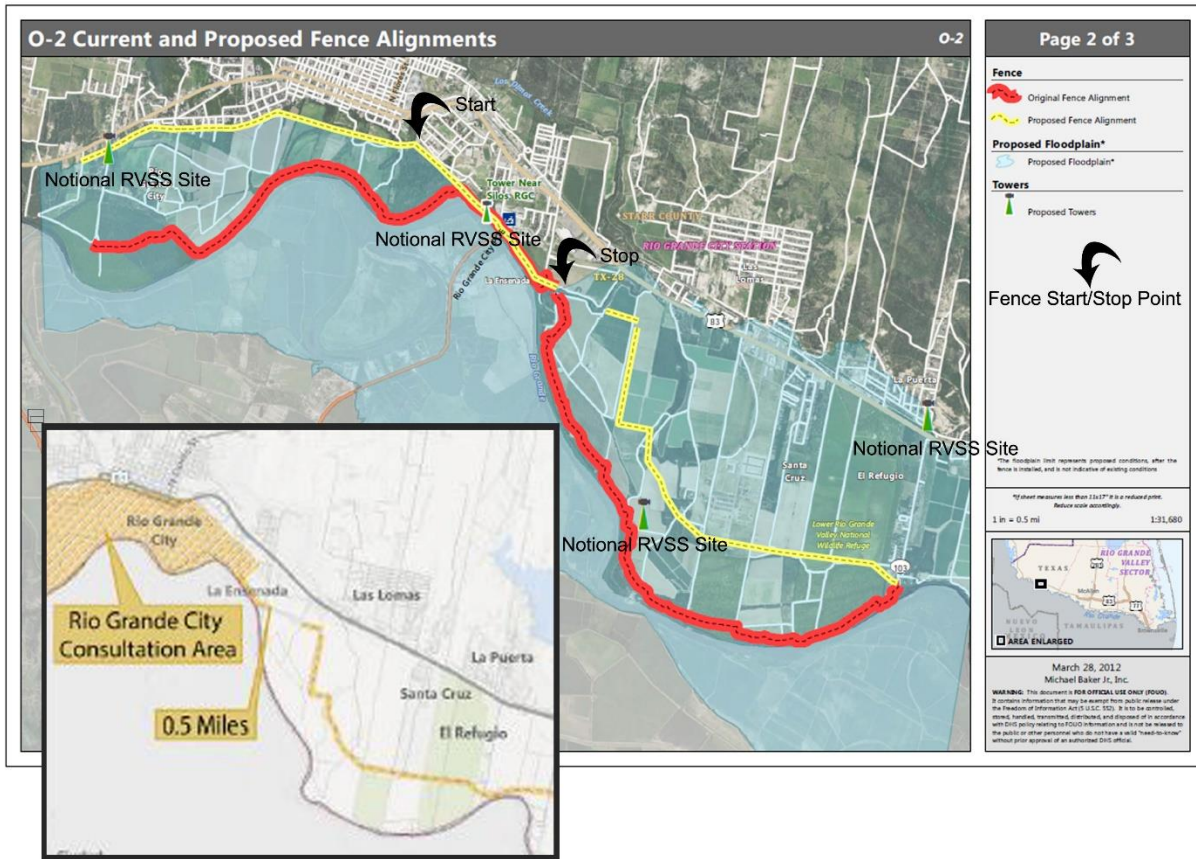
Another measure that is not explained in CBP’s “request for input” is the intentional channeling of flood water into communities in the United States, which CBP apparently plans to do by installing gaps in the border wall to channel floodwaters inland. The map below (Figure 2) shows these gaps to the east/downriver of the Rio Grande City consultation zone and again near the La Grulla consultation zone.



*Figure 2: Starr County map with floodwater gaps from 2019 request for input.*

The portion of this section of bollard border wall that is nearest to Rio Grande City, including the gap, appears to align precisely with a map produced for CBP by Baker Engineering in March of 2012, which we obtained through FOIA (Figure 3). We have reproduced the Baker Engineering map below with the relevant portion of the 2019 “request for input” map overlaid.





**Figure 3: March 2012 Baker map depicting the “splitting” of flood water at Rio Grande City with wall route from CBP’s “request for input” (Figure 2) inset.**

According to the 2009 Baker Engineering flood model, two gaps in the border wall were planned to alleviate the deflection of water into Mexico resulting from border wall construction. One, at Roma, would be 100 feet wide, while the other at Rio Grande City would be 275 feet wide. The point of these gaps, the Baker model said, was to “split” off a portion of rising floodwaters, channeling water into the United States and therefore lessening the severity of flooding in Mexico. The 2012 Baker map (Figure 3, above) shows this in action. The blue “proposed floodplain” upriver from the gap does not pass through the planned border wall (yellow line), whereas after the gap the “proposed floodplain” extends deep into the U.S., even crossing highway 83. This shows that CBP is planning to willingly direct floodwater into the U.S. and expose residents and their property to increased flood risk. CBP may be liable for properties damaged or lives lost from this flooding, which is almost certain to occur.

In addition to demonstrating how bollard walls in Starr County would be designed to direct floodwater deeper into U.S. communities, this map shows us that not even CBP believes its own false assertion that water will be able to pass freely through the planned bollard walls. Upriver from the 275 foot wide gap this map shows the bollard wall acting as the floodplain’s boundary, playing the same role as levees do in Hidalgo and Cameron Counties. It is only after water pours through the gap in the wall that the floodplain extends to the north of the border wall. Based on this model, it is clear that the engineers expect the planned bollard wall to block the free flow of water and even act as a levee.

## **Habitat Destruction, Harm to Wildlife Refuges**

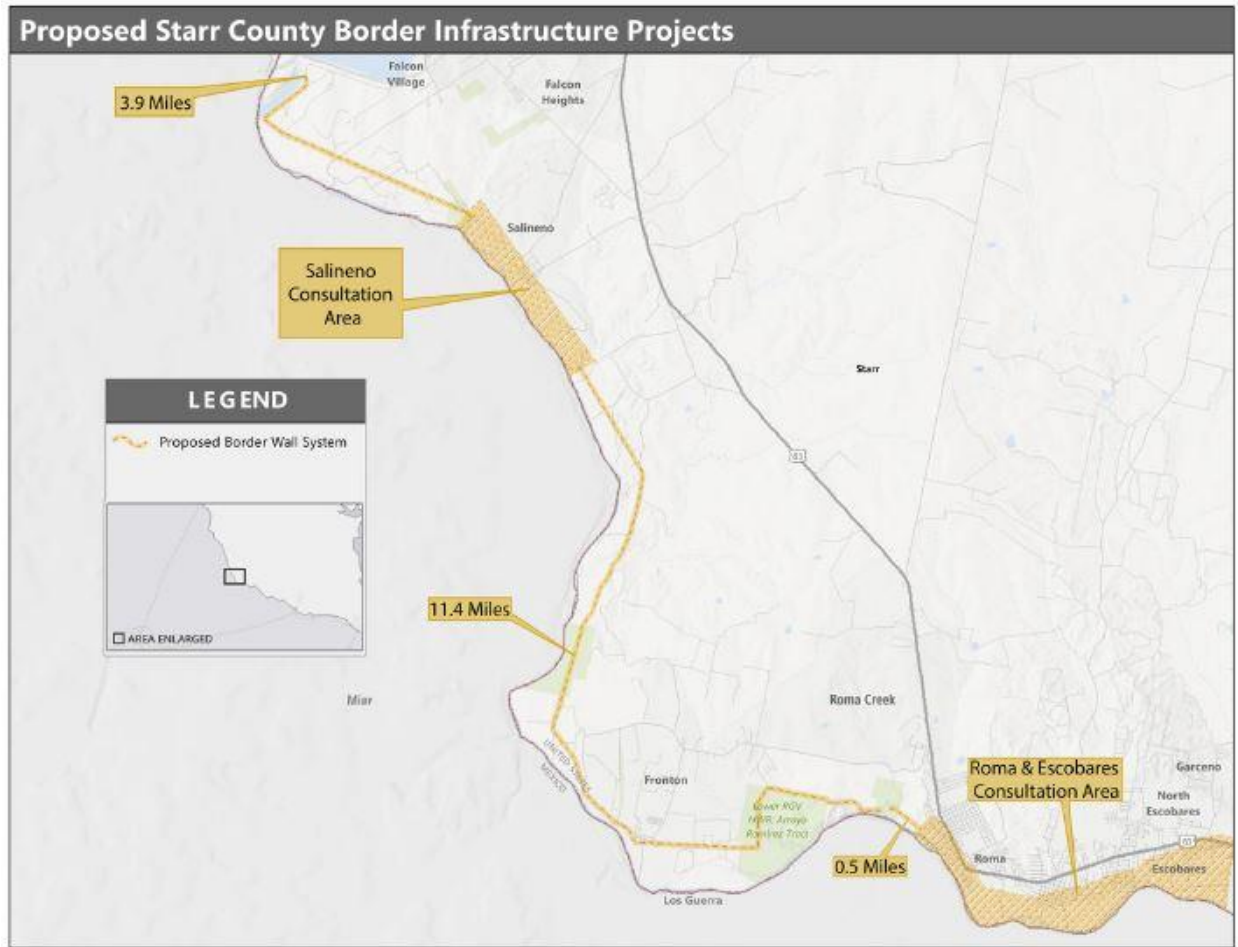
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Border walls are well understood to be ecological stressors that destroy habitat, divide genetic interchange, and impede wildlife migration.<sup>10</sup> In July 2018, more than 2,500 scientists published a paper detailing the harms that border walls cause to wildlife habitat, stating: “Physical barriers prevent or discourage animals from accessing food, water, mates, and other critical resources by disrupting annual or seasonal migration and dispersal routes.”<sup>11</sup> Existing border walls in the Lower Rio Grande Valley and across the U.S.-Mexico borderlands have caused extensive and well-documented harm to wildlife and natural processes, including the destruction and fragmentation of habitat; interference with the flow of water and the exacerbation of flooding; and disturbances to wildlife during construction.

The border walls shown in CBP’s “request for input” would repeatedly cut through tracts of the Lower Rio Grande Valley NWR. The same day that this “request for input” was issued (June 27, 2019), CBP announced that it had awarded contracts for four sections of border wall in Starr County, two of which would be built in the Las Ruinas and Arroyo Ramirez tracts of the Lower Rio Grande Valley NWR. On July 1, just three days after the “request for input” was issued, the DHS Secretary waived dozens of environmental and public health laws to rush this construction in the Arroyo Ramirez and Las Ruinas tracts of the Lower Rio Grande Valley NWR.

The Arroyo Ramirez and Las Ruinas tracts are designated critical habitat for Zapata bladderpod, a plant listed under the ESA. The Las Ruinas tract also holds habitat for muscovy ducks, red billed pigeons, and brown jays, birds that are rarely found in the United States and which attract birders and ecotourists to the Rio Grande Valley. A Construction contract for these areas has already been issued, survey stakes have been documented in the ground here,<sup>12</sup> and we have been told the bulldozing of these areas is imminent. It is extremely concerning that all of this activity has occurred before the public has even had the opportunity to submit comments.

CBP’s planned border walls would cut through and destroy many other tracts of the Lower Rio Grande Valley NWR (see figure 5, below), though only a few tracts, such as Arroyo Ramirez are labeled on the maps. In Starr County the Arroyo Morteros, Salineno, Fronton, Los Negros Creek, Garceno Prieta Bend, Rio San Juan, Los Velas, Los Velas West, La Casita (east and west), San Francisco Banco, La Grulla, Valadeces Banco, Los Ebanos, Sam Fordyce, Chicharra Banco, Cuevitas, and Havana South refuge tracts would either be bisected and bulldozed by the planned border wall or left in the “no man’s land” south of it. Other parts of the Lower Rio Grande Valley NWR would be north of the border wall, and the terrestrial animals that live there would be cut off from access to the river.



*Figure 4: Western Starr County map from the 2019 request for input.*

The map above (Figure 4) is the westernmost Starr County map included in CBP’s “request for input,” while the one below is a U.S. Fish and Wildlife Service (USFWS) map of Lower Rio Grande Valley NWR tracts in the western reach of Starr County.

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Western Starr County Area

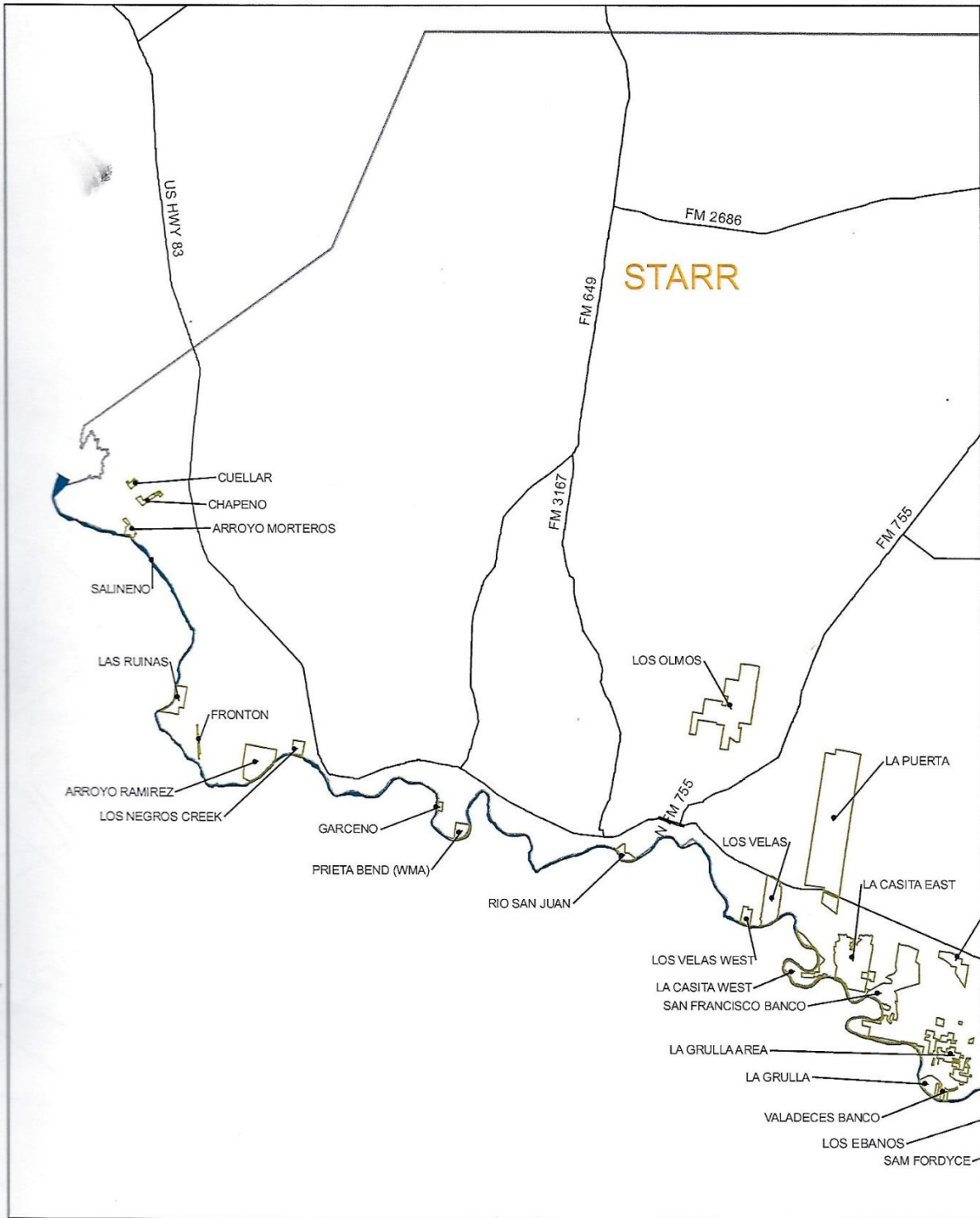


Figure 5: Starr County map from USFWS Lower Rio Grande Valley NWR Tract Map Book.

## **Impacts of Planned Border Walls on Terrestrial Wildlife and Endangered Species**

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The Rio Grande Valley is one of the most biologically diverse areas in North America, where gulf coast, great plains, and desert climates come together to create a series of unique ecosystems. The area is home to over 1,100 plant species and 700 vertebrate species (including more than 500 bird species), at least 18 of which are listed as federally threatened and endangered.<sup>13</sup> The riparian woodlands also provide habitat for about one half of all the butterfly species found in the U.S. During fall and spring migrations, millions of birds from the Central and Mississippi flyways funnel through the area on their way to and from Central and South America, as do migratory bats and butterflies. Of the original habitat that once supported this enormous diversity, only 5% currently remains.<sup>14</sup> Every remaining acre of native habitat in the valley is irreplaceable and important to the survival of these species. As currently proposed, CBP's project in Rio Grande Valley will construct 95 miles border walls through some of the last remaining native thornscrub and riparian habitat in the entire region.

A primary goal of the Lower Rio Grande Valley NWR system is to use the habitat that lines much of the Rio Grande to connect otherwise separate habitat in Starr, Hidalgo, and Cameron Counties. Further USFWS refuge tracts link federal lands along the Rio Grande to the Laguna Atascosa NWR on the Gulf Coast, where a population of endangered ocelots has been monitored with tracking collars for a number of years. This conservation strategy, which seeks to string together a protected and contiguous wildlife corridor, accounts for many of the tracts which make up the Lower Rio Grande Valley NWR system. Santa Ana NWR, Bentsen State Park and World Birding Center, and the National Butterfly Center, also act as links in this chain in the portion that has been established in Hidalgo County.

The creation of a contiguous wildlife corridor of protected habitat is a critical part of recovery efforts for the endangered ocelot. The border walls erected in Hidalgo and Cameron Counties a decade ago already create barriers to the movement of ocelots and other terrestrial animals, disrupting the purpose of the refuge system. Habitat fragmentation and genetic isolation are two of the main factors driving ocelots in the United States towards extirpation. In the 2008 update to the USFWS ocelot recovery plan, the agency notes that "Issues associated with border barrier development and patrolling the boundary between the United States and Mexico further exacerbate the isolation of Texas and Arizona ocelots from those in Mexico."<sup>15</sup> CBP's planned border walls in Rio Grande Valley would put the continued recovery of ocelots at risk.

While insects, birds, and even smaller terrestrial animals may be able to pass through certain designs of border walls, larger terrestrial animals will not. Ocelots, jaguarundi, javelinas, deer, bobcats, coyotes, and other similar animals would find it impossible to climb over or dig under a wall that is 20-30 feet tall and buried deep into the earth. Terrestrial animals north of the wall would be unable to access the Rio Grande. In Starr County and certain areas in Hidalgo County, the Rio Grande is the only reliable source of water for wildlife. In the summer, when temperatures top 100 degrees Fahrenheit for numerous days, animals may find themselves trapped on the wrong side of the border wall and unable to access water.

While we oppose the construction of bollard walls, we note that levee border walls are even worse for terrestrial animals than bollard alternatives. Certain reptiles and even small mammals

can slip through the gaps found in bollard walls. CBP's proposal for solid concrete levee walls, however, will stop nearly all non-flying species in their tracks, even those small enough to typically fit through gaps in bollard and mesh style walls like indigo snakes. A levee border wall cannot have gaps or holes because that would defeat the purpose of a levee, which is to stop the passage of water. Existing earthen levees have a slope on both sides, which, during a flooding event, allows terrestrial animals to go up one side and down the other to escape rising waters. A levee border wall would replace the existing sloping levee with a sheer concrete slab, easily surmountable by a human with a ladder or a rope, but impossible for terrestrial animals to cross.

Some of Hidalgo County's levees were converted to levee border walls in 2009. In 2010, the Rio Grande flooded, inundating a number of wildlife refuge tracts up to the levees for as long as four months. Trees were reported killed by the months-long inundation.<sup>16</sup> After the water receded, USFWS reported to CBP that in areas where levee border walls prevented the egress of animals they found hundreds of shells from drowned Texas tortoises, a state-listed threatened species, and that it was likely that animals whose remains would be less durable, possibly including ocelots, also drowned. USFWS warned CBP that:

“The floodwall blocked almost all egress for terrestrial wildlife species. Animals caught between the river and the flood wall that could not escape around the edges of floodwalls likely perished. Routine inspections of tracts during the event found terrestrial species in trees, swimming and wading in rising water.... 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.”<sup>17</sup>

The USFWS brief determined that any animals unable to find a gap in the wall to escape the 2009 floodwaters likely perished. CBP's proposal to build additional levee walls would trap and drown virtually all terrestrial animals present in the riparian corridor, including endangered species that may be present like ocelot and jaguarundi. Levee-border walls turn refuges into death traps for the animals that they are supposed to protect. Beyond drowning wildlife, levee walls could also endanger the lives of recreationalists, landowners, domestic animals, and migrants who may be present in the area between the border wall and the river during flood events.

All of these concerns were outlined in detail in our August 3, 2018 letter to CBP. Not a single one of these concerns has received a response or been addressed.

CBP's "request for input" contains no information regarding anticipated harms that border walls will inflict upon the Lower Rio Grande Valley NWR. Such information is necessary in order for stakeholders to provide substantive feedback. Even if CBP were to commit to mitigation and carry it out, the nature of a border wall makes meaningful mitigation extremely difficult or impossible. This is because the worst effects of the wall are not the habitat destroyed or damaged, but rather that the wall divides populations, cutting them off from resources and fragmenting them, which increases their odds of extirpation. A mitigation accounting in which

CBP were to replace each acre of habitat it destroys by purchasing and conserving a similar acre elsewhere would not come close to offsetting the harm caused by the fragmentation a wall would create, and therefore should not be considered legitimate mitigation. We remind CBP that more than 95% of the habitat that originally existed in the Rio Grande Valley has been converted to uses that make it unsuitable for wildlife. Neighboring farmlands exist that could one day be revegetated, but it can take 100 years or more to sufficiently revegetate such areas to the point where they again serve as viable habitat. These factors make the likelihood of adequate mitigation so remote that CBP should halt the proposed project and seek to employ border security strategies that preserve the existing high-quality habitat in the project area.

In addition, any promises to change the design or route of border walls would be difficult to put stock in, given CBP's track record. CBP erected many miles of border wall and upgraded patrol roads in parts of the Lower Rio Grande Valley NWR system from 2008–2010. CBP prepared an ESP (the inadequacies of such plans have been detailed previously) as a part of this construction, which determined that the most appropriate mitigation for habitat destroyed or fragmented by wall construction would be the purchase of 4,600 acres of land that could serve as ocelot habitat to be added to the USFWS refuge system. To date, CBP has purchased only 1,100 acres of potential ocelot habitat in South Texas. This is less than a quarter of the habitat that CBP committed to purchasing in the 2008 ESP. This clearly demonstrates that mitigation strategies and conservation measures outlined in ESPs are not adhered to by CBP and that mitigation commitments made by the agency are not taken seriously. This further demonstrates how ESPs are an inadequate substitute for NEPA. It seems that any similar pledges of mitigation that might be made to offset harm caused by the proposed project would likely also be unmet or ignored. Given this troubling history, we believe that it is imperative that CBP fully comply with NEPA and all other relevant federal laws.

### **Starr County Landowners**

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Most of the Texas borderlands are owned privately, rather than federally. This means CBP will need to acquire the title to the land upon which border walls will be built. Many properties in the Rio Grande Valley have been held within a family for generations, and in some instances in Starr County titles have been handed down since the property was granted by the Spanish Crown in the 1760s, before either the U.S. or Mexico existed. Through FOIA, we have obtained an internal CBP email dated February 13, 2018 that states for 52 miles of the planned Starr County border wall the agency will need to acquire ownership of 866 parcels of land held by 540 landowners. All of these parcels will need to be purchased by the federal government, or if the landowner does not wish to sell or disputes the government's terms, the property will need to be condemned.

The maps included in CBP's "request for input" are not of sufficient detail to inform landowners whether or not their properties or homes are subject to be taken by the federal government for border wall construction. Even those whose property may not be taken will likely see their land devalued, or the community in which they live or work blighted as a result of wall construction. As discussed above, they may also see increased risk of flooding. It is disingenuous, and ultimately meaningless, to ask the public for input without first providing sufficient information. CBP should therefore provide detailed and precise maps to the public, along with descriptions of

the project, so that local residents may fully evaluate the likely impacts of CBP’s planned border walls on their homes, businesses, farms, and communities.

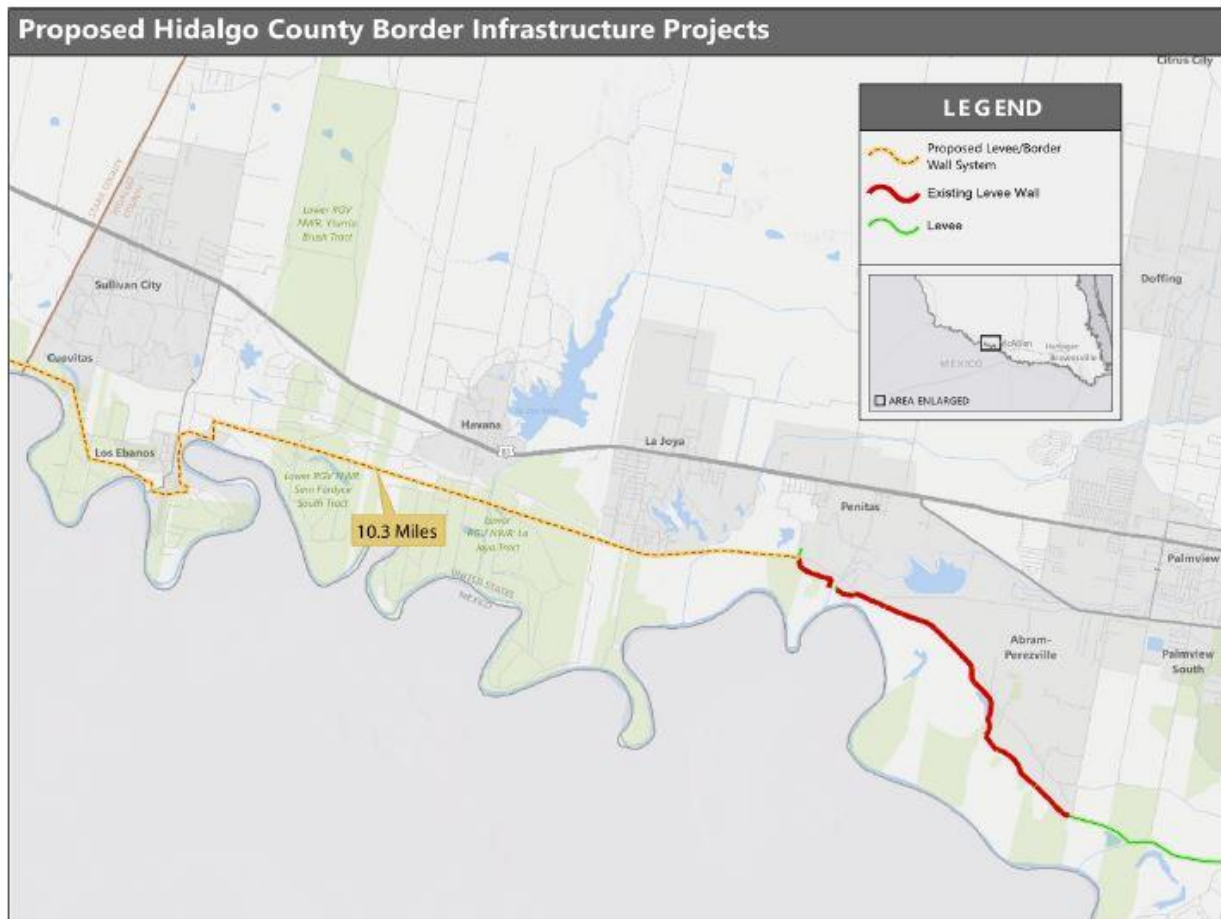
### **Levee-Border Walls in Hidalgo County**

CBP’s “request for input” distinguishes between “border wall system” and “levee/border wall system” in the following way:

“Levee Wall — the proposed levee wall consists of concrete wall to the approximate height of the levee crest with 18-foot tall bollards installed on top of the levee wall.

Border Wall — the proposed border wall is 20- to 30-feet high utilizing 6” x 6” concrete-filled steel bollards.”

The maps make this distinction as well. When they shift from Starr County to Hidalgo County the label switches from “proposed border wall system” to “proposed levee/border wall system.”



*Figure 6: Westernmost Hidalgo County map from the 2019 request for input.*



The map above (Figure 6) shows 10.3 miles of “proposed levee/border wall system” running east from the Starr/Hidalgo county line through Los Ebanos to Penitas, where it would connect with existing levee wall in Hidalgo County. The current levee wall’s western terminus is at Penitas because that is where the existing levee ends. Based on these maps, it appears CBP plans to build new levee border walls in locations where there are currently no levees. The new 10.3 miles appears to be mostly (if not entirely) in the Rio Grande floodplain. Because Mexico does not have a matching parallel levee on the south side of the Rio Grande, the U.S. cannot build a levee, levee-border wall, or border wall in this location without violating the international treaty (the details of which have already been described in previous sections of this document).

### Violation of Congressional Mandate on Santa Ana NWR



*Figure 7: Map including the Santa Ana NWR from the 2019 request for input.*

The map above (Figure 7) includes the Santa Ana NWR, which Congress explicitly exempted from border wall construction in the 2018 and 2019 appropriation bills. The 6-mile long span of planned levee-border wall, which would start at the terminus of the existing border wall section at the Old Hidalgo Pumphouse, appears to cut into Santa Ana NWR, but we suspect this is an error in the map. What appears to be the westernmost portion of Santa Ana NWR on CBP’s map is actually the Marinoff tract of the Lower Rio Grande Valley NWR, so CBP is not violating Congress’ directive by walling it off (though such actions will still inflict severe environmental

damage, as wildlife does not know the difference between the Lower Rio Grande Valley NWR and the adjacent Santa Ana NWR). On the east side of the Santa Ana NWR the map shows a 0.3-mile long section of levee-border wall that does actually incur into Santa Ana NWR, not the Lower Rio Grande Valley NWR. Building any border wall there (or anywhere else in Santa Ana NWR) would be an explicit violation of Congress' mandate.

The 6-mile long section of planned levee wall west of Santa Ana NWR also appears to run through the historic Jackson-Ramirez cemetery, where gravesites lie well within the proposed 150 foot enforcement zone. On June 3, 2019, the Associated Press quoted CBP stating that "It has never been CBP's intent to disturb or relocate cemeteries that may lie within planned barrier alignment."<sup>18</sup> CBP went on to say that "understanding the historical and cultural resources that may lie within planned barrier alignment has always been part of CBP's public and stakeholder outreach process," and the agency would therefore avoid impacting the cemetery. The above map does not show a gap in the border wall at the location of the Jackson-Ramirez cemetery, and appears to instead indicate that this pledge from just two months ago will not be honored. We urge CBP to cancel plans to construct border walls that would negatively impact the Jackson-Ramirez cemetery and other historic and/or religious sites.

### **Impacts to Access of Waters of the Rio Grande and Water supply**

The United States and Mexico have operated under a shared water supply agreement known as the 1944 Water Treaty for the "*Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande.*" This agreement lays out the process for sharing the water supply of these three major international rivers. That treaty and subsequent minutes to the treaty make clear that major projects that could impact water supply should involve consultation with and approval from both the U.S. and Mexican sections of the IBWC. Before construction moves forward, CBP must assess how the installation of border barriers could impact access to water by agricultural and municipal interests on both sides of the border. Under the treaty, one-half of the flow of the Rio Grande below Fort Quitman and one-half of all other flows into the Rio Grande not otherwise allocated are to be equally divided between the two countries. CBP has failed to assess how the planned border wall construction would interfere with access to water and not met its obligations under the aforementioned treaty.

### **Impacts to Ecotourism and Rio Grande Valley Economy**

Nature areas, wildlife refuges, historic districts and birdwatching preserves in the Rio Grande Valley are significant attractions that bring hundreds of millions of dollars to the local economy. According to a Texas A&M University study, nature tourism in Rio Grande Valley contributed \$344.4 million per year to county-level economies and created 4,407 jobs.<sup>19</sup> The State of Texas is the number one bird-watching destination in the nation and more than 500 bird species have been documented in the valley.<sup>20</sup>

Numerous renowned birding and nature areas lie within the proposed project area and would be irreversibly damaged or destroyed by border wall construction. As these refuge lands and nature areas are lost and endemic and migratory species decline, there will be less incentive for nature

enthusiasts to visit the area. CBP's proposal would also damage or destroy numerous cultural and historic sites that draw tourism.

CBP's border wall proposal would place severe economic tolls upon local communities in the Rio Grande Valley, which are already among the poorest in all of Texas.<sup>21</sup> Part of the Lower Rio Grande Valley's economy is tied to so-called "snowbirds," retired U.S. citizens who come to the region in the winter months to enjoy the warmer weather and take advantage of the nature-based tourism. Further development of walls and barriers could destroy much of the nature that these "snowbirds" come to the Rio Grande Valley to enjoy, causing visitation and economic expenditures in this region to drop. We request that before moving forward with the proposed project, CBP conduct a full assessment of how the project would impact local economies and offer mitigating strategies for businesses that are likely to lose revenue and individuals who are likely to lose their jobs.

### **Broad Public Opposition to Border Walls**

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It is also important to note that the overwhelming majority of borderland residents and 60% of the American public oppose the border wall.<sup>22</sup> Opposition to the border wall in border communities is even higher than that in the rest of the country, with polls showing that 72% of borderland residents oppose the border wall.<sup>23</sup> In an explicit rejection of CBP's proposed border wall construction, 39 cities, counties, and tribal nations in the borderlands have passed "No Border Wall" resolutions.<sup>24</sup> Each of these resolutions should be considered by CBP as a direct and public statement of opposition to the proposed project and all other border wall construction projects.

Importantly, Hidalgo, Starr, and Cameron counties, where CBP is proposing to build border walls, both passed "No Border Wall" resolutions condemning the border wall and taking a firm and formal stance against the project CBP is proposing. Hidalgo and Starr County commissioners voted unanimously in favor of these resolutions, citing concerns to the environment, private property, and flooding that would result from the proposed project. In addition to Hidalgo, Starr and Cameron counties, sixteen cities in the Rio Grande Valley have passed "No Border Wall" resolutions. These cities include McAllen, Mission, Pharr, Sullivan City, La Joya, Weslaco, Edinburg, and others that would be directly impacted by CBP's proposed project.

CBP often argues that the border wall will benefit border communities the most. If that were true, then it would be expected that these border communities would support border wall construction. The broad and vocal opposition from border communities demonstrates a different reality. The unambiguous opposition to the border wall expressed by communities across the borderlands shows that border communities neither want nor need additional miles of border walls. CBP has continually attempted to paint border communities as unsafe places while claiming that the construction of border barriers will reduce crime. We remind CBP that border communities have consistently lower crime rates than the national average.<sup>25</sup> CBP's portrayal of border communities as dangerous places is not only factually inaccurate, but also an offensive mischaracterization that further insults and profiles communities of color.

The opposition to border wall construction from local elected officials and the public at large reflects just how damaging this project would be to the local community. At a bare minimum, CBP must consult extensively with local communities by preparing a full EIS complete with public meetings and ample opportunities for the public and elected officials to understand the impacts and weigh in on the implications of the project before it moves forward in the planning process.

### **Unproven Need for and Inefficacy of Border Walls**

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CBP's "request for input" on the proposed project fails to describe a purpose and need for the project and supplies no language as to why the project is necessary in the first place. We remind CBP that at this point in time, there is no conclusive data to suggest that border barriers actually reduce levels of undocumented border crossings. In fact, a 2017 Government Accountability Office (GAO) report noted that there is currently no way of documenting the role of border barriers in impeding border-crossers. The report recommended that CBP:

“develop metrics to assess the contributions of pedestrian and vehicle fencing to border security along the southwest border and develop guidance for its process for identifying, funding, and deploying [Tactical Infrastructure] TI assets for border security operations.”<sup>26</sup>

Until CBP develops these metrics to prove the efficacy of border barriers, it is inappropriate to suggest that the deployment of additional border barriers will have a meaningful effect of deterring border crossings.

Border barriers block most species of animals, impede natural flows of water, and even alter plant dispersal, but there is no evidence they stop people from crossing. A 2014 study of activity around border barriers in natural areas showed that terrestrial mammals were found in higher numbers in locations where no border barriers were present. The authors, however, found no difference in the number of border-crossing humans detected between areas with and without barriers, suggesting that barriers are not effective at deterring migrants, but do affect wildlife populations.<sup>27</sup>

The 2017 GAO report that establishes CBP has not proven border barriers to be an effective means for deterring border-crossings also sheds light on CBP's overarching tactics of border barrier construction and border militarization. The report outlines CBP's strategy of border wall construction as a tactic employed not necessarily to stop border crossings, but as an attempt “to divert illicit cross-border activities into more remote or rural environments, where illegal entrants may require hours or days to reach the nearest U.S. community.”

This tactic has proven ineffective at deterring border crossings. It has also led to the deaths of thousands of migrants who have been pushed into remote reaches of borderland deserts and perished in the elements while attempting to cross the border. CBP's own statistics show that more than 7,000 people have died crossing the border between 1998 and 2017,<sup>28</sup> though this count only reflect bodies that have been found and therefore is widely considered to be much lower than the true number of deaths.<sup>29</sup>

From its conception, the construction of border barriers and militarization of border communities has been a part of a larger strategy to intentionally push border-crossers into remote desert environments where many die due to harsh conditions. This policy has led to a humanitarian crisis on our southern border. CBP's proposal to construct more miles of barriers in the Rio Grande Valley and increase levels of border militarization would exacerbate this crisis and likely lead to more migrant deaths in south Texas and across the borderlands. In 2017, Texas saw the largest increase in border deaths of any state, more than two thirds of which occurred in the Rio Grande Valley.<sup>30</sup>

### **Environmental Justice:**

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Environmental justice is defined by the Environmental Protection Agency (EPA) as “the fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies.” Executive Order 12898 directs that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>31</sup>

More than 90% of the population in Hidalgo and Starr counties can be classified as a minority.<sup>32</sup> Starr and Hidalgo counties have some of the lowest per-capita incomes in the entire state, with \$11,659 and \$13,480 per capita incomes respectively.<sup>33</sup> It is clear that based on the demographics of the project area, a disproportionately high number of the people who will be negatively affected by the proposed project are members of minority and/or low income populations. The Rio Grande Valley also holds ancestral lands of several indigenous peoples including the Carrizo-Comecrudo, who have been vocal in their opposition to the impact of proposed border walls on their ancestral lands. Any public process and assessment must recognize the peoples, culture, and history of the area and take this into account during planning.

Significant environmental justice concerns have already arisen in the planning process of the proposed project through CBP's failure to hold public meetings and conduct adequate public outreach. This suggests an intentional attempt to exclude and discriminate against the very populations that CBP is obligated to engage. For this and other projects, CBP should strive to actively engage *all* community members, regardless of race, culture, national origin, income and educational levels, and minimize impacts on marginalized populations, in accordance with Executive Order 12898. We ask that the planning process for this project proceed no further until CBP can demonstrate that a meaningful and transparent effort has been made to obtain public comment from a wide range of community members, including minority and low-income populations.

As previously discussed, the construction of 95 miles of border walls, some of which CBP has proposed to place within the Rio Grande Valley floodplain, would expose local residents to worsened floods. These floods would disproportionately impact residents in low-lying areas that are often home to poorer communities. Beyond these significant flooding concerns, the proposed

construction would also likely impact air and water quality of neighboring communities. CBP's proposed project is of significant scale and will involve extensive concrete batching, heavy machinery operation, and severe ground disturbance, all of which would likely emit particulate dust and pollutants into air and water and endanger the health of neighboring communities. These public health hazards would adversely and disproportionately impact human health of minority and low-income populations in violation of Executive Order 12898.

Without the preparation of an EIS under NEPA it is impossible to fully understand and analyze the true public health and environmental justice implications of CBP's proposed project. There is a clear framework for assessing environmental justice impacts within the NEPA process. The completion of an EIS for the proposed project, as required under NEPA, would illuminate these concerns and help inform the best path forward.

Finally, we are aware that DHS, CBP's parent agency, has waived dozens of laws to expedite border wall construction. DHS has done this by invoking Section 102 of the REAL ID Act, which we continue to argue is unlawful, as this waiver authority is no longer applicable and was never intended to exist in perpetuity. DHS's use of the Section 102 waiver to waive laws like NEPA, the Clean Water Act, the Clean Air Act, and other laws has denied residents in border communities the same critical public health and environmental protections that communities everywhere else in the nation receive as a basic right. The very purpose of these laws, and of Executive Order 12898, is to protect communities most at risk and ensure they receive the same protections and rights as all Americans. DHS's choice to cast aside dozens of critical public health and environmental protections endangers and exposes low-income minority populations to severe harm. This is profoundly undemocratic and raises significant environmental justice concerns. In this and other projects, DHS must work to actively engage stakeholders and respect our nation's laws, rather than using expired provisions of the REAL ID Act to deny legal rights to low-income and minority communities.

## **Conclusion**

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We urge CBP to carefully review and respond to all concerns raised within this letter and to comply with all applicable federal laws before moving forward with the planning and execution of this project. As discussed above, we are extremely concerned that CBP is conducting this project out of compliance with NEPA or other applicable federal laws. Because of the many concerns detailed within the contents of this and previous letters, CBP must cease all efforts towards constructing border barriers in Rio Grande Valley until these numerous and significant issues are resolved.

Sincerely,

Animal Legal Defense Fund  
Center for Biological Diversity  
Defenders of Wildlife  
End Streamline Coalition  
First Christian Church (Disciples of Christ)  
Frontera de Cristo  
Great Old Broads for Wilderness  
HOPE Border Institute  
Madrean Archipelago Wildlife Center  
National Wildlife Refuge Association  
Northern Jaguar Project  
ProgressNow New Mexico  
Rio Grande International Study Center (RGISC Inc.)  
Rachel's Network  
Samaritans  
School Sisters of Notre Dame  
Sierra Club  
Southern Border Communities Coalition  
Southwest Environmental Center  
Texas Border Coalition

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<sup>1</sup> U.S. Customs and Border Protection. 2019. Re: FY19 Rio Grande Valley Levee/Border Wall System Construction Projects Request for Input. June 27, 2019.

<sup>2</sup> U.S. Customs and Border Protection. 2019. Contract Award for New Border Wall Project in the Rio Grande Valley. May 28, 2019. <https://www.cbp.gov/newsroom/national-media-release/contract-award-new-border-wall-project-rio-grande-valley>

<sup>3</sup> U.S. Customs and Border Protection. 2019. Contract Award for New Border Wall Project in the Rio Grande Valley. June 27, 2019. <https://www.cbp.gov/newsroom/local-media-release/contract-award-new-border-wall-project-rio-grande-valley>

<sup>4</sup> U.S. Customs and Border Protection. 2019. Contract Award for New Levee Wall and Border Wall Gates in the Rio Grande Valley. August 7, 2019. <https://www.cbp.gov/newsroom/national-media-release/contract-awards-new-levee-wall-and-border-wall-gates-rio-grande>

<sup>5</sup> Paul Enriquez, U.S. Customs and Border Protection. 2018. Statement made during webinar on Rio Grande Valley border wall construction. October 30, 2018.

<sup>6</sup> 40 C.F.R. § 1502.14.

<sup>7</sup> 42 U.S.C. § 4332(E).

<sup>8</sup> The United States of America and Mexico. 1970. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary. Signed November 23, 1970.

<sup>9</sup> SBI-TI PF 225 and VF 300 Border Fence Projects Technical IPT Final Report. Michael Baker Jr., Inc. May 2009. p. 11.

<sup>10</sup> Flesch, A.D., C.W. Epps, J.W. Cain, III, M. Clark, P.R. Krausman, and J.R. Morgart. 2010. Potential effects of the United States-Mexico border fence on wildlife. *Conservation Biology*, 24, 171–181.

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<sup>13</sup> U.S. Fish and Wildlife Service. 2018. Lower Rio Grande Valley National Wildlife Refuge webpage: Wildlife and Habitat. Accessed July 2018. [https://www.fws.gov/refuge/Lower\\_Rio\\_Grande\\_Valley/wildlife\\_habitat.html](https://www.fws.gov/refuge/Lower_Rio_Grande_Valley/wildlife_habitat.html)

<sup>14</sup> U.S. Fish and Wildlife Service. 2018. Lower Rio Grande Valley National Wildlife Refuge webpage: Restoring Habitat. Accessed July 2018. [https://www.fws.gov/refuge/Lower\\_Rio\\_Grande\\_Valley/resource\\_management/restoring\\_habitat.html](https://www.fws.gov/refuge/Lower_Rio_Grande_Valley/resource_management/restoring_habitat.html)

<sup>15</sup> U.S. Fish and Wildlife Service. 2016. Recovery Plan for the Ocelot (*Leopardus pardalis*). Southwest Region. Albuquerque, New Mexico. July, 2016.

<sup>16</sup> E. Findell. 2011. Santa Ana Wildlife Refuge Still Growing Back from Alex Flooding. *The Monitor*. Accessed July 31, 2018. [https://www.themonitor.com/news/local/article\\_f76c9cf8-dc8e-5510-9fb3-f99248589eb8.html](https://www.themonitor.com/news/local/article_f76c9cf8-dc8e-5510-9fb3-f99248589eb8.html)

<sup>17</sup> U.S. Fish and Wildlife Service. 2011. Rationale and Justification for Conservation Measures: Rio Grande Valley Sector. Corpus Christi Ecological Services Field Office. March 9, 2011.



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- <sup>19</sup> Woosnam, K., R. Dudensing, D. Hanselka, and S. An. 2011. An Initial Examination of the Economic Impact of Nature Tourism on the Rio Grande Valley. Report prepared for the South Texas Nature Marketing Coop by Department of Recreation, Park & Tourism Sciences and Department of Agricultural Economics Texas A&M University.
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**APPENDIX A: COMMENTS SUBMITTED TO CUSTOMS AND BORDER PROTECTION ON AUGUST 3, 2019 – unanswered and unaddressed**

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**August 3, 2018**

Paul Enriquez  
Environmental Branch Chief  
Border Patrol Facilities and Tactical Infrastructure  
Program Management Office  
1300 Pennsylvania Avenue NW  
Washington, DC 20229

Kevin K. McAleenan  
Commissioner - U.S. Customs and Border Protection  
1300 Pennsylvania Ave. NW  
Washington, DC 20229

Carla L. Provost  
Acting Chief - U.S. Border Patrol  
1300 Pennsylvania Ave. NW  
Washington, DC 20229

CC:

Kirstjen M. Nielsen  
Secretary of Homeland Security  
300 7th Street, SW  
Washington, D.C. 20024

**Re: Rio Grande Valley Proposed Border Barrier Construction Comments**

Dear Mr. Enriquez,

These comments on the proposed construction of 33 miles of border barriers in Rio Grande Valley are submitted on behalf of the undersigned conservation, human rights, public interest, and faith-based organizations.

The construction of levee and bollard-style border barriers in the locations proposed in U.S. Customs and Border Protection (CBP's) notice would significantly damage the environment and harm the culture, commerce, and quality of life for communities and residents located near the project area. The area of proposed construction spans approximately 33 miles and bisects numerous national wildlife refuge tracts, Bentsen-Rio Grande Valley State Park, Roma and La Lomita National Historic Districts, and hundreds of private properties. Similar border barrier projects have damaged or destroyed protected landscapes, interfered with binational conservation efforts, obstructed the movement of wildlife, and impacted neighboring communities. Additionally, the border barrier designs proposed by CBP are likely to cause life-threatening flooding, as has occurred in other areas such as Nogales, Arizona, where similar types of barriers have been deployed. The proposed project is also likely to harm the Rio Grande Valley's local ecotourism economy, which is driven in large part by outdoor recreation in areas that the proposed construction project would disturb or destroy. Finally, we remind CBP that there is no

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evidence that the proposed project would achieve the agency's stated goals to "impede or deny illegal border crossings," as border walls of many designs have proven easily surmountable by people in a number of ways, including with a ladder or a rope.

We request that CBP carefully review and respond to the numerous concerns raised within the following sections of this letter before moving forward with any aspect of border barrier construction in Rio Grande Valley. Additionally, we underscore our strong concerns and objections to the public comment process. The 30-day comment period is inadequate for the public to thoroughly review and provide comment on a project of this magnitude. Furthermore, members of the public with limited English proficiency have not been provided information or notice to comment in an accessible format, key stakeholders have been disregarded, and federal requirements for consultation with other agencies, such as those within the National Environmental Policy Act (NEPA), have been ignored.

### **Inadequate Public Notice and Comment**

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The letter sent by CBP and received by the Center and other concerned organizations in July 2018 states that CBP "is writing once again to solicit your input concerning the proposed construction of border barriers in the . . . Rio Grande Valley Sector" and that this "letter follows-up on an initial scoping letter that was sent in March 2018."<sup>1</sup> The Center and other concerned organizations have no record of receiving a letter from CBP on or around March 2018 concerning the proposed construction of border barriers in in the Rio Grande Valley Sector. The CBP consultation process is already inadequate and is further confounded by not including the public, including the Center and interested organizations, from the start of this process.

Given the wide range of environmental, cultural, public safety, and economic impacts of the proposed project, the 30-day comment period allowed by CBP is inadequate to provide the public enough time to thoroughly review and meaningfully respond to the proposed project. Especially for members of the public who have no other means to weigh in on decisions impacting their communities, a 30-day comment period is an extremely short amount of time to comment on a project that will fundamentally alter the environment and communities near the project area.

Many community members potentially impacted by the proposed project have limited English proficiency and are Spanish dominant or monolingual Spanish speakers. To engage in meaningful consultation, CBP must send out information and requests for comment in both Spanish and English. Executive Order 13166 was issued to improve access to services for people with limited English Proficiency (LEP).<sup>2</sup> The Executive Order states "each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency." Failure to include Spanish-speaking members of the public is unacceptable, is in direct disregard to Executive Order 13166, and would amount to language-based suppression of public input.

CBP's 30-day comment period also does not include even a single public meeting, which strongly suggests a lack of sincere interest in obtaining thoughtful comments and broad

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engagement with the diverse constituencies affected by border barrier construction. To gather sufficient, meaningful public input, we encourage CBP to host a series of public comment forums in English and Spanish in the affected areas regarding the construction of border barriers through communities and protected lands in the Rio Grande Valley. Offering public forums in Spanish should not be an undue burden on the agency as CBP's website states that U.S. Border Patrol agents "must learn Spanish while at the Border Patrol Academy and you must pass a series of Spanish tests after entering on duty in order to continue in the Border Patrol."<sup>3</sup>

Also, the proposed border wall construction and related activities require compliance with federal laws including, but not limited to, NEPA, the Endangered Species Act (ESA), the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Coastal Zone Management Act, the Archaeological and Historic Preservation Act, the Historic Sites, Buildings, and Antiquities Act, the Religious Freedom Restoration Act, the National Wildlife Refuge System Administration Act, and the Administrative Procedure Act.

NEPA is a clear and well-established method of soliciting public comment, for which there is no substitute. Here, the public interest and the ultimate decision-maker will benefit from ensuring that this process moves forward under NEPA with the completion of an Environmental Impact Statement (EIS). Importantly, a NEPA-compliant EIS would ensure that the process is transparent and publicly accessible by providing notice to comment via Federal Register publication, local newspapers, and other means that are necessary to reach the communities that the proposed action would impact.

The NEPA process would also cure the numerous and significant shortfalls with CBP's recent notice. First, the notice was sent only to select individuals of CBP's choosing and may have excluded certain stakeholders who this project would significantly impact. CBP has distributed this notice in a manner inconsistent with transparent and informed decision-making by failing to circulate and publicize this comment request widely. Second, this inconsistency and carelessness is further highlighted by the fact that CBP's notice to comment was left undated, despite requiring the public to submit comments within "30 days following the date of this letter." Third, CBP's letter is replete with vagueness and devoid of site-specific details including locations of where the wall, gates, lights, roads, and cameras would be placed. The maps do not provide a level of detail that would permit a stakeholder to see precisely where walls are planned – in fact, the Starr county map shows the line of the Rio Grande City border wall crossing the Rio Grande into Mexico. In addition, the letter states that 8 miles of bollard border wall will be erected in Starr County, but the map for Starr County appears to show twice that mileage.

For these reasons, before CBP moves forward with the proposed construction, we request that CBP (1) extend the comment period to a minimum of 90 days after providing additional specific details about the project as would be required by an EIS; (2) that invitations to comment be sent out in English and Spanish; (3) that CBP host public forums in English and Spanish in McAllen, Mission, Rio Grande City, and Roma, Texas; (4) that CBP release information to the public, including accurate, detailed maps, that would allow for informed comment by the public; and (5) that CBP conduct this project in compliance with federal laws including, but not limited to, NEPA, ESA, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Coastal Zone Management Act, the Archaeological and Historic Preservation Act, the Historic Sites, Buildings, and Antiquities Act, the Religious

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Freedom Restoration Act, the National Wildlife Refuge System Administration Act, and the Administrative Procedure Act. CBP can start with the publication of a notice to comment on the proposal in the Federal Register that provides at least a 90-day comment period.

### **Destruction of Habitat and Impacts to Wildlife:**

The Rio Grande Valley is one of the most biologically diverse areas in North America, where gulf coast, great plains, and Chihuahuan desert climates come together to create a series of unique ecosystems. The area is home to over 1,100 plant species and 700 vertebrate species (including more than 500 bird species), at least 18 of which are listed as federally threatened and endangered.<sup>4</sup> The riparian woodlands also provide habitat for about one half of all the butterfly species found in the U.S. During fall and spring migrations, millions of birds from the Central and Mississippi flyways funnel through the area on their way to and from Central and South America, as do migratory bats and butterflies. Of the original habitat that once supported this enormous diversity, only 5% currently remains.<sup>5</sup> Every remaining acre of native habitat in the valley is irreplaceable and important to the survival of these species. As currently proposed, CBP's project in Rio Grande Valley will construct 33 miles of solid, impassable wall — with a small 3-mile gap at the Santa Ana National Wildlife Refuge — through some of the last remaining native thomscrub and riparian habitat in Rio Grande Valley.

Border walls are well understood to be ecological stressors that destroy habitat, divide genetic interchange, and impede wildlife migration.<sup>6</sup> In July 2018, more than 2,500 scientists published a paper detailing the harms that border walls cause to habitat quality, stating: "Physical barriers prevent or discourage animals from accessing food, water, mates, and other critical resources by disrupting annual or seasonal migration and dispersal routes."<sup>7</sup> Existing border walls in the Rio Grande Valley have already caused extensive and well-documented harm to wildlife and natural processes, including the destruction and fragmentation of habitat, the entrapment of animals during flooding, and disturbances to wildlife during construction.

While some plants, birds, and smaller terrestrial animals may be able to pass through certain designs of border walls, larger terrestrial animals will not. Ocelots, jaguarundi, javelinas, deer, bobcats, coyotes, and other similar animals would find it impossible to climb over or dig under a wall that is 20-30 feet tall and sunk deep into the earth. Terrestrial animals north of the wall would be unable to access the Rio Grande. In Starr County and certain areas in Hidalgo County, the Rio Grande is the only reliable source of water for wildlife. In the summer, when temperatures top 100 degrees every day, animals may not survive the trek around a one-mile section of wall, let alone a 33-mile span.

While we oppose the construction of bollard walls, we note that levee border walls are even worse for terrestrial animals than bollard alternatives. Certain reptiles and even small mammals can slip through the gaps found in bollard walls. CBP's proposal for 25 miles of solid concrete levee walls, however, will stop nearly all non-flying species in their tracks, even those small enough to typically fit through gaps in bollard and mesh style walls. A levee border wall cannot have gaps or holes because that would defeat the purpose of a levee, which is to stop the passage of water. Existing earthen levees have a slope on both sides, which, during a flooding event, allows terrestrial animals to go up one side and down the other to escape rising waters. A levee

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border wall would replace the existing sloping levee with a sheer concrete slab, easily surmountable by a human with a ladder or a rope, but impossible for terrestrial animals to cross.

Some of Hidalgo County's levees were converted to levee border walls in 2009. In 2010, the Rio Grande flooded, inundating a number of wildlife refuge tracts up to the levees for as long as four months. Trees were reported killed by the month-long inundation.<sup>8</sup> After the water receded, the U.S. Fish and Wildlife Service (USFWS) reported to CBP that in areas where levee border walls prevented the egress of animals they found hundreds of shells from drowned Texas tortoises, a state-listed threatened species, and that it was likely that animals whose remains would be less durable, possibly including ocelots, also drowned. USFWS warned CBP that:

"The floodwall blocked almost all egress for terrestrial wildlife species. Animals caught between the river and the flood wall that could not escape around the edges of floodwalls likely perished. Routine inspections of tracts during the event found terrestrial species in trees, swimming and wading in rising water.... 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."<sup>9</sup>

The USFWS brief determined that any animals unable to find a gap in the wall to escape the 2009 floodwaters likely perished. CBP's proposal to build 25 miles of solid levee walls with no gaps but a small 3.3-mile stretch at Santa Ana National Wildlife Refuge would trap and drown virtually all terrestrial animals present in the riparian corridor, including endangered species that may be present like ocelot and jaguarundi. With these concerns in mind, what measures does CBP intend to incorporate into the proposed levee border walls to ensure that these barriers do not serve as death traps for terrestrial animals during flooding events?

In addition to the grave harm the proposed project would inflict upon wildlife, there are also a number of endangered plants within the project area that would be impacted by CBP's proposed construction. The disturbance of land and the disruption of the natural flow of water into the Rio Grande would negatively impact these species and alter the area's flora, pushing threatened and endangered plants closer to extirpation. CBP's proposal for a 150-foot enforcement zone where all vegetation would be cleared indicates that a significant amount of vegetation would be destroyed close to the new border wall. This raises concerns about erosion. Without plant cover to slow water flow and stabilize soils, rain would likely cause gullying and loss of topsoil, further degrading ecosystems within and adjacent to the proposed project area.

According to a calculation made by Rio Grande Valley resident and Friends of the Wildlife Corridor board member Tiffany Kersten, 6,525 acres of natural areas would be degraded or destroyed by the proposed project, including numerous tracts of the Lower Rio Grande Valley National Wildlife Refuge, Bentsen-Rio Grande State Park, and the National Butterfly Center. The area of habitat destroyed by CBP's proposal would be greater in size than 5,000 football fields. Much of this acreage would be stripped of all vegetation to make way for the border wall and 150-foot enforcement zone, while the remaining lands would be cut off by the proposed

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barrier and turned into a “no-man’s” land, trapped on the south side of the border wall but north of the river. This no-man’s land would be cut off from public access and habitat on the north side of the border barrier, impacting both recreationalists and wildlife.

Apart from the extremely low-resolution maps attached to CBP’s notice to comment, no maps have been released that adequately detail the project area or assess the acreage of habitat that would be destroyed as a result of the project. It is CBP’s responsibility, not the responsibility of the public, to compile and share detailed information on the proposed project *before* requesting the public to comment. CBP must provide detailed maps of the project area and extend the comment period to allow the public to make informed and specific comments *after* reviewing detailed and specific maps showing the extent of CBP’s proposal.

Based on the information CBP has provided, the proposed project would harm native species and the natural environment over a wide area. Despite this, CBP has not indicated that it would mitigate harm to wildlife, including threatened and endangered species, and their habitat. Even if CBP does propose mitigating actions, we are concerned by CBP’s poor track record regarding promised mitigation. In the Lower Rio Grande Valley National Wildlife Refuge, where CBP erected many miles of border wall and upgraded patrol roads in 2008, CBP prepared an Environmental Stewardship Plan which determined that the most appropriate mitigation for destroyed or fragmented habitat would be the purchase of 4,600 acres of land to be added to the USFWS refuge system. To date, CBP has purchased only 1,100 acres of potential ocelot habitat in South Texas. This is less than a quarter of the habitat that CBP committed to purchasing to offset the damages caused by 2008 construction. We are concerned that similar pledges of mitigation that might be made in the course of this proposed project may also be left unmet or ignored.

Even if CBP were to commit to mitigation and carry it out, the nature of a border wall makes meaningful mitigation extremely difficult or impossible. This is because the worst effects of the wall are not the habitat destroyed or damaged, but rather that the wall divides populations, cutting them off from resources and fragmenting them so they are more vulnerable to extirpation. A mitigation accounting in which CBP were to replace each acre of habitat it destroys by purchasing and conserving a similar acre elsewhere would not come close to offsetting the harm caused by the fragmentation a wall would create, and therefore should not be considered legitimate mitigation.

It is conceivable that CBP could attempt to mitigate for fragmentation and other effects by purchasing and preserving land to offset the Mexican habitat that would be lost to U.S. populations of animals like ocelots. For example, if the wall were to cut off 10,000 acres of high-quality habitat from the U.S. population, a logical offset would be for CBP to purchase 10,000 acres of replacement habitat. However, even were CBP willing, it is unlikely that such high-quality habitat could be purchased nearby because so little remains. More than 95% of the habitat that originally existed in the Rio Grande Valley has been converted to uses that make it unsuitable for wildlife. Neighboring farmlands exist that could one day be revegetated, but it can take 100 years or more to sufficiently revegetate such areas to the point where they again serve as viable habitat. These factors make the likelihood of adequate mitigation so remote that CBP should halt the proposed project and seek to employ border security strategies that preserve the existing high-quality habitat in the project area.

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*Endangered Species:*

Natural areas like the Lower Rio Grande Valley Wildlife Refuge, Bentsen-Rio Grande State Park, the National Butterfly Center, as well as private, conservation-oriented ranchlands, hold some of the best-preserved native habitat left in the valley and are the last remaining homes for numerous endangered species including the red-billed pigeon and Aplomado falcon, and potentially the ocelot and jaguarundi. This means that preserving these protected areas—many of which are within or adjacent to CBP's proposed project area—could make the difference between survival and extinction for some of these species in the U.S.

Ocelots, numbering around just 70 in the U.S., live in the Rio Grande Valley's remaining thorn scrub forests. There are believed to be only 30 wild jaguarundi remaining in the U.S., all of which live in the Lower Rio Grande Valley. Habitat destruction and fragmentation have been major causes of the decline of both species and will be greatly exacerbated by the proposed project.

Another threat faced by nocturnal species like ocelot and jaguarundi are flood lights, which adversely affect migration, dispersal, foraging, predation, and other activities. CBP's own 2004 Environmental Impact Statement for Operation Rio Grande stated that "increased lighting from Operation Rio Grande may disrupt nocturnal behavior in portions of the project area, which could affect the ocelot and jaguarundi."<sup>10</sup> Specifically, the illumination of brush disturbs or prevents the regular nocturnal habits of animals, which in the case of the ocelot and jaguarundi includes hunting. Otherwise vital habitat becomes of limited value when blasted with floodlights. In settling a lawsuit brought by the Sierra Club, Audubon Society, and Defenders of Wildlife against the 2004 EIS, CBP agreed to limit the illumination of brush, particularly in refuge lands. The settlement is still in effect, and it is unclear how CBP's plans for lighting as proposed in this project would comply with the settlement. It is equally unclear how such lighting, installed within known habitat for endangered species, would comply with the Endangered Species Act (ESA).

The USFWS has identified the reconnection of viable populations of ocelots in the borderlands between Texas and Tamaulipas as an important recovery action in the 2016 Recovery Plan for the Ocelot.<sup>11</sup> CBP's proposed project would make meeting the goals set forth in the recovery plan impossible by cutting off these populations with a solid impassable barrier. Furthermore, scientists have determined that ocelots in the U.S. face a 33% chance of extinction in 50 years if key recovery actions, including maintaining landscape permeability, are not implemented.<sup>12</sup> CBP's proposed border wall construction would interfere with these recovery strategies and make the extinction of the U.S. ocelot population much more likely.

To our knowledge, CBP has not initiated ESA formal consultation with USFWS to ensure that the proposed activities will not jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of habitat. There is no indication in the notice to comment or elsewhere that CBP intends to comply with the ESA or is taking into account the impacts of border walls on federally listed endangered species. Failure to comply with the ESA would be highly problematic as there are at least 18 listed threatened and endangered species with habitat within or adjacent to the proposed project area. CBP's proposed



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activities would remove and degrade habitat and would likely lead to direct wounding, harassment, killing, and/or other forms of “take” of listed species through activities that would remove vegetation and create barriers that would restrict species’ movement within and around the proposed project areas. CBP, as all other federal agencies, must also further the purposes of the ESA by ensuring its activities conserve endangered and threatened species. We implore CBP to uphold its duties under the ESA and request that CBP engage in formal consultation with USFWS.

Finally, we expect that CBP may propose mitigation for ocelot and jaguarundi, such as installing “cat holes” similar to those that exist in certain bollard-style walls in Cameron County, installed approximately a quarter mile apart. These 9” X 12” gaps in the fence are intended to allow ocelots and jaguarundi to pass from one side of the wall to the other. Whether these are used by endangered species or any other animal should be thoroughly studied, as anecdotal evidence suggests that even if an animal can fit through the hole many will not approach the area due to the Border Patrol traffic, exposed space cleared of vegetation, and flood lights at night. Until CBP can demonstrate that the installation of “cat holes” is an effective means of allowing ocelots and jaguarundi to cross the border wall through detailed scientific study, these “cat holes” should not be considered an adequate or effective mitigation to the harm the proposed project would inflict upon endangered species. If the existing “cat holes” are proven to be of minimal benefit, CBP will need to work with USFWS to develop other proven mitigation measures, or else abandon the border wall project altogether to avoid violating the ESA.

#### *Migratory Birds:*

The proposed border wall and associated clearance of habitat for CBP’s desired 150-foot “enforcement zone” will negatively impact migratory birds. The Central and Mississippi migratory flyways converge on the Rio Grande Valley, funneling millions of birds through the proposed project area each fall and spring. Migratory birds travel hundreds or even thousands of miles on their annual journeys, in some cases crossing the Gulf of Mexico before arriving in the Rio Grande Valley. Migratory birds need intact habitat in which they can rest and refuel before continuing on their migrations.

#### **Flooding**

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The levee and bollard-style border walls proposed by CBP will increase the risk of flooding and could lead to the inundation of communities with floodwaters, the destruction of wildlife habitat, the drowning of animals and people, and the incurrence of millions of dollars in infrastructure damage, as has already occurred in other areas where CBP has constructed border walls.

#### *Bollard Walls in Starr County:*

CBP’s proposal to construct 8 miles of 20 to 30-foot-high bollard walls, made up of six-inch concrete-filled steel bollards would lead to increased risk of flooding and put communities, wildlife, and property at risk. Bollard walls have been documented to collect debris during floods and act as dams that trap the flow of water. Similar border walls have caused catastrophic flooding in Nogales, Arizona, where debris piled up against mesh and bollard border barriers and

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trapped more than 8 feet of water on the Mexican side of the border, causing two deaths and damaging 578 homes.<sup>13</sup>

The locations CBP has proposed for bollard wall construction lie within the Rio Grande floodplain, which is an area already susceptible to flooding. If CBP constructs the same design of bollard walls that were built in Cameron County, the bollards themselves would block 66% of the area that water would otherwise be able to flow through, not even considering additional blockage caused by debris obstruction. Floodwaters almost always carry high levels of sediment and debris. Bollard walls built in California, Arizona, and New Mexico have seen the gaps between their bollards clog with debris during flood events, sometimes only weeks after construction was completed.

In 2008, the border wall near Organ Pipe Cactus National Monument and the Lukeville Port of Entry caused extensive flooding when monsoonal rains were stopped from draining due to a debris dam created by the border wall. Most likely as a result of this flooding, CBP commissioned Baker Engineering to examine all of the places where border walls crossed streams and washes from El Paso, Texas to the Pacific Ocean. Baker reported:

“PF 225 fencing obstructs drainage flow every time a wash is crossed. With additional debris build-up, the IBWC’s criteria for rise in water surface elevations (set at 6” in rural areas and 3” in urban areas) can quickly be exceeded.”

In a number of instances, water dammed by debris-clogged border walls has pooled up to a depth of six feet or more behind the barriers. Over time, sediment accumulates behind these clogged walls, raising the upstream bed many feet higher than the downstream bed. In Organ Pipe Cactus National Monument, this effect led to water gouging around the foundation of the border wall and toppling 40 to 60-foot sections of wall, which were washed downstream. A 2008 National Park Service (NPS) assessment of flooding damages caused by the border wall recommended that CBP involve objective, third party experts in the review and approval of any additional border barrier construction and designs. The assessment cited concerns that the existing design, on which NPS was not consulted, was expected to accelerate erosional scour that might continue to undermine the stability of the fence itself, in addition to altering channel morphology and floodplain function and worsening flooding dangers.<sup>14</sup> There is no reason to believe that bollard border walls in the Rio Grande floodplain where rain is much more frequent, would be less of a flooding liability than existing bollard walls in Arizona.

Finally, CBP’s proposed bollard walls in Starr County would cause severe drainage issues for the cities of Roma and Rio Grande City, as well as other communities in their path. Water that now is able to drain downhill to the Rio Grande would be obstructed by the border wall and the debris caught between bollards. This would likely cause the flooding of homes, businesses, farms, as well as wildlife habitat. If CBP has a plan for addressing this issue, the full details should be released immediately so that they can be evaluated by the public. Continuing to withhold this information or failing to develop such a plan in the first place, would be shortsighted and a violation of the consultation requirements required by the Secure Fence Act as well as NEPA.

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*Levee Walls in Hidalgo County:*

Levee walls pose significant flooding concerns to wildlife that may be caught on the south side of the levee wall in a flood event. We have already voiced concern in the above section, detailing how existing levee walls function as wildlife traps that drown terrestrial animals, and how this danger will be greatly exacerbated by new construction of contiguous and impermeable levee barriers. Beyond drowning wildlife, levee walls could also endanger the lives of recreationalists, landowners, domestic animals, and migrants who may be present in the area between the border wall and the river during flood events.

*Border Walls Erected in the Rio Grande Floodplain Would be a Treaty Violation:*

Mexican officials of the International Boundary Water Commission (IBWC) have long voiced concern over the construction of border walls in the Rio Grande floodplain. Luis Antonio Rascón Mendoza, the principal engineer of the Mexican section of the IBWC, iterated concerns about border walls worsening flooding by pushing floodwaters into Mexico in 2008, stating:

“The location, alignment and design of the proposed fence represent a clear obstruction of the Rio Grande hydraulic area, since in the towns of Rio Grande City and Roma, TX, the fence would occupy nearly all of the hydraulic area on the U.S. side, causing the deflection of flows towards the Mexican side. If you consider that, given the design characteristics, the fence obstructs 60-70% of the hydraulic area in a direction perpendicular to the flow, and if you add to that the effect of the current retaining trash and debris, the significant length that is located in the floodplain, and the position of the fence relative to the direction of flow, the fence constitutes a serious obstruction and deflection of the Rio Grande flows towards Mexico. [...] We reiterate our opposition to the construction of the proposed fence in the Rio Grande floodplain given the impacts stated above.”

As demonstrated by Rascón’s comments, border walls constructed in the floodplain worsen flooding by redirecting floodwaters away from the U.S. and into Mexico, creating a disproportionate burden to be borne by Mexican communities. Just as the border wall in Nogales, Arizona flooded Nogales, Sonora, leading to millions of dollars in damages and two deaths, CBP’s proposed border walls in Rio Grande Valley could again lead to the inundation of Mexican communities with deadly and damaging floodwaters.

Beyond this being a clear issue of environmental injustice, redirecting dangerous floodwaters into Mexico, as CBP’s proposed project would almost certainly do, is also an international treaty violation. In a 1970 boundary treaty entitled: *Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary*, both nations agreed to “prohibit the construction of works... which, in the judgement of the commission, may cause deflection or obstruction of the normal flow of the river or of its flood flows.”<sup>15</sup> This treaty, signed with “a close spirit of friendship and mutual respect” between nations, was enacted to prohibit actions that would adversely impact either nation’s floodplain or interfere with natural river flows, just as CBP’s proposed project would do.

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During the 2008 construction of bollard border walls in Cameron County, the IBWC required that CBP build walls north of the levees and outside of the Rio Grande floodplain so as to not deflect waters into Mexico and violate the 1970 treaty. Mexico and the Mexican section of the IBWC continue to object that any unilateral action on the part of the U.S. to build a border wall in the floodplain would be a violation of the treaty.

The eight miles of border wall CBP is proposing to construct in Starr County fall within the Rio Grande River floodplain. Constructing walls in this area would constitute a treaty violation. CBP must either change the route and location of their planned border wall by moving it out of the floodplain or abandon the project altogether. Moving the wall out of the floodplain would mean walling off significant portions of towns such as Roma, and leaving homes and businesses trapped in no-man's land between the border wall and the river. For this and other reasons we recommend CBP halt the project altogether.

The levee wall CBP is proposing, with a vertical concrete slab built to the levee's existing height, topped with 18 foot-high bollard, would also violate the treaty. The height of the levees built in the U.S. and Mexico are intended to be precisely the same, ensuring that if a flood overtops one nation's levee it will simultaneously overtop that of the other. Like the prohibition of installing obstructions such as walls in the floodplain, this is intended to ensure that infrastructure constructed by one country does not deflect water and worsen flooding in the other. Bollards atop a levee border wall are just as likely to be clogged with debris as bollards erected in the floodplain, and thereby likely to become impermeable barriers that deflect water. This issue should be taken up with the Mexican section of the IBWC, and their response should be made publicly available.

As we have described, CBP's proposal will deflect water into Mexico and worsen the severity of flooding in Mexican communities such as Ciudad Aleman. If water is deflected south, the river could also settle into a new channel, effectively moving the international boundary. At a bare minimum, no construction should begin without extensive IBWC input regarding the design, placement, and impacts to flood control, and until Mexican IBWC officials' concerns are fully addressed.

### **Impacts to Ecotourism and Rio Grande Valley Economy**

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State parks, national wildlife refuges, historic districts and nature preserves in the Rio Grande Valley are significant attractions that bring hundreds of millions of dollars to the local economy. According to a Texas A&M University study, nature tourism in Rio Grande Valley contributed \$344.4 million per year to county-level economies and created 4,407 jobs.<sup>16</sup> The State of Texas is the number one bird-watching destination in the nation and more than 500 bird species have been documented in the valley.<sup>17</sup>

Numerous renowned birding and nature areas lie within the proposed project area and would be irreversibly damaged or destroyed by border wall construction. These areas include Bentsen-Rio Grande State Park, numerous tracts of the Lower Rio Grande National Wildlife Refuge, the National Butterfly Center, the Roma Bluffs World Birding Center, and others. As refuge lands

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and state parks are lost and endemic and migratory species decline, there will be less incentive for nature enthusiasts to visit the area.

Bentsen-Rio Grande Valley State Park is also the headquarters of the World Birding Center, which encompasses nine sites along the Rio Grande River. A brief from the Texas Parks and Wildlife Department (TPWD) (Attached as Exhibit A) states that the border barrier construction proposed by CBP would likely lead to the parks closure, stating:

“While the full impact to the operation is not known at this point, it is safe to say a wall would be a significant deterrent to visitors and inhibit the access currently provided. Construction of the proposed wall would certainly call into question whether TPWD could continue to safely operate the property as a state park.”<sup>18</sup>

The brief also details how the proposed project would restrict public access and eliminate opportunities for camping in the park, if not forcing the area to close altogether. The brief continues:

“If the wall is erected, TPWD will likely discontinue overnight camping and nighttime viewing of wildlife due to safety concerns.... The barriers would weaken the ability of Bentsen-Rio Grande to perform one of its primary missions, providing access to the outdoors for local scout groups and serving as an outdoor classroom for school groups. TPWD programming such as Texas Outdoor Family events that introduce new users to the outdoors would likely be curtailed, reducing outreach services to populations that are already underrepresented in the outdoors.”

The closure of Bentsen-Rio Grande State Park would not only harm wildlife and endangered species, it would also harm the local economy, and restrict public access to one of the last remaining places in the Rio Grande Valley where residents can camp in an undeveloped natural area.

A 2010 report by the National Recreation and Park Association shows Bentsen-Rio Grande State Park had an annual visitation of 45,296, more than 40% of which were non-local visitors. These non-local visitors spent an average of \$45.88 per day, contributing \$835,670 to the local economy.<sup>19</sup> This means that the closure of Bentsen-Rio Grande State Park alone would cost Rio Grande Valley communities many hundreds of thousands of dollars. This does not include economic loss incurred through the closure or decline in visitation at other frequently-visited areas like the National Butterfly Center, the Lower Rio Grande National Wildlife Refuge, Roma and La Lomita National Historic Districts, and others that would be impacted by the proposed project. CBP’s border wall proposal would place severe economic tolls upon local communities in the Rio Grande Valley, which are already among the poorest in all of Texas.<sup>20</sup>

We request that before moving forward with the proposed project, CBP conduct a full assessment of how the project would impact local economies and offer mitigating strategies for businesses that are likely to lose revenue and individuals who are likely to lose their jobs.

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## **Broad Public Opposition to the Border Wall in Rio Grande Valley and Beyond**

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It is also important to note that the overwhelming majority of Rio Grande Valley residents, the majority of Texans, and 60% of the American public oppose the border wall.<sup>21</sup> Opposition to the border wall in border communities is substantially higher and polls show that 72% of borderland residents oppose the wall.<sup>22</sup> In an explicit rejection of CBP's proposed border wall construction, 35 cities, counties and tribal nations in the borderlands have passed "No Border Wall" resolutions.<sup>23</sup>

Importantly, Hidalgo and Starr counties, where CBP is proposing to build border walls, both passed "No Border Wall" resolutions condemning the border wall and taking a firm and formal stance against the construction of any new miles of barriers. Both Hidalgo and Starr County commissioners voted unanimously in favor of these resolutions, citing concerns to the environment, private property, and flooding that would result from the proposed project. In addition to Hidalgo, Starr and Cameron counties, sixteen cities in the Rio Grande Valley have passed "No Border Wall" resolutions. These cities include McAllen, Mission, Pharr, Sullivan City, La Joya, Weslaco, Edinburg, and others that would be directly impacted by CBP's proposed project.

Each of these resolutions is a direct and public position taken by city and county governments in Rio Grande Valley that should be considered by CBP as statement of direct opposition to the proposed project. These resolutions, as well as the general public opposition to the project, are well-known throughout the Rio Grande Valley. The fact that CBP has only allowed a short 30-day comment period and has not made an effort to notify all members of the public, particularly Spanish-speaking individuals suggests that CBP is making an intentional effort to suppress public input, likely because CBP knows that the public and local elected officials in Rio Grande Valley are overwhelmingly opposed to the border wall.

CBP often argues that it is these very border communities that the border wall will benefit. If what CBP argues is true, then we would expect border communities to be supportive of the project. The broad and vocal opposition from border communities demonstrates the reality that these communities neither want nor need additional miles of border walls. CBP has continually attempted to paint border communities as unsafe places while claiming that the construction of border barriers will reduce crime. We remind CBP that border communities across the borderlands have consistently lower crime rates than the national average, and Texas border cities are among the safest communities in the state. Data from 2015 showed that murder rates in Houston, Dallas, and San Antonio were more than twice the murder rates in McAllen, Brownsville, Laredo, and El Paso, and aggravated assault rates for these same border communities were 19 times lower than those in Detroit, Michigan.<sup>24</sup> CBP's portrayal of border communities as dangerous places is not only factually inaccurate, but it is an offensive mischaracterization that further insults and profiles communities of color.

The overwhelming opposition to this project from local communities who stand to be harmed reflects just how damaging this project would be. At a bare minimum, CBP must consult extensively with local communities by preparing a full EIS with public meetings, and ample

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opportunities for the public and elected officials to weigh in on the disastrous implications of the project before moving forward in the planning process.

### Unproven Efficacy of Border Barriers

CBP's undated notice to comment on this project states that "the purpose of the proposed barrier construction is to increase CBP's ability to impede or deny illegal border crossings." At this point in time, there is no conclusive data to suggest that border barriers actually impede or deny undocumented border crossings. In fact, a 2017 Government Accountability Office (GAO) report noted that there is currently no way of documenting the role of border barriers in impeding border-crossers. The report recommended that CBP

"develop metrics to assess the contributions of pedestrian and vehicle fencing to border security along the southwest border and develop guidance for its process for identifying, funding, and deploying [Tactical Infrastructure] TI assets for border security operations."<sup>25</sup>

Until CBP develops these metrics, it is inappropriate to suggest that the deployment of border barriers will have a meaningful effect of "impeding and denying" border crossings.

Border barriers block most species of animals, impede natural flows of water, and even alter plant dispersal, but there is no evidence they stop people from crossing. A 2014 study of activity around border barriers in natural areas showed that terrestrial mammals were found in higher numbers in locations where no border barriers were present. The authors, however, found no difference in the number of border-crossing humans detected between areas with and without barriers, suggesting that barriers are not effective at deterring migrants, but do affect wildlife populations.<sup>26</sup>

The same 2017 GAO report that established CBP has not proven border barriers are effective at deterring border crossings also sheds light on CBP's overarching tactics of border barrier construction and border militarization. The report outlines CBP's strategy of border wall construction as a tactic employed not necessarily to stop border crossings, but as an attempt "to divert illicit cross-border activities into more remote or rural environments, where illegal entrants may require hours or days to reach the nearest U.S. community."

This tactic has proven ineffective at deterring border crossings. It has also led to the deaths of thousands of migrants who have been pushed into remote reaches of borderland deserts and perished in the elements while attempting to cross the border. CBP's own statistics show that more than 7,000 people have died crossing the border between 1998 and 2017,<sup>27</sup> though this count only reflect bodies that have been found and therefore is widely considered to be much lower than the true number of deaths.<sup>28</sup>

From its conception, the construction of border barriers and militarization of border communities has been a part of a larger strategy to intentionally push border-crossers into remote desert environments where many die due to harsh conditions. This policy has led to a humanitarian crisis on our southern border. CBP's proposal to construct more miles of barriers in the Rio

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Grande Valley and increase levels of border militarization would exacerbate this crisis and likely lead to more migrant deaths in south Texas and across the borderlands. Already, heat-related migrant deaths on the border are up 55% in the past nine months and more families are attempting to cross in remote and dangerous terrain.<sup>29</sup> In 2017, Texas saw the largest increase in border deaths of any state, more than two thirds of which occurred in the Rio Grande Valley.<sup>30</sup>

### **Environmental Justice:**

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Environmental justice is defined by the Environmental Protection Agency (EPA) as “The fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies.” Executive Order 12898 directs that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>31</sup>

More than 90% of the population in Hidalgo and Starr counties can be classified as a minority.<sup>32</sup> Starr and Hidalgo counties, where CBP is proposing to construct border walls, have some of the lowest per-capita incomes in the entire state, with \$11,659 and \$13,480 per capita incomes respectively.<sup>33</sup> It is clear that based on the demographics of the project area, a disproportionately high number of the people who will be negatively affected by the proposed project are members of minority and/or low income populations.

Significant environmental justice concerns have already arisen in the planning process of the proposed project though CBP’s failure to send notices in Spanish in an area where 85% of the public are Spanish-speaking. This suggests an intentional attempt to exclude and discriminate against the very populations that CBP is obligated to engage. For this and other projects, CBP should strive to actively engage *all* community members, regardless of race, culture, national origin, income and educational levels, and minimize impacts on marginalized populations, in accordance with Executive Order 12898.

As we previously requested in our July 23, 2018 letter to CBP entitled “Request for Sixty-day Extension on U.S. Customs and Border Protection’s Notice and Invitation to Comment on Rio Grande Valley Border Barrier Construction,” we ask that the planning process for this project proceed no further until CBP can demonstrate that a meaningful and transparent effort has been made to obtain public comment from a wide range of community members, including minority and low-income populations.

As previously discussed, the construction of 33 miles of border walls, some of which CBP has proposed to place within the Rio Grande Valley floodplain, would expose local residents to worsened floods. These floods would disproportionately impact residents in low-lying areas that are often home to poorer communities. Beyond these significant flooding concerns, the proposed construction would also likely impact air and water quality of neighboring communities. CBP’s proposed project is of significant scale and will involve extensive concrete batching, heavy machinery operation, and severe ground disturbance, all of which would likely emit particulate



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dust and pollutants into air and water and endanger the health of neighboring communities. These public health hazards would adversely and disproportionately impact human health of minority and low-income populations in violation of Executive Order 12898.

Without the preparation of an EIS under NEPA it is impossible to fully understand and analyze the true public health and environmental justice implications of CBP's proposed project. There is a clear framework for assessing environmental justice impacts within the NEPA process. The completion of an EIS for the proposed project, as required under NEPA, would illuminate these concerns and help inform the best path forward.

Finally, we are aware that the Department of Homeland Security (DHS), CBP's parent agency, has waived 38 laws to expedite three separate border wall construction projects in California and New Mexico in the past year alone. DHS has done this by invoking Section 102 of the REAL ID Act, which we continue to argue is unlawful, as this waiver authority is no longer applicable and was never intended to exist in perpetuity. DHS's use of the Section 102 waiver to waive laws like NEPA, the Clean Water Act, the Clean Air Act, and others has denied residents in border communities the same critical public health and environmental protections that communities everywhere else in the nation receive as a basic right. The very purpose of these laws, and of Executive Order 12898, is to protect communities most at risk and ensure they receive the same protections and rights as all Americans. If DHS chooses to issue yet another waiver and cast aside critical public health and environmental protections in Rio Grande Valley, it would be low-income minority populations who would suffer most. We caution CBP that issuing a waiver for the proposed project would be profoundly undemocratic and raise significant environmental justice concerns. In this and other projects, DHS must work to actively engage stakeholders and respect our nation's laws, rather than using expired provisions of the REAL ID Act to deny legal rights to low-income and minority communities.

## Conclusion

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We urge CBP to carefully review and respond to all concerns raised within this letter and to comply with all applicable federal laws before moving forward with the planning and execution of this project. As discussed above, we are extremely concerned that CBP does not appear to be conducting this project in compliance with NEPA or other applicable federal laws, as indicated by the fact that CBP has not initiated the NEPA process to begin gathering input on the project proposal. CBP's short 30-day comment period for this project, which was sent only to select individuals of the agency's choosing, is no substitute for meaningful public comment and is wholly inadequate to meet the public process and informed decision-making requirements set forth by NEPA. Because of this, and the additional reasons detailed within the contents of this letter, CBP must cease all efforts towards constructing border barriers in Rio Grande Valley until these numerous and significant issues are resolved.

Sincerely,

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ACLU Border Rights Center  
Animal Legal Defense Fund  
Animal Welfare Institute  
Borderlands Restoration Network  
Born Free USA  
Center for Biological Diversity  
Defenders of Wildlife  
Endangered Species Coalition  
Environmental Protection Information Center (EPIC)  
Franciscan Action Network  
Friends of the Earth US  
Friends of the Sonoran Desert  
Friends of the Wildlife Corridor  
Frontera Audubon  
Great Old Broads for Wilderness  
Hope Border Institute  
Klamath Forest Alliance  
La Unión del Pueblo Entero  
National Parks Conservation Association  
NM CIVIC  
NM Comunidades en Accion y de Fé - CAFé  
North American Butterfly Association  
NY4WILDLIFE  
Rio Grande Valley No Border Wall Unofficial Coalition  
Save Wolves Now Network  
Sierra Club  
Southern Border Communities Coalition  
Southwest Environmental Center  
Texas Border Coalition  
Western Watersheds Project  
WildEarth Guardians  
Wildlands Network

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<sup>1</sup> Undated letter from Paul Enriquez, Real Estate and Environmental Branch Chief, CBP (letter received on or around July 10, 2018).

<sup>2</sup> Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (Aug. 11, 2000); Memorandum to Federal Agencies from Attorney General Eric Holder Reaffirming the Mandates of Executive Order 13166 (Feb. 17, 2011).

<sup>3</sup> Customs and Border Protection Website. Frequently Asked Questions: *Do I have to speak Spanish to join the U.S. Border Patrol?* Accessed July 2018. <https://www.cbp.gov/faqs/do-i-have-speak-spanish-join-us-border-patrol>.

<sup>4</sup> U.S. Fish and Wildlife Service. 2018. Lower Rio Grande Valley National Wildlife Refuge webpage: Wildlife and Habitat. Accessed July 2018. [https://www.fws.gov/refuge/Lower\\_Rio\\_Grande\\_Valley/wildlife\\_habitat.html](https://www.fws.gov/refuge/Lower_Rio_Grande_Valley/wildlife_habitat.html)

<sup>5</sup> U.S. Fish and Wildlife Service. 2018. Lower Rio Grande Valley National Wildlife Refuge webpage: Restoring Habitat. Accessed July 2018. [https://www.fws.gov/refuge/Lower\\_Rio\\_Grande\\_Valley/resource\\_management/restoring\\_habitat.html](https://www.fws.gov/refuge/Lower_Rio_Grande_Valley/resource_management/restoring_habitat.html)

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<sup>9</sup> U.S. Fish and Wildlife Service. 2011. Rationale and Justification for Conservation Measures: Rio Grande Valley Sector. Corpus Christi Ecological Services Field Office. March 9, 2011.

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