



December 4, 2019  
via U.S. Express Mail

U.S. Army Corps of Engineers, Galveston District  
Regulatory Branch, Compliance Section  
Attn: Chief of Compliance  
P.O. Box 1229  
Galveston, TX 77553-1229

U.S. Army Corps of Engineers  
Corpus Christi Field Office  
5151 Flynn Parkway, Suite 306  
Corpus Christi, TX 78411

**Re: Notice of Unlawful Construction Activity along the Rio Grande in Hidalgo County, Texas**

Dear Chief of Compliance:

We are writing on behalf of the National Butterfly Center to report concerns regarding the apparently unlawful construction of 3.5 miles of 18-foot-tall bollard fencing on the banks of the Rio Grande in Hidalgo County, Texas, by private individuals and entities, including Lance Neuhaus, Thomas Fisher, Fisher Industries and We Build the Wall, Inc. (collectively “We Build the Wall”).<sup>1</sup> The International Boundary and Water Commission (“IBWC”) has already asked We Build the Wall to suspend construction and withdraw its construction equipment from the floodplain until it has submitted a detailed engineering study and receives required permits.<sup>2</sup> It appears that We Build the Wall has disregarded the IBWC’s request and is currently undertaking

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<sup>1</sup> See Letter from Greg Gentsch, Fisher Industries (Oct. 28, 2019), <https://www.documentcloud.org/documents/6555539-Rio-Grande-Fence-Within-Floodplain-Above.html>; see also <http://propaccess.hidalgoad.org/mapSearch/propertyPrint.html?cid=1&p=101531> (map of location).

<sup>2</sup> “We Build the Wall” issued cease and desist to stop construction in South Texas, officials confirm (Nov. 19, 2019), <https://fox6now.com/2019/11/19/we-build-the-wall-issued-cease-and-desist-to-stop-construction-in-south-texas-officials-confirm/>.

clearing and grading activities on the banks of the Rio Grande despite the fact that it has failed to obtain permits from the U.S. Army Corps of Engineers, as required under federal law.<sup>3</sup>

**We respectfully request that the Corps immediately investigate these apparent violations of federal law and ensure that all illegal construction activity cease.**

The Clean Water Act (“CWA”) prohibits the discharge of any pollutants, including dredged and fill material, into navigable waters unless in compliance with federal law. 33 U.S.C. § 1311(a); *see also* 33 C.F.R. § 323.2(c)-(f). The CWA defines “navigable waters” as “waters of the United States.” 33 U.S.C. § 1362(7). The Rio Grande is a water of the United States. *See* 33 C.F.R. § 328.3(a). The discharge of pollutants into the Rio Grande is therefore unlawful, unless authorized by a permit issued by the U.S. Army Corps of Engineers under the CWA (commonly referred to as Section 404 permits). *See* 33 U.S.C. § 1344; 33 C.F.R. § 323.3(a).

The U.S. Army Corps of Engineers’ website does not list a pending or final Section 404 permit for a discharge at this site.<sup>4</sup> Yet recent pictures from The Border Report show the removal of cane from the banks of the Rio Grande and areas where dredged and fill material appears to have been pushed into the river.<sup>5</sup> Video posted on We Build the Wall’s website and Twitter account likewise show construction activities on the banks of the river which may have resulted in discharges into the Rio Grande.<sup>6</sup>

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<sup>3</sup> On November 23, 2019, We Build the Wall founder Brian Kolfage tweeted “Construction has not stopped, we are not lacking any permits” along with video of ongoing construction at the site. Brian Kolfage (@BrianKolfage), TWITTER (Nov. 23, 2019, 9:44 A.M.), <https://twitter.com/BrianKolfage/status/1198296232986316801>.

<sup>4</sup> U.S. Army Corps of Engineers, *USACE Jurisdictional Determinations and Permit Decisions*, <https://permits.ops.usace.army.mil/orm-public#> (last visited Nov. 23, 2019).

<sup>5</sup> Sandra Sanchez, *Border Report*, <https://www.borderreport.com/hot-topics/the-border-wall/group-clears-private-riverfront-land-to-build-border-wall-in-south-texas/> (last visited Nov. 25, 2019).

<sup>6</sup> *See, e.g.*, Brian Kolfage (@BrianKolfage), TWITTER (Nov. 23, 2019, 9:46 A.M.), <https://twitter.com/BrianKolfage/status/1198296830360113153> (video of construction at site).



Photograph of site taken from the Rio Grande, available at <https://www.borderreport.com/hot-topics/the-border-wall/group-clears-private-riverfront-land-to-build-border-wall-in-south-texas/>.

Moreover, on its website, We Build the Wall states that it is building in the floodplain,<sup>7</sup> and they recently posted a video<sup>8</sup> from the site of a bulldozer clearing cane in wet soil mere feet from the Rio Grande.<sup>9</sup> We Build the Wall's video also describes how they are using heavy machinery to aerate and dry out the soil. The presence of what appears to be wetland vegetation, along with the saturation of the soil and proximity to the river, suggest that We Build the Wall may be building in a wetland area that is either adjacent or has a significant nexus to navigable waters. See 33 C.F.R. § 328.3(c)(4)-(5); see also *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J. concurring).<sup>10</sup> Thus, We Build the Wall's current and ongoing activities of clearing cane and preparing the site for border fencing construction may itself be a discharge into a water of the United States and may be unlawful under federal law absent a Section 404 permit. See 33 C.F.R. § 328.3(a)-(c); see also Rapanos Guidance.

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<sup>7</sup> We Build the Wall, *Update*, <https://webuildthewall.us/update/> (last visited Nov. 25, 2019).

<sup>8</sup> Brian Kolfage, *Foreman Mike Update Project 2*, YOUTUBE, [https://youtu.be/AF\\_mxCre5AI](https://youtu.be/AF_mxCre5AI) (last visited Nov. 25, 2019).

<sup>9</sup> See also Jolanie Martinez, *Border fence construction plans in Mission waiting for approval from IBWC*, CBS 4 News, <https://valleycentral.com/news/local/border-fence-construction-waiting-for-approval-from-ibwc?jwsourc=cl> (last visited Nov. 25, 2019).

<sup>10</sup> See also "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," (signed December 2, 2008) ("Rapanos Guidance"), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

Additionally, We Build the Wall's activities may also be unlawful absent a permit from the Corps under Section 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. § 403; 33 C.F.R. § 322.3. It has been reported that We Build the Wall has failed to submit to the IBWC engineering and hydrological studies showing how its proposed border fencing project would affect the Rio Grande. If We Build the Wall's construction activities and proposed border fencing "affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity," then those activities cannot lawfully be undertaken without a Section 10 permit. 33 C.F.R. § 322.3.

Finally, We Build the Wall's current construction activity may be a point source resulting in a discharge of pollutants that requires a permit under the National Pollution Discharge Elimination System ("NPDES"). See 33 U.S.C. § 1342; see also *id.* § 1362(12) (defining "discharge of pollutants") and (14) (defining "point source").

It appears that We Build the Wall has not sought or obtained required federal permits for its construction activities on the Rio Grande. As such, we respectfully ask that the Corps immediately investigate the extent of these violations, and require that all illegal construction activity cease.

Respectfully,



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