



INTERNATIONAL BOUNDARY AND WATER COMMISSION
UNITED STATES AND MEXICO

OFFICE OF THE COMMISSIONER
UNITED STATES SECTION

August 22, 2012

Jeff Ruch
Executive Director
2000 P Street NW, Suite 240
Washington, D.C. 20036

Dear Mr. Ruch:

I am in receipt of your letter dated July 25, 2012, regarding the concerns that you presented on behalf of Public Employees for Environmental Responsibility (PEER) for the construction of border walls in the Rio Grande floodplain adjacent to Roma, Rio Grande City, and Los Ebanos, Texas. You included a number of questions regarding the border walls that are proposed for construction by the U.S. Department of Homeland Security (DHS) and the role that the United States Section of the International Boundary and Water Commission (USIBWC) has in the process. In the narrative below, we provide responses to each of your questions.

First, the proposed border walls mentioned in your letter are not walls but are border fences, constructed of 6-inch square vertical bollards that are spaced 4-inches apart, designed to allow free exchange of water flows from one side of the fence to the other. Of the approximately 14-mile length of border fence in this region, 6.93 miles, DHS tells us, are to be constructed within the limits of the floodplain.

It is important to clarify that the decision to construct the border fence in these areas, and its proposed alignment, is a decision by DHS based on their national security mandate. The USIBWC does not construct border fences nor determine where or how those fences will be constructed. Concerns about the border fence itself should be directed to the sponsoring agency, in this case, to the attention of DHS.

The border fence segment that is currently planned to be erected through the Lower Rio Grande Valley National Wildlife Refuge does not fall within the USIBWC's jurisdiction. Any questions on the alignment of the project through the Refuge and impacts on endangered species should be addressed to the attention of Mr. Brian Winton, Refuge Manager for the United States Fish and Wildlife Service (USFWS). Mr. Brian Winton can be reached at (956)784-7500. The USFWS is responsible for evaluating the negative impacts on refuge properties from proposed projects.

The USIBWC evaluates projects within the Rio Grande floodplain for compliance with the 1970 Boundary Treaty. The USIBWC does not consider the fences as mentioned above as any violation of the treaty. Portable barrier fences were considered by the DHS but were found to be impractical for the proposed fence segments. The USIBWC required a detailed evaluation of the hydraulic impacts resulting from the proposed fence segments through a two-dimensional modeling analysis.

DHS developed a modeling approach using the FLO-2D software. The USIBWC along with the U.S. Army Corps of Engineers (USACE) provided technical inputs to the various components of this two-dimensional modeling approach. The FLO-2D software used for the modeling is the state-of-the-art in hydraulic modeling. FLO-2D has been extensively used for hydraulic modeling by several agencies such as the California Department of Water Resources, Flood Control District of Maricopa County and the USACE. It is a Federal Emergency Management Agency (FEMA) approved software for evaluating flood hazards (<http://www.fema.gov/national-flood-insurance-program-flood-hazard-mapping/numerical-models-meeting-minimum-requirement-0>). Within the Rio Grande itself, the USACE has used the FLO-2D software for modeling the Rio Grande Canalization Project reach in support of the Upper Rio Grande Water Operations Model. FLO-2D models have also been developed from Peñitas to River Mile 28 and the Off-River Floodways of the Lower Rio Grande to predict overbank flooding and flood wave attenuation in support of levee rehabilitation.

The USIBWC did not reverse its decision as mentioned in your letter. The project met the requirements of the 1970 Boundary Treaty and therefore, could proceed as planned. Our decision is based solely on sound technical review of the DHS FLO-2D models that show that the proposed fence project does not obstruct or deflect the normal or flood flows of the Rio Grande. The current fence design allows water to flow across the fence and reasonable amounts of debris blockage have also been accounted for in the modeling. The FLO-2D software accurately models this permeable fence design and a comparison of the existing and proposed condition modeling results determine that there is not an obstruction or deflection that would violate the treaty. The treaty requires the Commission, meaning both the U.S. and Mexican Sections, to provide a sound technical basis for rejecting a project. There is no agreement of the Commission that this project creates a prohibited deflection or obstruction.

In April 2008, the Secretary of the DHS exercised his authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to waive over thirty (30) environmental and other laws for the construction of tactical infrastructure along the border. DHS and Customs and Border Protection waived implementation of the National Environmental Policy Act (NEPA) and other laws for the three (3) proposed projects and, as such, the USIBWC did not have any environmental documentation to review or approve. The aforementioned projects are not USIBWC federal actions, the responsibility for compliance with NEPA and other regulations rests on the project proponent, which in this case is DHS. As the sponsor agency, DHS is responsible for implementing and complying with NEPA. The use of the 2008 Environmental Waiver by DHS for these projects to waive those requirements was made by DHS for their project(s). The USIBWC has no involvement in these projects other than providing easement to DHS for their projects and insuring compliance with the 1970 Boundary Treaty. Compliance with NEPA and the Endangered Species Act should be directed to DHS as the responsible agency.

Regarding the storage dams on the Rio Grande, the USACE has completed a draft inundation mapping downstream of the Falcon Dam. The study used the FLO-2D software. Preliminary results from this study were presented by the USACE to representatives of the U.S and Mexican Sections of the IBWC as well as the Comisión Nacional del Agua (CONAGUA) at a Binational Meeting held on August 3, 2012, at our Mercedes Field Office. Several review comments were made by the attendees and additional comments will be provided to the USACE after a review of the FLO-2D

models. The USACE will address these comments and the resulting inundation maps will be a dynamic document that will be used by emergency managers along the Rio Grande.

Regarding the specific questions in your letter, I offer the following responses:

1. How does this action comply with the 1970 Boundary Treaty, especially given the continued Mexican IBWC objections?

Response- The USIBWC did not approve the border fence project but rather informed DHS that it had no objections to the erection of these border fence segments in the floodplain. This in itself is not a violation of the 1970 Treaty.

2. How does IBWC intend to enforce the two conditions contained in Mr. Merino's letter of approval?
 - a. "Implement a maintenance program to remove any trash and/or debris found along the alignment of each fence including the approaches to the fence on a regular basis, especially after a storm event.
 - b. To the USIBWC's satisfaction, provide any future repair along the adjacent banks pertinent to the fence segments mentioned above, should any damage occur."

Response-

- a. The DHS will include procedures for trash and/or debris removal in their Operations & Maintenance (O&M) manual. They will be required to routinely inspect the alignment of the fence and remove any trash and/or debris found against it.
 - b. This is a standard clause that we use on all of our permits. DHS will be contacted and asked to repair any erosion to the banks of the Rio Grande found to be deficient by our respective Area Operations Managers as a result of the border fences in these areas.
3. Has USIBWC done its own inquiry on whether these structures would exacerbate flooding dangers? If not, what material did it rely upon supporting its action of approval?

Response- The proposed bollard fence is the same as that used by the DHS at other locations along the border. At wash crossings and within the Rio Grande floodplain, adverse hydraulic conditions were evaluated through a review of the hydraulic models.

4. While DHS may contend it need not comply with environmental laws because Congress gave DHS the power to waive any such laws, this waiver did not extend to the USIBWC. Yet Mr. Merino admits in his letter that "USIBWC did not review these fence projects for any potential environmental impacts..." How then did the USIBWC comply with its legal obligations under the National Environmental Policy Act and the Endangered Species Act in granting this approval?

Response- As explained above, the use of the environmental waiver by DHS was the reason that the USIBWC did not review any environmental documentation for NEPA compliance. The USIBWC is not a project sponsor nor lead federal agency for this project.

5. According to your own "Criteria for Construction Activities within the Limits of USIBWC Floodways":

"License or permit is required from the USIBWC for any proposed activities crossing or encroaching upon the floodplains of the USIBWC Flood Control projects and Rights-Of-Way."

Response - The letter of no objection issued by the USIBWC to DHS is in accordance with the criteria referenced.

6. These proposed DHS activities appear to fit this requirement precisely, so why then has USIBWC not required a license or permit?

Response- The area of these fence segments does not lie within USIBWC owned property, therefore USIBWC has no statutory authority to issue licenses, permits, or written approval regarding the use of this land. Further, given the fact that the Department of Homeland Security/Customs and Border Protection is a Federal agency, USIBWC does not have authority to engage in licenses or permits with them.

I appreciate your interest, and should you have additional questions, please contact Principal Engineer John L. Merino at 915-832-4749.

Sincerely,

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Edward Drusina, P.E.
Commissioner