



Gavin Newsom
Governor

September 25, 2020

Chad Wolf, Secretary
Department of Homeland Security

Mark A. Morgan, Senior Official Performing the Duties of the Commissioner
U.S. Border and Customs Protection

Rodney S. Scott, Chief
U.S. Border Patrol

Paul Enriquez
United States Border Patrol

U.S. Customs and Border Protection (CBP)
SanDiegoComments@cbp.dhs.gov

Re: Response to CBP's request for input on proposed Tijuana River Border Wall System

Dear Secretary Wolf and all,

The California Environmental Protection Agency (CalEPA)'s mission is to restore, protect and enhance the environment, and to ensure public health, environmental quality and economic vitality. The California Natural Resources Agency (CNRA)'s mission is to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration and respect for all the communities and interests involved. With both these missions in mind, CalEPA and CNRA submit the following comments, on behalf of the State of California, in response to CBP's proposed construction of approximately 0.2 miles of new border wall infrastructure ("Border Wall") across the Tijuana River.

1. The Border Wall's security benefits are minimal.

As discussed throughout these comments, the Border Wall would have significant adverse environmental impacts. At the same time, it would bring few tangible security benefits. CBP already fully controls the area surrounding the Border Wall location with significant remote and on-the-ground security infrastructure. Although people frequently congregate in the channel near the border in Mexico, CBP maintains an

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extensive, unimpeded operational presence, 24 hours per day, throughout the flood control channel, and on both sides of the river, downstream from the international boundary. Given such existing controls, the Border Wall would offer minimal security benefits, which its adverse environmental impacts would greatly outweigh.

2. Construction and operation of the Border Wall may impede successful implementation of planned investments in critical wastewater infrastructure.

Ongoing discharges contribute to a range of health and ecological risks caused by the prevalence of harmful pathogens, solid waste, and other discharges coming across the border from Tijuana, through the Tijuana River. Currently, anywhere between 28 to over 160 million gallons of wastewater discharges flow from the Tijuana River into the United States on an almost daily basis. These discharges include raw sewage and often toxic and solid wastes.

Local, regional, state, and federal public agencies and representatives have long struggled with the development and implementation of successful binational solutions to address the ongoing challenge of treating wastewater flows from an ever-growing population in the city of Tijuana and the unmet need for sewage and wastewater treatment infrastructure serving residents on both sides of the U.S.-Mexico Border. For this reason, the State of California, under the leadership of Governor Gavin Newsom, has prioritized domestic and binational collaborative efforts to identify infrastructure upgrades and investments to treat ongoing wastewater discharges.

One such effort is currently underway between the United States Environmental Protection Agency (USEPA), the State of California, the International Boundary and Water Commission and various local and regional leaders from the San Diego area to guide federal funding priorities for Congress' appropriation of funds associated with the United States-Mexico-Canada-Agreement (USMCA), effective July 2020. Their goal is to identify proposed infrastructure investments for projects that could control transboundary flows of sewage, industrial wastes, solid waste, and sediment in the flood control channel and tributary canyons of the Tijuana River.

All potential projects currently under consideration in the USMCA funding process would address wastewater flows from the very same location in which CBP proposes to construct its proposed Border Wall project. The proposed Border Wall may interfere with needed investments in wastewater treatment in two ways.

First, as noted above, USEPA is currently prioritizing projects for significant investments of congressionally allocated funding, in partnership with the State of California and local and regional entities, consistent with the implementation of USMCA. Congress' appropriation of these funds specified that USEPA carry out specific efforts to reduce pollution and conserve biological resources – through the investment of federal dollars

in wastewater infrastructure – within certain time periods.¹ Construction of the Border Wall during roughly the same window of time could complicate USEPA's ability to secure portions of that appropriation for wastewater projects in the Tijuana River Valley during the same time.

Second, the Border Wall could result in construction activities and/or physical infrastructure that prevent wastewater capture and treatment systems from operating as intended or from being developed in the first place. Any additional investments of federal funds in physical infrastructure in the area should complement – and not impede – investments of congressionally appropriated funding aimed at protecting and enhancing water quality and ecosystem and human health.

3. The Border Wall would interfere with flood control efforts.

The location in which CBP proposes to build a steel bollard bridge, vertical lift gate, and maintenance walkway is notorious for flash flooding during winter storms. During storm events, this segment of the river experiences flows that can go from less than 1 cubic feet per second (cfs) to over 15,000 cfs in a matter of hours.

In storm events, the Tijuana River also carries very large loads of sediment and solid waste, requiring the fence and associated structures to be designed to survive obstruction, as demonstrated in CBP's operation and maintenance of similar structures in Goat Canyon, Stewart's Drain, and Smuggler's Gulch – all of which experience much smaller flows than the Tijuana Rivers' main channel. Experience in these canyons and with infrastructure similar to the proposed Border Wall show that the presence of gates often encourages encroachment by people seeking illegal entry into the United States from Mexico, rather than discouraging attempted or successful illegal entry. The operations and maintenance necessary to protect the proposed Border Wall structure from damage in high flood flows and during even modest storm events may therefore encourage the very type of activity that CBP would build the Border Wall to discourage. Such an outcome would represent poor return on the costly investment needed to build and operate the Border Wall.

The structure(s) proposed must also permit continued binational management of the flood control channel. The San Diego Regional Water Quality Control Board is in the process of developing Total Maximum Daily Load standard requirements, pursuant to the Clean Water Act, for solid waste and for bacterial indicators. CBP's proposed project will have to meet these new standards as well as future waste load reduction standards approved by the Regional Water Quality Control Board, to achieve Clean Water Act water quality objectives.

¹ USMCA Implementation Act, PL 116-113 (2020)

4. If the project moves forward, it will require significant mitigation and Consultation with California Native American Tribes.

We believe that the Border Wall would be an expensive project with significant adverse environmental impacts and minimal national security benefits. We strongly recommend that CBP withdraw the proposal. Still, if CBP ultimately chooses to move ahead with the Border Wall, we request that it implement all appropriate measures to mitigate the impacts on air quality, species and habitats, and cultural resources.

a. CBP must mitigate all air quality impacts caused by project construction.

The State is generally concerned with any activities that may make air quality worse, or that might exacerbate vulnerability to respiratory illness, given the ongoing prevalence of COVID-19 across the country, in California, and throughout the border region. In fact, the border region already grapples with particularly significant air quality challenges. Construction of the Border Wall would compound these challenges by generating additional emissions in the San Diego region, which is currently in nonattainment for multiple 8-hour ozone standards, and suffers from high levels of particulate matter emissions, including harmful smog and ozone precursors like NO_x that are caused by emissions from heavy trucks and construction equipment.

California is continuing to develop and implement increasingly rigorous zero emission requirements for all off road vehicles in the state, and there is a growing urgency to reduce the impact of the greenhouse gas and other air pollutant emissions at the local and regional level. For these reasons, it will be critical that CBP fully mitigate all air quality impacts from project construction.

If CBP moves forward with the Border Wall, we urge it to commit to mitigation measures that minimize air quality impacts and related harms to human health and ecosystems. These include measures designed to ensure that ozone and PM₁₀ emission levels do not exceed the thresholds for Federal projects as required per 40 CFR 51.853(b)(1). Specifically, we request that CBP: (a) require all contractors to use construction equipment and vehicles (in good standing condition) that comply with CARB's in-use diesel fleet rules, such as the In-Use Off-Road Diesel-Fueled Fleets Regulation and the Truck and Bus Regulation; (b) require dust suppression methods to minimize particulate matter created during construction activities²; and (c) require all construction contractors to comply with all applicable or relevant and appropriate requirements and air quality regulations including the San Diego Air Pollution Control District's Rules 50 (Visible Emissions), 51 (Nuisance), and 55 (Fugitive Dust Control).

² Such methods would include routinely watering the construction site and roads leading to the site can also control fugitive dust during the construction phases of the project.

b. CBP must require mitigation to avoid impacts to vulnerable and endangered migratory birds, sensitive plant species, and wetland habitat.

As discussed more fully in a parallel comment from the California Department of Fish and Wildlife, the proposed project area provides critical habitat to migratory birds and other year-round animal species, as well as potential habitat for several sensitive plant species and wetlands. The bird species that currently rely on habitat within the project area include special status species that depend on vegetation in the project area for successful reproduction and survival.

The construction and operation of the Border Wall could harm these and other species. For example, the construction and operation would result in greater discharges of pollutants into the Tijuana River,³ new hardscapes, light and noise, and reduced water quality. All of these impacts would alter habitat. Therefore, if CBP moves forward with the Border Wall, we request that it adopt species-protective mitigation measures that, among other things, require construction activities to occur outside of the breeding and/or migratory seasons for special status birds.

c. CBP must Consult with all potentially affected California Native American Tribes.

If the proposed project moves forward, the State and the California Native American Heritage Commission (NAHC) would strongly urge timely and meaningful Consultation with all potentially affected tribes, and requests input in any environmental review process.

The NAHC specifically recommends that CBP conduct a record search of the NAHC's Sacred Lands File (SLF) and of the appropriate regional archaeological information in the Center of the California Historic Resources Information System (CHRIS), to determine if any tribal cultural resources are located within the proposed project area.

Please note that a negative response to a search does not preclude the existence of tribal cultural resources. Often, a tribe may be the only source for information about tribal cultural resources within the proposed project area – making Consultation with all tribes in the area all the more critical.

5. The project should undergo NEPA review as part of the Department of Homeland Security's larger border wall infrastructure.

³ These discharges could include sediments, silts, nutrients, heavy metals, pesticides, and other toxins that originate from upstream sources.

National Environmental Policy Act (NEPA) review is generally required for any “major federal action significantly affecting the quality of the human environment.”⁴

NEPA is the “basic national charter for protection of the environment” and has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” and (2) to ensure that “the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.”⁵

The Border Wall is the exact sort of project for which NEPA intended. Despite this, on February 8, 2019, the Secretary of the Department of Homeland Security (“DHS”) issued a waiver (“February 8, 2019 Waiver”) of NEPA’s requirements.⁶ The State has previously expressed its concerns – through comments and litigation – about the waivers of environmental laws for construction of barriers on the United States-Mexico border. Two of these concerns warrant reiteration here.

First, the proposed Border Wall is certain to have the very types of environmental impacts that NEPA is intended to identify, disclose, and mitigate. Thus, even if DHS has the authority to waive NEPA for the Border Wall - which we do not believe it does – it has ample reason not to exercise that authority. We therefore urge DHS to rescind the February 8, 2019 waiver and to comply with all applicable environmental laws. In the alternative, we request that CBP voluntarily submit the proposed Border Wall to a NEPA (or NEPA-equivalent) environmental review.

Second, public scrutiny, input, and comment are essential to evaluating the full potential impacts of any given project, and it is imperative that the public evaluate the incremental impact of particular actions in relation to other past, present, and reasonably foreseeable future actions.⁷ But the February 8, 2019 Waiver – and similar waivers for barriers on other portions of the United States-Mexico border – undercut public comment by providing for environmental review (to the extent that there is environmental review) and receipt of public comment on a piecemeal basis. This approach obscures potential impacts to air and water quality, species, habitat, and the environment. We therefore request that CBP conduct a programmatic environmental review for all proposed barriers on the United States-Mexico border and

⁴ 42 U.S.C. § 4332(2)(C).

⁵ 40 C.F.R. § 1500.1(a); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

⁶ The February 8, 2019 Waiver was issued under section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and specifically waives certain environmental laws, including NEPA, for the construction of roads and physical barriers within a portion of the San Diego Sector that includes the location of CBPs proposed Border Wall.

⁷ 40 C.F.R. §§ 1500, 1508.7.

that this review account for the impacts for the barriers already constructed or approved for construction.

Conclusion

At this time of urgent health and environmental crises, CalEPA, CNRA, and the State of California broadly urge all federal agency partners to focus the nation's collective investments and attention on the critical need to address wastewater, air quality, and ecosystem and health challenges affecting the border region.

The State of California's leadership welcomes collaboration from federal agency partners to address the concerns detailed above. We are grateful for your careful consideration of these comments.

Sincerely,



Jared Blumenfeld
Secretary for Environmental Protection



Wade Crowfoot
Secretary for Natural Resources