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6 BAJAGUA, LLC

7  
8 BEFORE THE  
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10  
11 In the Matter of Bajagua LLC Petition to  
12 Appeal the Action of the San Diego  
Regional Water Quality Control Board  
13 Denying Review of Bajagua's Permit  
Application

SWRCB/OCC File \_\_\_\_\_

**PETITION TO APPEAL REGIONAL  
BOARD'S REJECTION OF PERMIT  
APPLICATION FOR BAJAGUA, LLC**

14  
15 **I. BACKGROUND**

16 1. Petitioner in this matter is the Bajagua LLC, a Delaware limited liability company,  
17 whose mailing address is c/o Jim Simmons, 160 Industrial Street, Suite 200, San Marcos,  
18 California 92078 ("Bajagua" or "Petitioner"), and whose agent for service of process is Craig  
19 Sapin at Procopio Cory Hargreaves & Savitch LLP, 530 B Street, Suite 2100, San Diego,  
20 California 92101-4469.

21 2. For over 70 years, raw sewage from the Republic of Mexico has flowed into the  
22 United States from the Tijuana River creating serious environmental and public health problems  
23 in the South Bay communities of San Diego, forcing the closure of San Diego-area beaches, and  
24 impacting local businesses. The problem has grown over the years as the population of and  
25 industrial activity in the City of Tijuana have increased.

26 3. In response to this situation, the government of the United States funded the  
27 construction of the International Wastewater Treatment Plant ("IWTP"), which was completed in  
28 April of 1997. The IWTP is operated by the International Boundary and Water Commission

1 (“IBWC”), an international body composed of an United States and a Mexican section. The  
2 IBWC is responsible for implementing boundary and water treaties between the United States  
3 and Mexico and for resolving differences that may arise out of those treaties.

4 4. The IWTP currently treats up to 25 million gallons per day (“MGD”) of  
5 wastewater to advanced primary treatment standards. The treated wastewater is discharged into  
6 the Pacific Ocean off the coast of San Diego through the South Bay Ocean Outfall (“SBOO”)  
7 pursuant to Waste Discharge Requirements (“WDRs”) (Order No. 96-50) and an NPDES permit  
8 (CA0108928) issued to the IBWC by the San Diego Regional Water Quality Control Board  
9 (“Regional Board”).

10 5. Although the IWTP treats water from the Tijuana River that otherwise would flow  
11 untreated to the Pacific Ocean, because the IWTP was not constructed to meet secondary  
12 treatment standards, the facility continuously violates the terms of its NPDES permit. As a result,  
13 the State of California and the Regional Board sued the IBWC in February of 2001 seeking to  
14 have the court establish and enforce a schedule for the IBWC to achieve secondary treatment  
15 standards.

16 6. Because Congress continually failed to appropriate funds to improve the IWTP so  
17 that discharges could meet secondary treatment standards, a private group of investors proposed  
18 to construct a treatment facility in Mexico to provide the necessary secondary treatment for the  
19 wastewater. In response, the United States Congress enacted legislation allowing a privately  
20 owned and operated treatment facility to be constructed to address this environmental issue. This  
21 legislation, PL 106-457 (the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of  
22 2000, codified as amended at 22 U.S.C. § 277d-43 et seq. in 2004), was unanimously passed by  
23 Congress, and signed into law on November 7, 2000 (the “Sewage Cleanup Act”). (Exhibit A).

24 7. The Sewage Cleanup Act authorized the IBWC to enter into a fee-for-services  
25 contract with the owner of a wastewater treatment facility to be constructed in Mexico to provide  
26 secondary treatment for the water from the IWTP. This contract was required to provide, at a  
27 minimum, (a) the transportation of advanced primary effluent from the IWTP to the new plant,  
28 (b) the treatment of the IWTP effluent to secondary standards at the new plant, (c) additional

1 sewage capacity in the new treatment facility to treat sewage generated in Mexico, (d) the return  
2 conveyance from the Mexican facility of the treated effluent to the SBOO for discharge into the  
3 Pacific Ocean, and (e) arrangements for monitoring, verification, and enforcement of federal,  
4 state and Mexican water quality standards. The Sewage Cleanup Act also directed the IBWC to  
5 give "highest priority" to negotiating a new Treaty Minute with the Republic of Mexico to  
6 implement the provisions of the legislation.

7 8. In response, Treaty Minute 311, which was approved by the United States and  
8 Mexican governments in early 2004, provided a framework for funding the construction,  
9 operation and maintenance of a 59 MGD wastewater treatment plant in Mexico through a  
10 "public-private participation arrangement." Treaty Minute 311 envisioned that the treatment  
11 facility located in Mexico would receive 25 MGD of effluent by pipeline from the IWTP, collect  
12 and treat an additional 34 MGD of effluent generated in Mexico, and discharge the effluent  
13 treated to secondary standards through the SBOO into the Pacific Ocean. (Exhibit B).

14 9. In response to the lawsuit filed by the State of California against the IBWC  
15 mentioned above, the District Court issued an injunction in December of 2004 ordering the  
16 IBWC to take those actions necessary to comply with the secondary treatment standards in its  
17 NPDES permit by September 30, 2008. (Exhibit C). The Court order also required the IBWC to  
18 publish a final Supplemental Environmental Impact Statement ("FSEIS") by August 1, 2005, and  
19 to issue a Record of Decision ("ROD") by October 1, 2005, defining the project selected to  
20 enable the IBWC to meet the effluent standards in its NPDES permit.

21 10. The IBWC issued an FSEIS, dated July 2005, in which it analyzed seven  
22 alternatives for achieving secondary treatment standards. The analysis in the FSEIS concluded  
23 that the proposed wastewater treatment facility to be built in Mexico by Bajagua (the "Bajagua  
24 Facility") was the preferred alternative because, among the numerous reasons cited, (a) there was  
25 no funding for the other options, (b) the Bajagua Facility was consistent with the Sewage  
26 Cleanup Act and Treaty Minute 311, and (c) Bajagua already had completed advance work to  
27 facilitate the timely construction of the project in order to meet the court-ordered deadlines.

28 11. Based on the FSEIS, the IBWC issued a ROD on September 30, 2005, identifying

1 the Bajagua Facility as the selected alternative. (Exhibit D). The ROD stated that the Bajagua  
2 Facility would receive water from the IWTP for additional treatment and up to 34 MGD of raw  
3 sewage from other locations in Tijuana, and would discharge the treated wastewater through the  
4 SBOO. (ROD, pg. 4).

5 12. Subsequently, the IBWC and Bajagua negotiated and signed a Development  
6 Agreement in February of 2006. (Exhibit E). Section 2.1(a) of the Development Agreement  
7 granted Bajagua the exclusive right “to pursue the acquisition of permits, approvals, financing  
8 and other prerequisites to the design, construction, ownership, operation and maintenance” of the  
9 Bajagua Facility to treat up to 25 MGD of effluent from the IWTP and an additional 34 MGD of  
10 effluent generated in Mexico, and to discharge the treated effluent through the SBOO into the  
11 Pacific Ocean. Once the Bajagua Facility is constructed, *no* water treated at the IWTP will be  
12 discharged through the SBOO until it has received secondary treatment at the Bajagua Facility.  
13 Once the Bajagua Facility is operating, the IBWC no longer will discharge treated wastewater  
14 directly to the SBOO or to the Pacific Ocean.

## 15 **II. THE WDR/NPDES PERMIT PROCESS**

16 13. In March of 2006, Bajagua submitted a Report of Waste Discharge (“ROWD”) to  
17 the Regional Board that also served as an application for an NPDES permit under federal law  
18 (“Bajagua Permit Application”). The permit applicant was Bajagua, and the Bajagua Permit  
19 Application was signed by Jim Simmons, a managing member of Bajagua. In a letter from John  
20 H. Robertus, Executive Officer of the Regional Board (“Executive Officer”) to Mr. Carlos Marin,  
21 Acting Commissioner of the IBWC, dated April 27, 2006 (“April Letter”), the Regional Board  
22 acknowledged that it had received the Bajagua Permit Application on March 27, 2006.  
23 (Exhibit F).

24 14. As part of the Bajagua Permit Application, Bajagua sought authorization to  
25 discharge up to 59 MGD of secondary treated wastewater through the SBOO once the Bajagua  
26 Facility is constructed. The Bajagua Permit Application estimated that the Bajagua Facility  
27 would begin discharging secondary treated wastewater through the SBOO no sooner than  
28 September 30, 2008.

1           15.     Although Government Code section 65943 required that the Regional Board  
2 provide a written response to Bajagua within 30 days of the date the Bajagua Permit Application  
3 was submitted (or April 27, 2006) listing any deficiencies in the application, no direct written  
4 response was sent to Bajagua. Rather, Mr. Simmons of Bajagua was listed as a “cc” on the April  
5 Letter to Acting Commissioner Marin. The April Letter did not list any deficiencies in the  
6 Bajagua Permit Application that Bajagua could cure, but simply stated that the “ROWD listing  
7 Bajagua as the applicant also is incomplete because it is not clear that Bajagua . . . is subject to  
8 the jurisdiction of the state under the terms of the Porter-Cologne Water Quality Control Act.”  
9 Given that position, the Executive Officer stated that

10                   [u]ntil convinced otherwise, I consider IBWC to be the only  
11                   appropriate entity to receive NPDES requirements for any proposed  
12                   discharge from the IWTP. No further work will be conducted by the  
13                   Regional Board regarding the review of the ROWD until the IBWC  
14                   unequivocally acknowledges, in writing, responsibility for the  
15                   discharge and for compliance with any NPDES requirements issued  
16                   by the Regional Board for the discharge in accordance with the  
17                   signatory provisions of Section 122.22 for federal agencies.

18 Pursuant to Government Code section 65943, the Regional Board’s failure to provide a written  
19 determination to Bajagua regarding its Permit Application within 30 days resulted in the ROWD  
20 being deemed complete.

21           16.     Given the Executive Officer’s statement in the April Letter stating that the  
22 Regional Board would not consider or review the Bajagua Permit Application, Bajagua filed a  
23 Petition with the State Water Resources Control Board (“State Board”) dated May 24, 2006  
24 (“Initial Petition”). The Initial Petition challenged the Regional Board’s failure to act on the  
25 Bajagua Permit Application and its decision, as expressed in the April Letter, to reject Bajagua’s  
26 Permit Application. The Initial Petition requested that the State Board direct the Regional Board  
27 to process the Permit Application.

28           17.     However, in a letter from the State Board’s Office of Chief Counsel dated May 31,  
2006, to our office (Exhibit G), the State Board took the position that the April Letter from the  
Executive Officer did not constitute a “final action” of the Regional Board or a “denial of a  
permit” that could be appealed to the State Board. On that basis, the State Board rejected

1 Bajagua's Initial Petition, and concluded that "[s]hould the San Diego Water Board act to deny a  
2 permit, a petition would be appropriate at that time."

3 18. Following the letter from the State Board, Bajagua continued to request that the  
4 Regional Board review the Bajagua Permit Application. However, in the first direct written  
5 correspondence from the Regional Board to Bajagua, the Executive Officer stated in a letter to  
6 Mr. Simmons of Bajagua dated August 21, 2006, (Exhibit H) that he would not recommend that  
7 the Regional Board "issue NPDES requirements for a discharge of wastewater originating in  
8 Mexico through the South Bay Ocean Outfall unless the IBWC is named as a discharger." Given  
9 that decision, he stated that "the Report of Waste Discharge submitted on behalf of Bajagua is not  
10 needed for the purpose of permitting any discharge from the International Wastewater Treatment  
11 Plant (IWTP), including any secondary treatment facility operated in conjunction with the IWTP  
12 by Bajagua or any other entity." The letter did not indicate that the Bajagua Permit Application  
13 was otherwise deficient.

14 19. The August 21, 2006, letter confirmed that the Regional Board would not process  
15 the Bajagua Permit Application. Petitioner has received no information indicating that the  
16 Regional Board has changed its position and will process the Bajagua Permit Application, and  
17 the Regional Board's refusal to do so is the reason for this Petition.

### 18 **III. SUMMARY OF PETITIONER'S ARGUMENTS**

19 20. The State Board has jurisdiction under Water Code section 13320(a) to review any  
20 action or failure to act by the Regional Board under Article 4 of Chapter 4, commencing with  
21 Water Code section 13260, or under Chapter 5, commencing with Water Code section 13370.

22 21. Section 13260 of the Water Code addresses the requirement to submit a ROWD  
23 prior to discharging wastes that could impact the quality of waters of the state. Section 13370  
24 addresses compliance with the Clean Water Act through the NPDES permit program. The  
25 Regional Board's refusal to review, and thus its rejection of, the Bajagua Permit Application  
26 constitutes an action that can be reviewed by the State Board.

27 22. Petitioner requests that, pursuant to 23 C.C.R. section 2052(a)(2)(C), the State  
28 Board direct the Regional Board to process Bajagua's Permit Application as required by law.

1 Petitioner also requests that, unless the State Board is willing to take that action without a  
2 hearing, that the State Board conduct a full hearing on this Petition in accordance with 23 C.C.R.  
3 section 2052(c).

4 23. The Regional Board's action raises substantial issues of law that the State Board  
5 must resolve. A copy of this Petition has been provided to the Regional Board.

6 24. Given the court-ordered deadline in the lawsuit brought by the State of California  
7 against the IBWC, and the environmental benefits of constructing a new wastewater treatment  
8 plant that will allow wastewater discharged to the Pacific Ocean to meet secondary treatment  
9 standards, Petitioner urges the State Board to consider this Petition on an expedited basis.

#### 10 **IV. MEMORANDUM OF POINTS AND AUTHORITIES**

11 The legal basis for the Regional Board's decision to not process the Bajagua Permit  
12 Application was not fully stated in the August 21, 2006, letter from the Executive Officer to  
13 Bajagua that triggered this Petition. (Exhibit H). However, the April Letter from the Executive  
14 Officer does state that the Regional Board does not consider Bajagua to be a "proper permittee"  
15 because "it is not clear that Bajagua . . . is subject to the jurisdiction of the state under the terms  
16 of the Porter-Cologne Water Quality Control Act." The only other rationale claimed by the  
17 Executive Officer for refusing to process the Bajagua Permit Application is that the IBWC is the  
18 only proper permittee, even though the Bajagua Facility would provide the required secondary  
19 treatment and discharge the treated effluent to the Pacific Ocean. As discussed below, both of  
20 these rationales fail as a matter of law.

#### 21 **A. Bajagua is a Proper Permittee Even Though the Bajagua Facility Would Be 22 Located in the Republic of Mexico.**

##### 23 **1. Bajagua is Subject to the Jurisdiction of the State of California.**

24 The concern expressed by the Regional Board that Bajagua is not "subject to the  
25 jurisdiction of the state under the terms of the Porter-Cologne Water Quality Control Act" is  
26 without merit. Bajagua is a Delaware corporation that maintains a statutory agent for service of  
27 process in San Diego. This provides the Regional Board with jurisdiction over Bajagua in  
28 general.

In addition, by seeking to obtain a permit from the Regional Board under state and federal

1 water quality laws, Bajagua clearly has acquiesced to the jurisdiction of the state. By obtaining  
2 WDRs and an NPDES permit from the Regional Board, Bajagua would be subject to the terms of  
3 the permit and the relevant enabling laws. If Bajagua violates the terms of that permit, the  
4 Regional Board would have the authority to seek an injunction against Bajagua to stop the  
5 violations or to cease all discharges from the Bajagua Facility through the SBOO. The Regional  
6 Board also could seek penalties against Bajagua for any violations of its permit or any relevant  
7 laws in the same manner that the Regional Board can seek such sanctions against any other  
8 permittee. In fact, because Bajagua is a private entity, the state actually has greater jurisdiction  
9 over Bajagua that it does over the IBWC because Bajagua is subject to the jurisdiction of state  
10 courts.

11 **2. Point-Source Discharges From the SBOO Are Subject to the**  
12 **Jurisdiction of the Regional Board Under Both Federal and State**  
13 **Laws.**

14 The Regional Board's focus on the fact that the Bajagua Facility would be located in the  
15 Republic of Mexico as a reason to reject the Bajagua Permit Application also is misplaced  
16 because both the federal Clean Water Act and the Porter-Cologne Act focus on regulating the  
17 "discharge" of pollutants or waste and not on the treatment facility that generates those pollutants  
18 or waste. The point of discharge from the SBOO is located in an area subject to the jurisdiction  
19 of the United States and the State of California.

20 **a. Federal Law Regulates Discharges from "Point Sources."**

21 The Clean Water Act authorizes the Administrator to "issue a permit for the discharge of  
22 any pollutant, or combination of pollutants," 33 U.S.C. § 1342(a)(1), and defines the "discharge  
23 of a pollutant" as "any addition of any pollutant to navigable waters *from any point source*" or  
24 "any addition of any pollutant to the waters of the contiguous zone or the ocean *from any point*  
25 *source.*" *Id.* § 1362(12)(emphasis added). The Clean Water Act defines a "point source" as "any  
26 discernible, confined and discrete conveyance," such as a pipe, ditch, channel tunnel or conduit,  
27 *id.* § 1362(14), but does not define the facility which generates the discharge through the point  
28 source as a point source itself. In implementing the NPDES program in California, the state has  
adopted the Clean Water Act definitions of "discharge" and "point source." Water Code § 13373.

1 In this case, the point-source discharge to be regulated by an NPDES permit issued to  
2 Bajagua would be the point-source discharge from the SBOO. The SBOO is the point source  
3 through which the IWTP currently discharges treated wastewater pursuant to Order No. 96-50,  
4 and through which the City of San Diego currently discharges treated wastewater pursuant to  
5 Order No. 2000-129. Those point-source discharges from the SBOO result in the addition of  
6 pollutants to the “waters of the contiguous zone or the ocean” under the Clean Water Act, and  
7 thus regulation of those discharges are within the jurisdiction of the Regional Board under federal  
8 law. As Bajagua’s proposed discharge would be through the same point source, the SBOO, that  
9 discharge also would be subject to the jurisdiction of the Regional Board and would require an  
10 NPDES permit. The fact that the Bajagua Facility that generates the treated effluent discharged  
11 through the SBOO would be located in the Republic of Mexico does not change this analysis.

12 The Regional Board appears to be taking the position that regulation of the Bajagua  
13 Facility would be an impermissible “extraterritorial” application of the Clean Water Act because  
14 the facility will be located in the Republic of Mexico. We disagree. First, as discussed above,  
15 the activity regulated by the Clean Water Act, “the discharge of any pollutant by any person”  
16 through a “point source” occurs within the jurisdiction of the United States and does not require  
17 the extraterritorial application of the Clean Water Act. The point of the discharge is within the  
18 jurisdiction of the United States, and Bajagua is a “person” under the Clean Water Act, 33 U.S.C.  
19 § 1362(5), so regulation of the discharge through the SBOO and issuance of an NPDES permit to  
20 Bajagua would be a domestic application of the Clean Water Act. *See Pakootas v. Tech Cominco*  
21 *Metals, Ltd.*, 452 F.3d 1066 (9<sup>th</sup> Cir. 2006).

22 Second, the law is quite clear that the presumption against the extraterritorial application  
23 of federal statutes also does not apply “where the failure to extend the scope of the statute to a  
24 foreign setting will result in adverse effects within the United States.” *Environmental Defense*  
25 *Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993); *see, e.g., Steel v. Bulova Watch*  
26 *Company*, 344 U.S. 280 (1952) (United States citizen subject to the Lanham Act even though  
27 illegal activities occurred in Mexico). In this case, a United States corporation, Bajagua, would be  
28 discharging treated wastewater through the SBOO into waters of the United States. Because the

1 discharge would occur within the United States and impact its waters, Bajagua needs a permit for  
2 the discharge and that requirement would not be an impermissible extraterritorial application of  
3 the Clean Water Act.

4 **b. The Porter-Cologne Act Regulates the Discharge of Waste.**

5 The Porter-Cologne Act specifically prohibits the “discharge of waste . . . that could  
6 affect the quality of the waters of the state” unless WDRs are obtained from the Regional Board.  
7 Water Code § 13260(a). While the source of the discharge is not limited to “point sources” as  
8 under the Clean Water Act, this provision still focuses on the point where the “discharge” of the  
9 waste occurs and not on the facility that generates the waste. That is especially important here,  
10 where the discharge point from the SBOO will be miles from the Bajagua Facility.

11 Critically, while state law requires a discharger to obtain WDRs, state law also explicitly  
12 precludes the Regional Board from regulating the operations of the discharging facility, or the  
13 manner in which the facility comply with any discharge requirements. Specifically, the Water  
14 Code prohibits the Regional Board from specifying the “design, *location*, type of construction or  
15 *particular manner in which compliance may be had . . .*” with WDRs. Water Code § 13360  
16 (emphasis added). This statutory provision confirms that, as under the Clean Water Act, the  
17 focus of the Regional Board’s authority under the Porter-Cologne Act is the effect of the  
18 discharge and the point where the discharge occurs, not operations at the facility which generates  
19 the discharge. Even so, permit conditions could be structured to provide the Regional Board with  
20 access to the Bajagua Facility or to require independent, third-party compliance audits of the  
21 facility. In addition, operations at the Bajagua Facility itself will be subject to regulation under  
22 Mexican law.

23 **c. Even if the Discharge Point Is Considered to be Outside of**  
24 **California, the Regional Board Still Has Jurisdiction Over**  
25 **Bajagua.**

26 From the discussion above, it is clear that the discharge from the SBOO occurs within the  
27 jurisdiction of the state and is subject to regulation by the Regional Board. However, even if one  
28 accepts the Regional Board’s apparent position that the regulated discharge would occur at the  
Bajagua Facility in the Republic of Mexico, California law still authorizes the Regional Board to

1 regulate the discharge, and requires that Bajagua obtain WDRs.

2 Specifically, Water Code section 13260(a)(2), requires that any “citizen or domiciliary”  
3 of the State of California that proposes to discharge waste from outside the state “in a manner  
4 that could affect the quality of waters of the state within any region” must obtain WDRs. The  
5 definition of a “citizen or domiciliary” in the Water Code includes “a foreign corporation having  
6 substantial business contacts in the state *or* which is subject to service of process in this state.”  
7 Water Code § 13050(o) (emphasis added). As discussed above, Bajagua qualifies as a “citizen or  
8 domiciliary” under the law because it is subject to the service of process in California. Notably,  
9 the statute only refers to “out-of-state” discharges, and does not limit this requirement to  
10 discharges occurring in neighboring states.

11 Not only does this provision of the Water Code authorize the Regional Board to regulate  
12 the Bajagua Facility, it *requires* that Bajagua obtain WDRs if it proposes to discharge waste “in a  
13 manner that could affect the quality of waters of the state within any region.” By discharging  
14 through the SBOO into waters of the state without first filing a ROWD and obtaining WDRs,  
15 Bajagua could be subject to statutory penalties, including mandatory minimum penalties. Water  
16 Code § 13385(i)(1)(B). Because state law requires that Bajagua obtain WDRs in order to  
17 discharge through the SBOO from the Bajagua Facility, the Regional Board would have  
18 jurisdiction over Bajagua and Bajagua’s discharge.

19 **B. EPA Rules Require That the Operator of a Facility Obtain the NPDES**  
20 **Permit.**

21 As to the NPDES permit, the rules of the United States Environmental Protection Agency  
22 (“EPA”) implementing the Clean Water Act require that the NPDES permit be obtained by “any  
23 person who discharges or proposes to discharge.” 40 C.F.R. § 122.21(a). As discussed above,  
24 Bajagua is the “person” that will “discharge” wastewater treated at the Bajagua Facility through  
25 the SBOO. This means that, under the EPA rules, Bajagua must obtain the NPDES permit. The  
26 EPA rules make no exception for the need to obtain an NPDES permit based on the location of  
27 the facility generating the discharge.

28 The fact that Bajagua does not own the SBOO does not change this analysis. The EPA

1 rules state that, if a “facility or activity is owned by one person but is operated by another person,  
2 it is the *operator’s* duty to obtain a permit.” 40 C.F.R. § 122.21(b) (emphasis added); *see Newton*  
3 *County Wildlife Assoc. v. Rogers*, 141 F.3d 803, 810 (8<sup>th</sup> Cir. 1998) (Forest Service was not  
4 required to obtain NPDES permit even though it owned the land on which discharges occurred);  
5 *see also Sierra Club Mineral Policy Center v. El Paso Gold Mines, Inc.*, 2002 WL 33932715 (D.  
6 Colo. 2002) (owner of mine was required to obtain NPDES permit because there was no separate  
7 operator). The phrase “facility or activity” is defined as “any NPDES ‘point source’ or any other  
8 facility or activity (including land or appurtenances thereto) that is subject to regulation under the  
9 NPDES program.” 40 C.F.R. § 122.2. In this case, the SBOO is the “point source,” and the  
10 language of this provision *requires* that Bajagua, as the operator of the Bajagua Facility and the  
11 discharger through the SBOO, obtain the NPDES permit.<sup>1</sup>

12 In addition, as discussed above, the Sewage Cleanup Act requires that the fee-for-services  
13 contract for the treatment facility provide for the “[r]eturn conveyance from the Mexican facility  
14 of any such treated effluent that cannot be reused in either Mexico or the United States to the  
15 South Bay Ocean Outfall for discharge into the Pacific Ocean.” PL106-457, sec. 804(c)(2)(C)  
16 (Exhibit A). Treaty Minute 311 repeated that provision of the Sewage Cleanup Act, and also  
17 stated that the proposed project would “comply with the water quality laws of the United States  
18 and the State of California in order to allow the discharge . . . through the South Bay Ocean  
19 Outfall.” This means that both an act of Congress and an International Treaty authorize the  
20 discharge of wastewater treated at the Bajagua Facility through the SBOO.

21 The fact that the IWTP will continue to treat wastewater to an advanced primary level  
22 before the treated water is piped to the Bajagua Facility for secondary treatment appears to be  
23 confusing the fact that Bajagua is a proper permittee under both federal and state law. However,  
24 if the IWTP shut down, and the Bajagua Facility treated water from Tijuana without prior  
25 treatment at the IWTP, it is our position that (1) the IBWC would not need a permit to discharge

26 \_\_\_\_\_  
27 <sup>1</sup> Under the Regional Board’s logic regarding ownership of the SBOO, the City of San Diego and  
28 the IBWC permits should be co-permittees on each other permits because they are co-owners of  
the SBOO. It is our understanding that is not the case.

1 simply because it partially owns the SBOO, *see* 40 C.F.R. section 122.21(b); and (2) Bajagua  
2 would be required to obtain WDRs and an NPDES permit.

3         Given the Regional Board’s current position regarding the Bajagua Permit Application,  
4 however, Bajagua would not be able to obtain a permit to discharge through the SBOO. The  
5 effect of that decision would be either that (1) no treated wastewater could be discharged through  
6 the SBOO, which would cause an unacceptable environmental result, or (2) Bajagua would  
7 discharge through the SBOO without a permit, which most likely would be unacceptable to the  
8 Regional Board and could subject Bajagua to civil and criminal liability. The only difference  
9 between the “no IWTP” scenario offered above and the proposed operational arrangement is that,  
10 under the proposed arrangement, the IWTP would treat a portion of the water to be treated in the  
11 Bajagua Facility. That physical difference should not make a legal difference as to Bajagua’s  
12 ability to obtain the necessary permit because, in either case, Bajagua will be the entity  
13 responsible for discharging the secondary treated effluent through the SBOO.

14 **V. CONCLUSION**

15         Contaminated water flowing in the Tijuana River continues to pose an unacceptable  
16 environmental and public health risk to San Diego. Without construction of a wastewater  
17 treatment facility to provide secondary treatment for a greater volume of the untreated wastewater  
18 that flows daily in the Tijuana River, untreated and inadequately treated wastewater will continue  
19 to be discharged into the Pacific Ocean.

20         The proposed Bajagua Facility would significantly improve the situation by treating up to  
21 59 MGD of wastewater to secondary treatment standards prior to discharge into the Pacific  
22 Ocean. Because the final treatment of the wastewater would occur at the Bajagua Facility prior  
23 to discharge through the SBOO, Bajagua, as the operator of the facility, is not only the proper  
24 permittee, but is the necessary permittee.

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Consequently, the State Board should direct the Regional Board to process Bajagua's Permit Application for the proposed discharge through the SBOO. Prompt resolution of this issue by the State Board is important for Bajagua, the IBWC, and the environment.

DATED: September 7, 2006

PROCOPIO CORY HARGREAVES  
& SAVITCH LLP

By: John J. Lorman  
John J. Lorman  
Attorneys For Petitioner  
BAJAGUA LLC



## Public Law No: 106-457.

**A bill to encourage the restoration of estuary habitat through more efficient project financing and enhanced coordination of Federal and non-Federal restoration programs, and for other purposes.**

### **-TITLE VIII- TIJUANA RIVER VALLEY ESTUARY AND BEACH CLEANUP**

#### **SEC. 801. SHORT TITLE.**

This title may be cited as the 'Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000'.

#### **SEC. 802. PURPOSE.**

The purpose of this title is to authorize the United States to take actions to address comprehensively the treatment of sewage emanating from the Tijuana River area, Mexico, that flows untreated or partially treated into the United States causing significant adverse public health and environmental impacts.

#### **SEC. 803. DEFINITIONS.**

In this title, the following definitions apply:

- (1) ADMINISTRATOR- The term 'Administrator' means the Administrator of the Environmental Protection Agency.
- (2) COMMISSION- The term 'Commission' means the United States section of the International Boundary and Water Commission, United States and Mexico.
- (3) IWTP- The term 'IWTP' means the South Bay International Wastewater Treatment Plant constructed under the provisions of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), section 510 of the Water Quality Act of 1987 (101 Stat. 80-82), and Treaty Minutes to the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, dated February 3, 1944.
- (4) SECONDARY TREATMENT- The term 'secondary treatment' has the meaning such term has under the Federal Water Pollution Control Act and its implementing regulations.
- (5) SECRETARY- The term 'Secretary' means the Secretary of State.
- (6) MEXICAN FACILITY- The term 'Mexican facility' means a proposed public-private wastewater treatment facility to be constructed and operated under this title within Mexico for the purpose of treating sewage flows generated within Mexico, which flows impact the surface waters, health, and safety of the United States and Mexico.
- (7) MGD- The term 'mgd' means million gallons per day.

#### **SEC. 804. ACTIONS TO BE TAKEN BY THE COMMISSION AND THE ADMINISTRATOR.**

##### **(a) SECONDARY TREATMENT-**

- (1) IN GENERAL- Subject to the negotiation and conclusion of a new Treaty Minute or the amendment of Treaty Minute 283 under section 1005 of this Act, and notwithstanding section 510(b)(2) of the Water Quality Act of 1987 (101 Stat. 81), the Commission is authorized and directed to provide for the secondary treatment of a total of not more than 50 mgd in Mexico--
  - (A) of effluent from the IWTP if such treatment is not provided for at a facility in the United States; and
  - (B) of additional sewage emanating from the Tijuana River area, Mexico.
- (2) ADDITIONAL AUTHORITY- Subject to the results of the comprehensive plan developed under subsection (b) revealing a need for additional secondary treatment capacity in the San Diego-Tijuana border region and recommending the provision of such capacity in Mexico, the Commission may provide not more than an additional 25 mgd of secondary treatment capacity in Mexico for treatment described in paragraph (1).

(b) **COMPREHENSIVE PLAN-** Not later than 24 months after the date of enactment of this Act, the Administrator shall develop a comprehensive plan with stakeholder involvement to address the transborder sanitation problems in the San Diego-Tijuana border region. The plan shall include, at a minimum--

- (1) an analysis of the long-term secondary treatment needs of the region;
- (2) an analysis of upgrades in the sewage collection system serving the Tijuana area, Mexico; and
- (3) an identification of options, and recommendations for preferred options, for additional sewage treatment capacity for future flows emanating from the Tijuana River area, Mexico.

(c) **CONTRACT-**

(1) **IN GENERAL-** Subject to the availability of appropriations to carry out this subsection and notwithstanding any provision of Federal procurement law, upon conclusion of a new Treaty Minute or the amendment of Treaty Minute 283 under section 5, the Commission may enter into a fee-for-services contract with the owner of a Mexican facility in order to carry out the secondary treatment requirements of subsection (a) and make payments under such contract.

(2) **TERMS-** Any contract under this subsection shall provide, at a minimum, for the following:

(A) Transportation of the advanced primary effluent from the IWTP to the Mexican facility for secondary treatment.

(B) Treatment of the advanced primary effluent from the IWTP to the secondary treatment level in compliance with water quality laws of the United States, California, and Mexico.

(C) Return conveyance from the Mexican facility of any such treated effluent that cannot be reused in either Mexico or the United States to the South Bay Ocean Outfall for discharge into the Pacific Ocean in compliance with water quality laws of the United States and California.

(D) Subject to the requirements of subsection (a), additional sewage treatment capacity that provides for advanced primary and secondary treatment of sewage described in subsection (a)(1)(B) in addition to the capacity required to treat the advanced primary effluent from the IWTP.

(E) A contract term of 20 years.

(F) Arrangements for monitoring, verification, and enforcement of compliance with United States, California, and Mexican water quality standards.

(G) Arrangements for the disposal and use of sludge, produced from the IWTP and the Mexican facility, at a location or locations in Mexico.

(H) Maintenance by the owner of the Mexican facility at all times throughout the term of the contract of a 20 percent equity position in the capital structure of the Mexican facility.

(I) Payment of fees by the Commission to the owner of the Mexican facility for sewage treatment services with the annual amount payable to reflect all agreed upon costs associated with the development, financing, construction, operation, and maintenance of the Mexican facility, with such annual payment to maintain the owner's 20 percent equity position throughout the term of the contract.

(J) Provision for the transfer of ownership of the Mexican facility to the United States, and provision for a cancellation fee by the United States to the owner of the Mexican facility, if the Commission fails to perform its obligations under the contract. The cancellation fee shall be in amounts declining over the term of the contract anticipated to be sufficient to repay construction debt and other amounts due to the owner that remain unamortized due to early termination of the contract.

(K) Provision for the transfer of ownership of the Mexican facility to the United States, without a cancellation fee, if the owner of the Mexican facility fails to perform the obligations of the owner under the contract.

(L) The use of competitive procedures, consistent with title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), by the

owner of the Mexican facility in the procurement of property or services for the engineering, construction, and operation and maintenance of the Mexican facility.

(M) An opportunity for the Commission to review and approve the selection of contractors providing engineering, construction, and operation and maintenance for the Mexican facility.

(N) The maintenance by the owner of the Mexican facility of all records (including books, documents, papers, reports, and other materials) necessary to demonstrate compliance with the terms of this section and the contract.

(O) Access by the Inspector General of the Department of State or the designee of the Inspector General for audit and examination of all records maintained pursuant to subparagraph (N) to facilitate the monitoring and evaluation required under subsection (d).

(P) Offsets or credits against the payments to be made by the Commission under this section to reflect an agreed upon percentage of payments that the owner of the Mexican facility receives through the sale of water treated by the facility.

**(d) IMPLEMENTATION-**

(1) **IN GENERAL-** The Inspector General of the Department of State shall monitor the implementation of any contract entered into under this section and evaluate the extent to which the owner of the Mexican facility has met the terms of this section and fulfilled the terms of the contract.

(2) **REPORT-** The Inspector General shall transmit to Congress a report containing the evaluation under paragraph (1) not later than 2 years after the execution of any contract with the owner of the Mexican facility under this section, 3 years thereafter, and periodically after the second report under this paragraph.

**SEC. 805. NEGOTIATION OF NEW TREATY MINUTE.**

(a) **CONGRESSIONAL STATEMENT-** In light of the existing threat to the environment and to public health and safety within the United States as a result of the river and ocean pollution in the San Diego-Tijuana border region, the Secretary is requested to give the highest priority to the negotiation and execution of a new Treaty Minute, or a modification of Treaty Minute 283, consistent with the provisions of this title, in order that the other provisions of this title to address such pollution may be implemented as soon as possible.

**(b) NEGOTIATION-**

(1) **INITIATION-** The Secretary is requested to initiate negotiations with Mexico, within 60 days after the date of enactment of this Act, for a new Treaty Minute or a modification of Treaty Minute 283 consistent with the provisions of this title.

(2) **IMPLEMENTATION-** Implementation of a new Treaty Minute or of a modification of Treaty Minute 283 under this title shall be subject to the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(3) **MATTERS TO BE ADDRESSED-** A new Treaty Minute or a modification of Treaty Minute 283 under paragraph (1) should address, at a minimum, the following:

(A) The siting of treatment facilities in Mexico and in the United States.

(B) Provision for the secondary treatment of effluent from the IWTP at a Mexican facility if such treatment is not provided for at a facility in the United States.

(C) Provision for additional capacity for advanced primary and secondary treatment of additional sewage emanating from the Tijuana River area, Mexico, in addition to the treatment capacity for the advanced primary effluent from the IWTP at the Mexican facility.

(D) Provision for any and all approvals from Mexican authorities necessary to facilitate water quality verification and enforcement at the Mexican facility.

(E) Any terms and conditions considered necessary to allow for use in the United States of treated effluent from the Mexican facility, if there is reclaimed water which is surplus to the needs of users in Mexico and such use is consistent with applicable United States and California law.

(F) Any other terms and conditions considered necessary by the Secretary in order to implement the provisions of this title.

**SEC. 806. AUTHORIZATION OF APPROPRIATIONS.**

There is authorized to be appropriated a total of \$156,000,000 for fiscal years 2001 through 2005 to carry out this title. Such sums shall remain available until expended.



**INTERNATIONAL BOUNDARY AND WATER COMMISSION  
UNITED STATES AND MEXICO**

El Paso, Texas  
February 20, 2004

MINUTE NO. 311

**RECOMMENDATIONS FOR SECONDARY TREATMENT IN MEXICO OF THE  
SEWAGE EMANATING FROM THE TIJUANA RIVER AREA IN BAJA  
CALIFORNIA, MEXICO**

The Commission met at the offices of the United States Section in El Paso, Texas on February 20, 2004 at 1:30 p.m., to address the construction in Mexico of a plant and related facilities for secondary treatment of sewage emanating from the Tijuana River area in Mexico that flows untreated into the United States or is partially treated at the South Bay International Wastewater Treatment Plant (SBIWTP) located in San Ysidro, California.

The Commissioners noted the stipulations in the Treaty between the United States of America and the United Mexican States for the "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande," signed February 3, 1944, as they relate to the obligation of both Governments to provide preferential attention to the solution of border sanitation problems. They also noted the stipulations in Minute No. 283, entitled "Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California," dated July 2, 1990, that provided for the United States and Mexico to design, construct, operate and maintain a treatment plant for up to 25 million gallons per day (mgd) <1100 liters per second (l/s)> of wastewater arriving from the City of Tijuana, Baja California to be treated to a level of secondary treatment in the United States. The Commissioners also noted that the Mexican Government covers the costs of operation and maintenance of the volumes mentioned above in its corresponding portion, in accordance with Minute No. 296, entitled "Distribution of Construction, Operation and Maintenance Costs for the International Wastewater Treatment Plant Constructed under the Agreements in Commission Minute No. 283 for the solution of the Border Sanitation Problem at San Diego, California/Tijuana, Baja California," dated April 16, 1997. Likewise, they noted that due to problems in the United States the level of treatment provided by the present international plant is only at a level of advanced primary treatment.

The United States Commissioner noted that the level of treatment provided at the SBIWTP currently fails to meet the secondary treatment level standard set forth in the State of California discharge permit. The concentration and mass emissions rates for total suspended solids and Carbonaceous Biochemical Oxygen Demand and Whole Effluent Toxicity have routinely exceeded the permit levels since the initiation of advanced primary treatment in 1997. In addition, the United States Commissioner noted the failure to meet

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UNITED STATES AND MEXICO**

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discharge permit requirements had resulted in litigation in Federal District Court. The United States Commissioner further noted that a possible result of this lawsuit is that the United States Section would be required to cease discharges from the SBIWTP. The Mexican Commissioner noted that this would mean that the SBIWTP could not accept any flows from Mexico and this would not be acceptable to Mexico. Both Commissioners noted that this would have serious impacts on health and the environment in the border region.

The Commissioners noted passage by the United States Congress of Public Law 106-457, "Tijuana River Valley Estuary and Beach Cleanup" signed on November 7, 2000, which authorizes appropriation of up to \$156 million dollars to comprehensively address the treatment of sewage emanating from the Tijuana River area in Mexico that flows untreated or partially treated into the United States causing significant adverse public health and environmental impacts. They also considered the proposal presented by the United States Section to the Mexican Section through correspondence in January 2002. The implementation of a secondary treatment facility in Mexico in a manner consistent with Public Law 106-457 would provide the secondary treatment which was originally to be provided at the SBIWTP in conformance with Minute No. 283.

The Commissioners noted the efforts of the Comisión Estatal de Servicios Públicos de Tijuana and of the United States Environmental Protection Agency (USEPA) in the development of the Master Plan for Water and Sanitation for the City of Tijuana, Baja California, published on March 7, 2003, which analyzes the present and future generation of wastewater in the City of Tijuana, the available treatment capacity at present, and the facilities required to cover the treatment needs through 2023. The Mexican Commissioner noted that the United States proposal for constructing the secondary treatment for the SBIWTP in Mexico would complement the provisions in the City of Tijuana Master Plan until 2023 that suggests the construction of a wastewater treatment plant with total treatment capacity of 33.5 mgd (1470 l/s). In addition the Master Plan considered secondary treatment consisting of 25 mgd (1100 l/s) of the SBIWTP advanced primary effluent, if secondary treatment of that effluent is not provided for at a facility in the United States. This increases the total needed capacity for the planning period to 2023 to 59 mgd (2570 l/s).

**I. PROPOSED PROJECT**

The Commissioners considered it possible to implement the concept of the referenced United States proposal in Mexico for a secondary treatment facility for sewage emanating from the City of Tijuana, Baja California, under a public-private participation arrangement. The United States Section would agree to fund, subject to availability of annual appropriations, up to \$156 million for the engineering, construction, and for a period of 20 years for the operation and maintenance of a 59 mgd (2570 l/s) wastewater treatment plant in Mexico if the treatment of 25 mgd (1100 l/s) of advanced primary effluent of the SBIWTP is not provided in the United States. Any additional costs will be subject to

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UNITED STATES AND MEXICO**

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subsequent Commission agreements. The Government of Mexico would continue to cover the corresponding costs for the first 25 mgd (1100 l/s) as stipulated in Minutes Nos. 283 and 296.

Specifically, the proposed project will consider at a minimum the following:

- To locate the required primary and/or secondary treatment facilities in Mexico and associated facilities directly related to the project in the United States and Mexico.
- To provide secondary treatment of the SBIWTP effluent in Mexico, if such treatment is not provided for at facilities located in the United States.
- To provide the treatment capacity, including all processes necessary to provide secondary treatment level, in Mexico, for flows of 59 mgd (2570 l/s) if the treatment of 25 mgd (1100 l/s) of advanced primary effluent of the SBIWTP is not provided in the United States.
- To obtain all the permits required by the Mexican authorities in order to facilitate the verification and oversight of compliance with laws related to the treatment structures that are constructed in Mexico.
- To comply with the water quality laws of the United States and of the State of California in order to allow the discharge in the United States of treated effluent that is not utilized in Mexico through the Southbay Ocean Outfall (SBOO), constructed in the United States within the framework of Minute No. 283.
- To provide the pumping, conveyance and secondary treatment in Mexico for a flow of 59 mgd (2570 l/s), as derived from the results of the City of Tijuana Master Plan.
- To have supervision and approval of each phase of the projects resulting from the United States proposal undertaken by the Commission with participation of the appropriate United States and Mexican technical advisors.
- Ownership and disposition of wastewater from Tijuana, Baja California, treated or not treated under this proposal, will remain under the jurisdiction of the Government of Mexico. Likewise, the Government of Mexico will maintain the jurisdiction for disposal of said wastewater in accordance with applicable Mexican laws.

## II. CONTRACT SERVICES

Likewise, both Commissioners observed it acceptable to develop the United States proposal to engineer, construct, operate and maintain treatment works in Mexico in conformance with applicable Mexican legislation, under an operating lease contract between the Commission and the service provider of the Mexican facility. The United States Section would make payments to the service provider, subject to the availability of annual appropriations, under the contract, which would be administered by the Mexican Section in accordance with the 1944 Water Treaty. The payments to be made to the service provider would be offset by compensations or credits that reflect an agreed upon percentage of payments received by Mexico through the sale of water treated by the facility. Said

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UNITED STATES AND MEXICO**

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compensations or credits would be mutually agreed upon by the two governments through the Commission. In no instance will the service provider be authorized to decide on the fate or use of the Tijuana, Baja California wastewater, treated or untreated. This decision will be made solely by the Government of Mexico. The service provider may propose mechanisms and specific actions to this respect, but, in any case, will require the authorization of the Government of Mexico.

The Government of the United States would provide, subject to the availability of annual appropriation up to a total of \$156 million for the implementation of the project. Any costs above this amount will be subject to subsequent Minutes of the Commission.

The contract will at a minimum include the following items:

- Conveyance of the advanced primary effluent from the SBIWTP, located in the United States, to the Mexican facility for secondary treatment, if secondary treatment for the effluent is not provided at a facility located in the United States.
- Treatment to the secondary level at the facility in Mexico, in compliance with applicable water quality laws of the United States, the State of California, and Mexico.
- Return conveyance from the Mexican treatment facility to the United States of any treated effluent that cannot be reused. The effluent may be discharged through the SBOO into the Pacific Ocean in compliance with water quality laws of the United States and the State of California.
- Wastewater treatment capacity that provides secondary treatment for volumes in addition to the capacity of the SBIWTP, for a total capacity of 59 mgd (2570 l/s) if the treatment of 25 mgd (1100 l/s) of the advanced primary effluent of the SBIWTP is not provided in the United States.
- A contract term of 20 years. When the contract terminates, the facilities will be transferred, in good operating conditions, to the responsible Mexican authorities.
- Attainment of permits in order for the Commission to monitor, verify and assure compliance with United States, California, and Mexican water quality standards.
- Arrangements in order for the Commission to assure the proper disposal and use, at a site or sites in Mexico, of sludge produced at the SBIWTP and the Mexican facility.
- Payment by the United States Section, subject to annual availability of appropriations, for the contracted wastewater treatment services, including the necessary processes to attain treatment at a secondary level for a capacity of 59 mgd (2570 l/s), if the treatment of 25 mgd (1100 l/s) of advanced primary effluent is not provided in the United States. The payment will cover all agreed upon costs associated with the development, financing, construction, operation and maintenance of the Mexican facilities, on an annual basis.
- Provisions for non-compliance with the terms of the contract.
- The use of competitive procedures applicable in Mexico in the procurement of all

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UNITED STATES AND MEXICO**

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property and/or services for the engineering, construction, and operation and maintenance of the Mexican facility.

- Oversight of a Binational Technical Committee composed of appropriate United States and Mexican technical advisors, presided over by the Commission, to provide support to the Commission in the supervision of the different phases of the proposed actions included in this and subsequent Minutes. The Technical Committee may include for the United States the State of California and USEPA and for Mexico Comisión Nacional del Agua (CNA) and Government of Baja California.
- Provisions for the Commission, with the support of the Binational Technical Committee, to review and approve the selection of all contractors to perform the engineering, construction, and operation and maintenance for the Mexican facility.
- Ensure the maintenance by the service provider of the Mexican facility of all records (including books, documents, papers, reports, and other materials) pertaining to the operation of the facility necessary to demonstrate compliance with the terms of the contract and those in this Minute.
- Access by the Commission for audit and examination of all records maintained in accordance with the previous item, to facilitate the monitoring and evaluation of the performance of the Mexican facility

The Commissioners noted that the implementation of this Minute would require supervision by the Commission with the support of the Binational Technical Committee that includes the monitoring, on a quarterly basis, of the progress and status on the implementation of any contract executed under this Minute, as well as an evaluation of the extent to which the terms of such contract have been met. They also considered the recommendations that the findings of such observations will be presented, through the respective Section, to domestic agencies requiring such reports, beginning no later than two years after the execution of such a contract and every year after until contract close-out.

**III. PREVIOUS CONSULTATIONS**

The Commissioners also noted the ongoing discussions convened by the two Sections since January 2001. Meetings of the Commission have taken place and letters have been exchanged within the Commission as well as at the diplomatic level, in which the Government of Mexico has shown interest in the United States proposal and expressed its willingness to further discuss this matter on the basis that the concept is compatible with the option recommended in the City of Tijuana Master Plan, presents opportunities for additional investment in Mexico, includes an arrangement for the disposal of the effluent by means of the SBOO, allows opportunity to realize the existing potential for reuse of the effluent, decreases the pressure on the supply sources by placing the treated effluent closer to the potential sites for potable and non-potable reuse, and involves cooperation between

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UNITED STATES AND MEXICO**

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both countries for treatment and disposal of a volume of Tijuana wastewater greater than the present 25 mgd (1100 l/s).

From the various meetings and exchange of letters of the Commission, the following understandings were noted:

1. It would be feasible to incorporate the participation of a public-private service provider for the treatment of wastewater in accordance with applicable regulations in Mexico.
2. The Commission could participate in an operating lease contract for the engineering, construction, operation and maintenance in accordance with Mexican law and in accordance with additional terms to be established in a subsequent Commission Minute.
3. The operating lease contract would be administered consistent with provisions in the 1944 Water Treaty, applicable Mexican laws and in accordance with the terms and conditions established through subsequent Commission Minutes.
4. That the adopted project would be consistent with the solution identified in the Tijuana Master Plan; that it would address infrastructure capacities, land use, land acquisition, type of treatment and disposal of effluent; they would satisfy the requirements of CNA and the State of Baja California; that it would dedicate special attention to odor control; that it would address the selection of the service provider, in accordance with procedures in applicable Mexican laws; and it would define the fate of the facilities when the contract period ends.

**IV. IMPLEMENTATION PLAN**

The Commissioners noted the legislation set forth by the United States Congress in Public Law 106-457, the conclusions set forth by the Tijuana Master Plan and the discussions held by the Commission were sufficient basis to move ahead in relation to the secondary treatment of the effluent from the SBIWTP and the future flows of Tijuana. Therefore, the Commissioners considered it appropriate to implement the following actions:

1. Once the initial appropriated funds are available, the Commission would develop an operating lease arrangement contract, as defined under Section II of this Minute, "Contract Services," for the financing and development of the engineering, construction, operation and maintenance of the facilities in Mexico. This arrangement will need to have the approval of both governments, expressed in a subsequent Minute.
2. The final design of the facilities to be constructed in Mexico and the final arrangement for its implementation, as well as the terms under which the United States Section will make payments for the design, construction, operation and maintenance of said facilities, will be established in a subsequent Minute of the

**INTERNATIONAL BOUNDARY AND WATER COMMISSION  
UNITED STATES AND MEXICO**

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Commission. In case that agreement on an operating lease arrangement or design that is acceptable to both governments is not reached, the stipulations established in Commission Minutes Nos. 283 and 296 will apply.

3. At the termination of the contract, the facilities constructed in Mexico will be transferred in adequate operating condition to the responsible Mexican authorities. The terms for subsequent operation will be established in a Commission Minute, and if necessary, the terms for the discharge of the plant effluent.

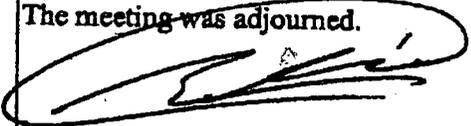
Based on the above, the Commissioners present the following recommendations for the approval of the two governments:

1. The United States Section shall fund, subject to availability of annual appropriations, up to a total of \$156 million for the engineering, construction, and for a period of 20 years the operation and maintenance of a 59 mgd (2570 l/s) secondary wastewater treatment plant in Mexico, if the treatment of 25 mgd (1100 l/s) of advanced primary effluent of the SBIWTP is not provided in the United States. Any additional costs shall be subject to subsequent Commission agreements. The Government of Mexico shall cover the corresponding costs for the first 25 mgd (1100 l/s) as stipulated in Commission Minutes Nos. 283 and 296. Treatment to the secondary treatment level will be in compliance with water quality laws of the United States, the State of California and Mexico.
2. The Commission shall adopt the implementation plan contained in Section IV of this Minute.
3. The Commission, with support from their respective technical advisors, shall review and approve the terms of reference for the selection of a service provider.
4. The Commission shall administer the project guided by the solution identified in the Tijuana Master Plan, to satisfy the requirements of the responsible Mexican authorities and to address infrastructure capacities, land use, land acquisition, type of treatment, odor control, sludge management, and disposal of effluent that cannot be reused in Mexico. The effluent may be discharged through the SBOO into the Pacific Ocean in compliance with water quality laws of the United States and the State of California.
5. The Commission shall supervise the project including quarterly monitoring of progress and status of performance on any contract executed to fulfill the objective of this Minute, and an evaluation of the degree to which the service provider of the facilities in Mexico has complied with the terms of the contract. The results of these observations shall be presented, through the corresponding Section of the Commission, to the authorities which require these reports in each country, beginning no later than two years after execution of the contract referred to in Section II of this Minute, and annually thereafter.

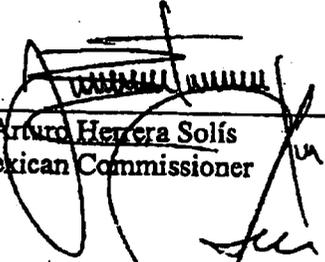
**INTERNATIONAL BOUNDARY AND WATER COMMISSION  
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6. All activities undertaken pursuant to the provisions of this Minute shall be subject to the availability of appropriated funds, resources, and corresponding personnel, as well as to applicable laws and regulations in each country.
7. This Minute shall enter into force upon notification of approval by the Government of the United States of America and the Government of the United Mexican States through the respective Sections of the Commission, and shall terminate when the operating lease contract referenced in Paragraph No. 1 of Section IV of this Minute concludes.

The meeting was adjourned.

  
\_\_\_\_\_  
Arturo Q. Duran  
United States Commissioner

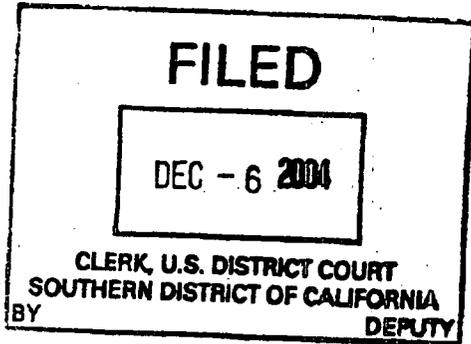
  
\_\_\_\_\_  
Carlos Peña, Jr.  
Secretary of the United States Section

  
\_\_\_\_\_  
J. Arturo Herrera Solís  
Mexican Commissioner

  
\_\_\_\_\_  
Jesús Luévano Grano  
Secretary of the Mexican Section



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**PEOPLE OF THE STATE OF CALIFORNIA, Ex  
Rel. THE REGIONAL WATER QUALITY  
CONTROL BOARD, SAN DIEGO REGION,**  
  
**Plaintiff,**  
  
**v.**  
  
**ARTURO DURAN, an individual in his capacity  
as Commissioner of the INTERNATIONAL  
BOUNDARY AND WATER COMMISSION,  
UNITED STATES SECTION, et al.,**  
  
**Defendants.**

Case No. 01-CV-0270-BTM(JFS)  
**ORDER SETTING COMPLIANCE  
SCHEDULE**

On December 5, 2003, this Court granted Plaintiff California Regional Water Quality Control Board, San Diego Region's ("Regional Board") Motion For Summary Judgment re: liability of Defendant International Boundary and Water Commission, United States Section ("USIBWC") in the above referenced action. The Court found Plaintiff had established liability against the USIBWC under the Federal Water Pollution Control Act ("Clean Water Act"), and the California Porter-Cologne Water Quality Control Act ("Porter-Cologne Act") based upon USIBWC's ongoing discharges from the International Wastewater Treatment Plant ("IWTP") through the South Bay Ocean Outfall. The Court found that USIBWC's discharges violate, and will continue to violate, effluent limitations based on secondary treatment requirements, and for acute and chronic toxicity, contained in waste discharge requirements for the IWTP , Order No. 96-50, as amended [National

1 Pollutant Discharge Elimination System Permit No. CA 0108928[ ("Order No. 96-50") issued by  
2 the Regional Board.

3 The parties have submitted a statement of stipulated facts that includes a statement that  
4 presently, advanced primary treatment of sewage from Mexico at the IWTP provides substantial  
5 mitigation of the previous uncontrolled discharges of raw, untreated sewage to waters of the United  
6 States. Any action by the Court at this time that would require USIBWC to discontinue the existing  
7 level of advanced primary treatment at the IWTP would be detrimental to public health, water  
8 quality, and the environment despite the fact that USIBWC will continue to violate effluent limits  
9 based on secondary treatment and effluent limits for toxicity until USIBWC provides secondary  
10 treatment or takes alternative measures to avoid violation of Order No. 96-50. Therefore, this Court  
11 finds that it is in the interest of the public health, water quality, and environment of the state of  
12 California to establish a schedule by which USIBWC can come into compliance with the effluent  
13 limitations contained in Order No. 96-50.

14 Accordingly, it is **ORDERED** that:

15 1. Plaintiff is entitled to an injunction under both federal and state law compelling  
16 USIBWC to comply with the effluent standards and limitations based on secondary treatment and  
17 relating to acute and chronic toxicity contained in Order No. 96-50.

18 2. USIBWC shall achieve full compliance with all effluent standards and limitations  
19 contained in Order No. 96-50 not later than September 30, 2008. USIBWC shall achieve compliance  
20 by providing secondary treatment of its effluent, or otherwise meeting the requirements contained  
21 in Order No. 96-50.

22 3. USIBWC shall publish the Draft Supplemental Environmental Impact Statement  
23 ("SEIS") for Clean Water Act Compliance for the IWTP not later than December 31, 2004, and shall  
24 publish the Final SEIS not later than August 1, 2005.

25 4. USIBWC shall issue a Record of Decision not later than October 1, 2005 defining  
26 the project(s), and identifying one or more feasible alternative projects, that USIBWC shall  
27 implement to achieve compliance with the effluent standards and limitations in Order No. 96-50.

28 ///

1           5.       USIBWC shall, on or before October 15, 2005, generate a "Critical Path Schedule"  
2 for its project(s) utilizing Critical Path Management Method ("CPMM") software to define, track,  
3 and report the design and construction phases of the project(s) selected in the Record of Decision  
4 to achieve compliance. The Critical Path Schedule for the project(s) shall include a listing and  
5 description of design and construction tasks that are required to construct, operate and manage the  
6 selected project(s) to completion on a day-to-day basis. Each task shall be described and assigned  
7 a duration in days, an early start and late start date, an early finish and late finish date, and shall be  
8 depicted in a graphic logic network representation to clearly show the tasks' relationships to the  
9 overall project and the Critical Path Schedule for completion of the project. A sufficient number of  
10 tasks shall be included in the listing to ensure that the current status of the overall project(s) shall be  
11 clearly depicted on a daily basis, so that interested persons can determine whether the project is  
12 ahead of, or behind, schedule, and the reasons for any deviations from the Critical Path Schedule.  
13 The Critical Path Schedule shall be kept up to date at least daily to ensure that it reflects the  
14 projected early and late start and finish dates for all tasks and for the project(s) accurately.

15                   (a) The Critical Path Schedule shall include the following deadlines:

- 16                   i.       Award contract(s) for design and construction of facilities and notice  
17 to proceed with construction of facilities not later than December 19, 2005.
- 18                   ii.       Initiate design phase, if necessary, not later than December 19, 2005.
- 19                   iii.       Commence construction phase of project(s) not later than September  
20 15, 2006.
- 21                   iv.       Complete construction phase of project(s) not later than August 24,  
22 2008.
- 23                   v.       Achieve full compliance with applicable effluent standards and  
24 limitations not later than September 30, 2008.

25           6.       USIBWC shall submit the Critical Path Schedule to the Court for purposes of  
26 reviewing the schedule's reasonableness.

27           7.       If the Critical Path Schedule developed by USIBWC reveals that USIBWC can  
28 accomplish the tasks set forth in paragraph 5 above materially sooner than the deadlines delineated,

1 the Regional Board may ask the Court to exercise its discretion to impose earlier deadlines.

2 8. As soon as the Critical Path Schedule is established and until the selected project(s)  
3 is/are completed, USIBWC shall provide to the Regional Board and the Court internet-web-based  
4 real-time access to the Critical Path Schedule and all CPMM information developed or relied upon  
5 by USIBWC.

6 9. USIBWC shall rely on the CPMM to direct and manage the project(s) needed to  
7 achieve compliance with Order 96-50 and shall utilize expeditious project management principles  
8 to promote completion of the project(s) and compliance with Order No. 96-50 in the shortest  
9 possible time. The tasks and dates contained in the Critical Path Schedule shall serve as an integral  
10 means for ensuring compliance with the deadlines set forth in paragraph 5 above, or with any  
11 modifications thereafter imposed by the Court.

12 10. If USIBWC fails to meet dates contained in the Critical Path Schedule, USIBWC  
13 shall promptly make adjustments to return the project(s) to schedule. If USIBWC fails to meet the  
14 dates contained in the Critical Path Schedule that might cause USIBWC to miss any of the deadlines  
15 set forth in paragraph 5 above, or with any modifications imposed by the Court, USIBWC shall,  
16 within 10 days, meet and confer with the Regional Board regarding adjustments to the schedule of  
17 work to meet the deadlines in paragraph 5 above. USIBWC and the Regional Board shall  
18 immediately notify the Court of any scheduled meet and confer as described above and thereafter  
19 shall notify the Court of the outcome of the meet and confer. If, after meeting and conferring with  
20 the Regional Board as described above, the Regional Board determines that USIBWC will fail to  
21 meet, or if USIBWC fails to meet, any of the deadlines set forth in paragraph 5 above, or any  
22 modifications imposed by the Court, the Regional Board can seek relief from the Court, including  
23 but not limited to, coercive penalties. USIBWC can assert any and all defenses.

24 11. USIBWC has consistently achieved removal of not less than 75 percent of TSS from  
25 the wastewater treated at the IWTP using advanced primary treatment. USIBWC shall remove not  
26 less than 75 percent of TSS at any time as required by applicable effluent limitations. USIBWC shall  
27 continue to manage the advanced primary treatment process at IWTP to optimize TSS removal above  
28 75 percent while working to complete the project(s) needed for USIBWC to achieve compliance with

1 Order No. 96-50. Within 60 days from the entry of the Court's order, USIBWC shall commence an  
2 optimization study utilizing an independent third party to determine how additional TSS can be  
3 removed from the effluent from the IWTP. If the optimization study reveals that additional TSS can  
4 be removed from the effluent, USIBWC and the Regional Board shall meet and confer regarding  
5 methods for achieving additional TSS removal. If the parties cannot agree, the Regional Board can  
6 request any appropriate relief from the Court.

7 12. Plaintiff is a substantially prevailing party in this lawsuit and USIBWC shall pay  
8 Plaintiff reasonable attorneys' fees and costs.

9 13. The claim for coercive penalties is by stipulation of the parties withdrawn without  
10 prejudice and may be raised as set forth in paragraph 10.

11 14. This Order shall be a final judgment for equitable relief for all of Plaintiff's claims.  
12 The Court retains jurisdiction to enforce the terms of this Order.

13 *M* **IT IS SO ORDERED.** *The clerk shall enter this as a final judgment*

14  
15 Date: 12-06-2004

*Barry T. Moskowitz*  
The Honorable Barry T. Moskowitz  
United States District Judge

17 I hereby affirm and certify on 12-6-04  
18 that the foregoing document is a true and correct  
19 copy of the original on file in my office and is in my  
20 custody.

21 CLERK, U.S. DISTRICT COURT  
22 SOUTHERN DISTRICT OF CALIFORNIA

*Shirley J. ...*



RECORD OF DECISION  
FOR THE  
FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT  
FOR

INTERNATIONAL BOUNDARY AND WATER COMMISSION

CLEAN WATER ACT COMPLIANCE AT THE  
SOUTH BAY INTERNATIONAL WASTEWATER TREATMENT PLANT  
SAN DIEGO COUNTY, CALIFORNIA

Approved by:

  
\_\_\_\_\_  
Carlos Morán  
Acting Commissioner, U.S. Section  
International Boundary and Water Commission

9/30/05  
Date

**RECORD OF DECISION  
INTERNATIONAL BOUNDARY AND WATER COMMISSION  
CLEAN WATER ACT COMPLIANCE AT THE  
SOUTH BAY INTERNATIONAL WASTEWATER TREATMENT PLANT  
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

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**I. INTRODUCTION**

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The United States Section, International Boundary and Water Commission (USIBWC) has prepared this Record of Decision on the Final Supplemental Environmental Impact Statement for Clean Water Act Compliance at the South Bay International Wastewater Treatment Plant (hereinafter referred to as the "Final SEIS").

The SBIWTP is an existing international wastewater treatment plant located in San Diego County at the United States-Mexico border. This facility plays a critical role in protecting public health and the environment of the south San Diego region. The SBIWTP and its associated facilities capture and treat to the advanced primary level an average of 25 million gallons per day (mgd) of raw sewage originating from the Tijuana region of Mexico and discharge the treated effluent approximately 3.5 miles offshore into the Pacific Ocean through the South Bay Ocean Outfall (SBOO). The SBIWTP and its system of canyon collectors prevent millions of gallons of dry weather flows of raw sewage from flowing daily into the United States from Mexico and polluting the Tijuana River, the Tijuana River Valley and Estuary, and south San Diego beaches.

The Final SEIS analyzed existing and new alternatives that would enable the USIBWC to bring the SBIWTP into compliance with the Clean Water Act (CWA) and with the SBIWTP's National Pollutant Discharge Elimination System (NPDES) permit either by providing secondary treatment at the SBIWTP; or by having another entity, either private or public, provide secondary treatment of the SBIWTP's effluent in Mexico; or by achieving CWA compliance by some other means. The Final SEIS also evaluated new information on the current discharges of advanced primary effluent from the SBIWTP through the SBOO, as well as potential interim actions that would allow continued operations of the SBIWTP until the SBIWTP achieves CWA compliance.

This Record of Decision was prepared in compliance with 40 CFR 1505.2 to document the USIBWC's decision on the project. The decision is based on the Final SEIS development process (40 CFR 1502) and public involvement (40 CFR 1500). The Record of Decision includes:

- ◆ a description of the project background;
- ◆ an overview of agency and public involvement in the decision-making process;
- ◆ a statement of the decision made;
- ◆ a synopsis of alternatives considered and the basis for the decision;
- ◆ a description of the environmentally preferred alternative;
- ◆ a listing of measures to minimize environmental harm;

- ◆ a discussion of major issues and factors in selecting the preferred alternative; and,
- ◆ a discussion of compliance with environmental regulations.

The USIBWC has engaged in an extensive public consultation process for development of the Draft and Final SEIS. On October 22, 2003, the USIBWC issued a Notice of Intent for preparation of the Draft SEIS. The USIBWC conducted a public scoping meeting on November 12, 2003 in San Diego, California. Preliminary alternatives were identified in the Notice of Intent and presented for stakeholder review during the scoping meeting. Subsequently, the USIBWC continued to consult with the public regarding development of the SEIS at community meetings in March, June, September and December 2004.

On December 30, 2004, USIBWC made the Draft SEIS available for public review and comment. The USIBWC conducted a public hearing on the Draft SEIS in San Diego, California on February 2, 2005 and received both oral and written comments at the hearing. The deadline for submittal of comments on the Draft SEIS was February 28, 2005.

On July 22, 2005, USIBWC made the Final SEIS available for public review and comment. A Notice of Availability of the Final SEIS was published in the Federal Register by the USIBWC on July 22, 2005, and by the United States Environmental Protection Agency (EPA) on July 29, 2005. USIBWC invited written comments on the Final SEIS to be submitted on or before August 24, 2005. USIBWC received one comment letter on the Final SEIS. The comments on the Draft and Final SEIS along with USIBWC responses are discussed in Sections VI and VII of this Record of Decision, respectively.

The USIBWC also held a public meeting on August 15, 2005 in the community of Imperial Beach, California on the Final SEIS and provided information on the Preferred Alternative. Issues raised at this public meeting were: contracting and issues associated with the Preferred Alternative; issues associated with the Preferred Alternative raised by Mexican governmental officials; and, ownership of the site for the Preferred Alternative. These issues are discussed in Sections VI and VII, respectively, of this Record of Decision.

## **II. DECISION**

The USIBWC has selected the Bajagua Project, LLC proposal (Operation of SBIWTP as Advanced Primary Facility, Secondary Treatment in Mexico, Alternative 4, Treatment Option C, Discharge Option I) as the means for achieving CWA compliance at the SBIWTP. This decision is based on numerous factors, including: 1) a review of the Draft and Final SEIS for Clean Water Act Compliance at the South Bay International Wastewater Treatment Plant; 2) review of preliminary associated technical documents prepared by Bajagua Project, LLC for the project; 3) review of correspondence received in response to publication of the Draft and Final SEIS; 4) the proposal's consistency with Public Law 106-457, Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000, as amended by Public Law 108-425, which authorizes funding for a multiyear fee-for-services contract with a service provider to provide secondary treatment for the SBIWTP's effluent in Mexico; 5) the proposal's consistency with IBWC Minute 311 (Recommendations For Secondary Treatment in Mexico of the Sewage Emanating From the Tijuana River Area in Baja California, Mexico); and, 6) the proposal's consistency with the Potable Water and Wastewater Master Plan for Tijuana and Playas de Rosarito (Master Plan), which was issued by the State Commission of Public Services Tijuana (CESPT) and prepared pursuant to Public Law 106-457 with funding from EPA, and which sets

forth the long term wastewater treatment needs for the Tijuana/San Diego border region. The U.S. Fish and Wildlife Service, the California State Office of Historic Preservation, and the California Coastal Commission have also reviewed the proposal.

This decision also updates and revises the previous decisions made with respect to the SBIWTP. Specifically, in the 1997 Record of Decision, the USIBWC and EPA decided to operate the facility as an advanced primary treatment facility on an interim basis stating that "interim operation of the IWTP would result in a net environmental benefit as opposed to discharge of untreated sewage from Mexico into the Tijuana River or nearshore coastal waters in Mexico." (1997 ROD, p. 15). The 2005 Final SEIS included an assessment of the environmental impacts of this ocean discharge based on data from 1999 through 2002 (see, Final SEIS, Chapter 4). The decision to select Alternative 4C continues interim operation of the advanced primary treatment plant, with construction of the Alternative 4C Option I facilities to occur consistent with the deadlines set forth in an Order Setting Compliance Schedule entered on December 6, 2004 in *People of the State of California ex rel. the Regional Water Quality Control Board, San Diego Region v. Duran et al*, Civ. 01-CV-0270 (consolidated with *The Surfrider Foundation v. Duran*, Case No. 99-CV-2441.) In addition, today's decision modifies the 1999 decision in which the USIBWC and EPA decided to construct completely mixed aerated (CMA) ponds adjacent to the SBIWTP as a means of achieving secondary treatment (reassessed as Alternative 5A in the 2005 Final SEIS), although funding to implement this 1999 decision was never authorized or appropriated by Congress.

#### **A. Consultations with Mexican Government and Necessary Approvals**

The proposed facilities to be designed and constructed under the alternative selected in this ROD are the subject of ongoing consultations with the Government of Mexico. Implementation of the selected alternative will require issuance of all necessary permits and obtaining approvals from the relevant Mexican authorities. The USIBWC understands that the Government of Mexico must have a decisive role in the approval of various aspects of the project to be constructed in Mexico, including final site selection and treatment technology, design, construction, operation, maintenance, commercialization of the effluent, and other contracting and administration aspects of the project. Further, prior to the construction of any proposed facilities in Mexico, a review of potential environmental impacts in Mexico will be conducted in accordance with the applicable environmental review process in Mexico (please see Subchapter 6.2 of the SEIS). In addition, IBWC Minute 311 provides for oversight by a Binational Technical Committee composed of appropriate U.S. and Mexican technical advisors to provide support to the Commission in the supervision of the different phases of implementation of the project in Mexico. Moreover, implementation of the selected alternative will be subject to successful completion of contract negotiations, execution of appropriate contract documentation, and the appropriation of necessary funding consistent with Public Law 106-457, as amended.

In the event there are modifications to the proposed facilities that have been selected based on requirements or requests of the Government of Mexico, the Binational Technical Committee, the contracting process, or for other reasons, USIBWC will evaluate whether supplementation of the Final SEIS or this Record of Decision is required.

**B. Description of Bajagua Project, LLC Proposal (Alternative 4C, Discharge Option I)**

The Bajagua Project, LLC Proposal would consist of the following: a private company would provide funding for the construction, operation and maintenance of a secondary treatment facility in Mexico in the Rio Alamar Region. The project would be developed through a public-private arrangement whereby a private company would provide up-front funding for the project and would be compensated by the United States through a multi-year fee-for-services contract, subject to the availability of future appropriations. Operation of the SBIWTP as an advanced primary facility would continue, with 25 mgd of primary treated effluent sent to a secondary treatment facility to be constructed in Mexico (Mexican Facility). In addition, up to 34 mgd of raw sewage would also be pumped to the Mexican Facility from other locations in the Tijuana region. The sewage treated at the Mexican Facility would be required to comply with the water quality requirements of NPDES Permit No. CA0108928 and would be discharged through the SBOO. This alternative would require new facilities in the United States and in Mexico as described below. Under this alternative, up to 59 mgd of sewage originating from the Tijuana region would be treated to the secondary treatment level and would be discharged through the SBOO.

**United States Facilities**

- ◆ A new pump station at the SBIWTP site;
- ◆ A new SBIWTP force main (48-inch) from the new pump station at the SBIWTP site to the Bajagua treatment plant. Approximately 800 feet of this pipeline would be located in the United States.
- ◆ A return flow pipeline (60-inch) for conveying secondary treated effluent from the Bajagua treatment facility back to the SBIWTP. It would connect with the SBOO at the existing effluent blending structure. Approximately 1,400 feet of this pipeline would be located within the United States.

**Mexico Facilities**

- ◆ SBIWTP force main (48-inch) for conveying primary-treated effluent to the Bajagua treatment plant site. This pipeline would be approximately 12.5 miles in length, all but 800 feet of it would be in Mexico;
- ◆ A pump station (Tijuana Raw Water Pump Station situated just south of the Tijuana River near its confluence with the Alamar River and adjacent to the main sewer collector in the Tijuana Sewer System) and force main (Tijuana Force Main) for conveying raw wastewater from the Tijuana sewer system to the Bajagua treatment plant site (approx. 233 acres, 12.5 miles from the SBIWTP);
- ◆ Bajagua treatment facility located near the Alamar River; and,
- ◆ Return-flow pipeline (60-inch) for conveying secondary-treated effluent back to the SBIWTP. The return flow pipeline would follow the same alignment as the SBIWTP force main, 12.5 miles in length.

**Secondary Treatment Process**

Alternative 4C, Option I would provide secondary treatment using a completely mixed aerated (CMA) pond system. Secondary treatment would include the aeration lagoons and clarifiers, followed by disinfection before discharge of the treated effluent. Sludge would settle and be removed from the clarifiers. Sludge would be thickened using a dissolved air flotation (DAF) process followed by dewatering using

belt filter presses. Excess sludge would be withdrawn from the clarifiers, thickened and dewatered, and hauled to disposal sites in Mexico.

The new facilities would be designed to treat an average monthly organic loading of 325 mg/L BOD5 and 325 mg/L TSS, and an average flow of 59 mgd with a 75 mgd peak. The system would be designed to meet existing USIBWC NPDES permit limits for the SBIWTP's discharges through the SBOO.

### C. Reasons for Selection

In the SEIS, USIBWC considered a range of alternatives, which are described in detail in Section III below. USIBWC has decided that the Bajagua Project, LLC proposal (Alternative 4C, Option I) is its preferred means to achieve compliance with the CWA and its NPDES permit for the following reasons:

- ◆ This alternative would provide secondary treatment for the SBIWTP's effluent. The Bajagua Project, LLC proposal is one of the secondary treatment alternatives that is designed to meet secondary treatment standards and California Ocean Plan requirements. Preliminary project details and a description have been developed for Alternative 4C and Bajagua Project, LLC is the only firm known to USIBWC at this time to have undertaken preliminary environmental and engineering studies and other advance work that should facilitate timely design and construction of secondary treatment facilities in compliance within the court order issued by the U.S. Federal Court on December 6, 2004 and referenced above.
- ◆ This alternative is also preferred based on federal legislation and funding considerations. In 1987, Congress passed Section 510(b) (2) of the Water Quality Act of 1987 ("Section 510"), which directed EPA to make available financial assistance to the USIBWC and others "to provide primary or more advanced treatment" of Mexican waste originating from Tijuana. Section 510 currently imposes a cap of \$239.4 million on Section 510 funding for a treatment plant in San Diego. In 1999, USIBWC and EPA issued a Record of Decision recommending construction of secondary treatment facilities in the U.S. and sought congressional approval to raise the funding limits so the agencies could implement this decision. Congress, while it declined to authorize further funding for secondary treatment in the U.S., in November 2000 passed Public Law 106-45 which expressly provided for secondary treatment to be undertaken in Mexico for the advanced primary effluent treated at the SBIWTP if secondary treatment for that effluent was not available in the U.S. In the fall of 2004, Congress passed new legislation to reauthorize and amend Public Law 106-457 and also to request that USIBWC give the highest priority to implementing IBWC Minute 311, which provides the framework for the construction of a 59 mgd facility in Mexico.
- ◆ This alternative would be consistent with Title VIII of Public Law 106-457, the *Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000*, as amended. This alternative would also be consistent with IBWC Minute 311 and the Potable Water and Wastewater Master Plan for Tijuana and Playas de Rosarito, prepared by the State Commission of Public Services Tijuana (CESPT) and the EPA.
- ◆ This alternative could address long-term needs of the San Diego/Tijuana region. This alternative provides an opportunity for Mexico to expand its treatment infrastructure/capacity and reduce or eliminate dry weather raw sewage flows into the United States. Alternative 4C promotes potential re-use activities in Mexico thus reducing its dependence on Lower Colorado River water supply

and other water sources. This alternative promotes, after 20 years, the enhancement of CESPT's institutional capacity because construction of the facility will be paid in full. Given projected increased flows in Tijuana, this alternative would provide a long-term approach to address projected increasing wastewater treatment needs for the region.

- ◆ This alternative is preferred over Alternative 1 because the "No Action" alternative would not achieve compliance with the CWA, the NPDES permit or the court order issued by the U.S. Federal Court on December 6, 2004.
- ◆ This alternative is preferred over Alternative 2 because the return of SBIWTP's primary treated effluent to Mexico would require the agreement of the Government of Mexico, which has heretofore indicated its unwillingness to accept the SBIWTP effluent. In addition, this alternative would not achieve secondary treatment for the SBIWTP's effluent, would result in increased ocean discharges in Mexico just south of the U.S. border, and would overburden the existing infrastructure in the Tijuana region.
- ◆ This alternative is preferred over Alternative 3 (use of City of San Diego connections) because the City has advised that its facilities are not available, including even on an interim basis, to treat Tijuana sewage. The City confirmed in its February 23, 2005 comment letter on the Draft SEIS that it does not support any alternative that would require treatment of Tijuana sewage in the City system.
- ◆ This alternative is preferred over Alternatives 4A and 4B because they lack specificity and because no preliminary planning or studies have been prepared that would facilitate timely compliance with the deadlines set forth in the December 6, 2004 court order.
- ◆ This alternative is preferred over Alternative 5 (which considers secondary facilities in the U.S. that would upgrade the current plant from an advanced primary to a secondary treatment facility) because of funding constraints associated with the construction of facilities in the U.S. While USIBWC envisioned the construction of such secondary facilities in the U.S. adjacent to the SBIWTP and has previously issued Records of Decision for such facilities, USIBWC has been unable to implement these decisions due to legal challenges and/or lack of adequate funding. In particular, USIBWC and EPA originally issued a 1994 Record of Decision selecting activated sludge secondary treatment facilities at the SBIWTP (reassessed as Alternative 5B in the 2005 Final SEIS) as the means for providing secondary treatment at the SBIWTP; however, that alternative was subject to a legal challenge and USIBWC resolved the litigation by agreeing to reexamine the alternatives available to complete the secondary treatment component of the SBIWTP. Thereafter, USIBWC and EPA issued a 1999 Record of Decision selecting completely mixed aerated ponds at the SBIWTP (reassessed as Alternative 5A in the 2005 Final SEIS), but Congress declined requests by USIBWC and EPA to authorize the necessary funding for implementation of this alternative, instead passing the Title VIII of Public Law 106-457, the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, authorizing secondary treatment for the SBIWTP's effluent in Mexico pursuant to a public-private partnership arrangement. As noted above, Congress reauthorized and amended this legislation in 2004, directing USIBWC to give the highest priority to implementation of IBWC Minute 311, which provides a framework for the construction of new secondary treatment facilities in Mexico.
- ◆ This alternative is preferred over Alternative 6 (which considers a combination of Alternatives 4 and 5 which would include secondary treatment facilities in both

countries) because Alternative 6 would include construction of secondary treatment facilities in the United States adjacent to the SBIWTP. While USIBWC envisioned the construction of such secondary treatment facilities, Congress has declined to approve funding for such facilities on the U.S. side of the border beyond that which has been already been authorized under Section 510(b)(2) of the Water Quality Act of 1987 and expended for the existing SBIWTP, SBOO and related facilities. In addition, construction of new secondary treatment facilities in both countries is not consistent with IBWC Minute 311, which provides for the engineering, construction and operation and maintenance of a 59 mgd secondary wastewater treatment plant in Mexico, if the treatment of 25 mgd of advanced primary effluent of the SBIWTP is not provided in the United States.

The USIBWC has considered the comments that were provided in response to the Draft SEIS concerning the preferred and other alternatives and addressed these comments in the Final SEIS (see Appendix H). USIBWC has also considered written comments received since the issuance of the Final SEIS in response to the notice published in the Federal Register. A summary of these comments and responses is provided in Sections VI and VII of this Record of Decision.

### **III. ALTERNATIVES AND CONSIDERATIONS BALANCED IN MAKING THE DECISION**

In arriving at the decision to select the Bajagua Project, LLC proposal, the USIBWC considered the No Action and six (6) treatment alternatives for the SBIWTP to achieve compliance with the Clean Water Act and its NPDES permit, including primary and secondary treatment in the United States and/or Mexico, and two discharge options, including discharging in the United States via the SBOO and discharging at the shoreline in Mexico at Punta Bandera. The analysis of the No Action and six treatment alternatives for full consideration in the SEIS was based on: 1) the potential environmental impacts of each option; 2) the terms and conditions of IBWC Minutes 270, 283, 296, 298, 311 and Public Law 106-457, as amended by Public Law 108-425; 3) the status of Mexico's pretreatment program; 4) feasibility of alternative treatment facilities in the United States and Mexico; 5) the need to expeditiously achieve CWA compliance and meet the limitations of SBIWTP's NPDES permit and the deadlines set forth in an Order Setting Compliance Schedule entered on December 6, 2004 in *People of the State of California ex rel. the Regional Water Quality Control Board, San Diego Region v. Duran et al*, Civ. 01-CV-0270 (consolidated with *The Surfrider Foundation v. Duran*, Case No. 99-CV-2441), and 6) the requirements of the federal Water Pollution Control Act (Clean Water Act) and the California Porter-Cologne Water Control Act.

A summary of each alternative is provided below. A more detailed description of the alternatives is discussed in the Final SEIS.

- A. **Alternative 1: No Action (Operation of SBIWTP as Advanced Primary Facility)**
  - 1. **Alternative 1 Option A (USIBWC Continues Operating SBIWTP as Advanced Primary Facility and Mexico Does Not Rehabilitate Its Original Conveyance Channel)**

Under Alternative 1 Option A, the SBIWTP would continue to operate, providing advanced primary treatment for average flows of 25 mgd and peak flows of 50 mgd. All treated effluent would be discharged through the SBOO. This alternative

represents the last phase of interim operating conditions of the SBIWTP as discussed in the 1996 Interim Operation SEIS, without the detention/flow equalization basin, which has not been constructed, and reflects current (i.e., existing) operations. Pump Station 1/1A would operate in a way that results in daily peak flows of 50 mgd being directed to the SBIWTP. Combined with low flows, the average flow to the SBIWTP would be 25 mgd. The discharge of advanced primary effluent via the SBOO would continue.

Remaining flows of up to 50 mgd would continue to be conveyed to Mexico's SABWWTP via the Parallel Conveyance Line (PCL) which is a conveyance pipeline in the City of Tijuana that was constructed parallel to Tijuana's original conveyance channel. The original conveyance channel is currently in need of rehabilitation and serves as the backup to the PCL conveyance system. Of this total, 25 mgd would be treated at the SABWWTP. The rest would bypass treatment at the SABWWTP and be discharged untreated into the shoreline at Punta Bandera, 5.6 miles south of the international border. Under Alternative 1 Option A, USIBWC assumed that Mexico's Original Conveyance Channel (OCC) in Tijuana would not be rehabilitated and used. Sewage flows beyond the capacity of the United States or Mexican treatment and conveyance systems would not be treated in either country and could eventually reach the Tijuana River and flow northward via the Tijuana River and nearby canyons and gullies into the United States, polluting the Tijuana River, the Tijuana River Valley and Estuary and south San Diego beaches. It is estimated that by 2023, up to 9 mgd of untreated sewage from Tijuana would drain into the river unless the conveyance channel capacity is increased to route the wastewater to Punta Bandera. Untreated wastewater flowing south of the international border would significantly affect water quality by exceeding most water quality criteria for protection of freshwater aquatic life, both under acute and chronic exposure of aquatic organisms.

## **2. Option B: With Future Improvements to Mexico's Existing Conveyance Facilities**

Under the No Action Alternative Option B, the SBIWTP would continue to operate, providing advanced primary treatment for average flows of 25 mgd and peak flows of 50 mgd. No equalization of flow would be provided. All treated effluent would be discharged through the SBOO. Pump Station 1/1A would be operated in a way that results in daily peak flows of 50 mgd being directed to the SBIWTP. Combined with low flows, the average flow to the SBIWTP would be 25 mgd. Similar to Option A, under Alternative 1 Option B, the SBIWTP would continue to provide advanced primary treatment for average flows of 25 mgd and discharge through the SBOO. All other flows would remain within Mexico. However, with Alternative 1 Option B, average flows of 25 mgd would be conveyed to the SABWWTP via the PCL for treatment. Up to 34 mgd of average flows would be conveyed via the OCC, and USIBWC assumed for purposes of this alternative that all excess flows conveyed via this system (i.e., the OCC) would bypass treatment at the SABWWTP to be discharged into the shoreline at Punta Bandera. This alternative would not include any new treatment facilities at the SBIWTP.

The improved conveyance system would eliminate the untreated sewage flows into the Tijuana River, but increase untreated sewage releases at Punta Bandera that bypass the SABWWTP.

**B. Alternative 2: Operate SBIWTP as Advanced Primary Facility With Treated Flows Conveyed To Mexico for Discharge**

Under Alternative 2, the SBIWTP would continue to operate as an advanced primary facility for average flows of 25 mgd and peak flows of 50 mgd. No SBIWTP advanced primary treated effluent would be discharged through the SBOO; instead, all effluent would be returned to Mexico. All other flows would remain within Mexico, with 25 mgd being conveyed to the SABWWTP via the PCL for treatment. Up to 34 mgd would be conveyed via the OCC, if Mexico undertakes the necessary rehabilitation. It would bypass treatment at the SABWWTP and would be discharged into the shoreline at Punta Bandera.

Currently, Mexico has advised the USIBWC that it does not have sufficient capacity to accept treated effluent back from the SBIWTP. A new pumping and conveyance system has been constructed by Mexico as a parallel backup facility for the existing original Mexican conveyance system, to pump an average flow of 25 mgd and peak of 50 mgd, to convey flows from Pump Station 1/1A to the SABWWTP in Mexico. The new parallel pumping and conveyance system, or PCL, was originally intended as backup for the existing system to allow for needed repairs to Tijuana's existing system. However, this system is now the primary conveyance system.

Under Alternative 2, the treated effluent would be sent to Tijuana via the SBIWTP's primary effluent return connection (PERC) conveyance and pumping facilities, completed in 2004, and by the PCL. If the treated effluent does not enter the SABWWTP, it would be discharged into the shoreline 5.6 miles south of the U.S./Mexico border, at Punta Bandera. The new pumping and conveyance system to the treatment works in SABWWTP would continue to operate.

All other flows would remain within Mexico, with 25 mgd being conveyed to the SABWWTP via the PCL for treatment. Up to 34 mgd would be conveyed via the OCC by 2023; it would bypass treatment at the SABWWTP and would be discharged into the shoreline at Punta Bandera.

The following improvements to the OCC in Mexico would be required to implement this alternative:

- ◆ Refurbish Pump Station 1
- ◆ Install new pumps and new motors
- ◆ Install a new conveyance pipeline (force main) with increased capacity from Pump Station 1 to Playas de Tijuana

The Comision Estatal de Servicios Publicos de Tijuana/State Commission of Public Services Tijuana (CESPT) has expressed objections to this alternative because it would eliminate the redundancy of their conveyance line and reduce operational flexibility.

**C. Alternative 3: Operate SBIWTP with City of San Diego Connections (Interim Alternative Only)**

Under Alternative 3, the SBIWTP would continue to operate as an advanced primary facility at its current 25-mgd capacity and would send up to 14 mgd to San Diego city treatment facilities. The SBIWTP would also return 11 mgd of treated effluent to Mexico via its OCC. Direct discharges by the SBIWTP to the SBOO would cease. This alternative would be a potential interim alternative for the SBIWTP, while

secondary facilities were being constructed, and would require agreement by the City of San Diego. It would also require agreement by the Government of Mexico to accept the returned effluent and to expand the capacity of the OCC.

The Rules, Finance and Intergovernmental Relations Committee of the San Diego City Council voted unanimously in 2002 to deny any request from the USIBWC to treat effluent from the SBIWTP at the South Bay Water Reclamation Plant (SBWRP), a tertiary plant, and/or the Point Loma Wastewater Treatment Plant (PLWTP), an advanced primary plant, because of toxicity of Tijuana wastewater, handling of sludge, reduced capacity, and reclaimed water concerns. Further, on October 11, 2004, and in prior correspondence, the City of San Diego has advised the USIBWC that its facilities are not currently available to treat Tijuana sewage on an interim basis or otherwise. For purposes of this alternative, USIBWC assumed that if circumstances were to change and the City's facilities were to be made available to USIBWC under this potential interim alternative, the SBIWTP would send its advanced primary effluent to two existing City of San Diego treatment facilities, specifically the SBWRP and the PLWTP to complete the wastewater treatment process and discharge the treated effluent. Advanced primary treated or screened effluent would be sent to the SBWRP for secondary treatment via a new connection, with treated effluent discharged through the SBOO. In addition, screened effluent would be sent to the PLWTP via the City's South Metro Interceptor, where it would be treated and discharged through the Point Loma Outfall.

Under this alternative, a total of 14 mgd of advanced primary treated effluent or 14 mgd of screened effluent would be sent to the SBWRP or the PLWTP. The remaining 11 mgd of advanced primary effluent from the SBIWTP would be returned to Mexico via its OCC, where it would be blended with untreated wastewater and discharged at Punta Bandera. This alternative assumes that the Government of Mexico agrees to accept the return of the treated effluent and expands the capacity of its OCC. Alternative 3 also assumes that 25 mgd of flows generated by the City of Tijuana would be conveyed to the SABWWTP via Mexico's PCL.

In its comment letter on the Draft SEIS dated February 23, 2005, the City of San Diego confirmed that it does not support any alternative that would require treatment of Tijuana sewage in the City's system.

#### ***D. Alternative 4: Public Law 106-457, Secondary Treatment Facility in Mexico***

This Alternative includes three treatment options for implementing Public Law 106-457, as amended, and IBWC Minute 311:

- ◆ **Option A:** Operation of SBIWTP as Advanced Primary Facility, Secondary Treatment in Mexico
- ◆ **Option B:** Cease Operation of SBIWTP and Conduct all Secondary Treatment in Mexico
- ◆ **Option C:** Bajagua Project, LLC proposal – Operation of SBIWTP as Advanced Primary Facility with Secondary Treatment in Mexico

At present, the specific facilities required to implement Public Law 106-457, as amended, and IBWC Minute 311 have not been fully identified. Therefore, USIBWC made the following assumptions about the characteristics of this alternative:

- ◆ Required facilities would include a pump station (for Alternative 4 Options A and C only) on the SBIWTP to pump the plant's advanced primary effluent to the Public Law 106-457 facility (sized to pump an average of 25 mgd), a pipeline to

transport treated effluent from the SBIWTP to the Public Law 106-457 facility, a pump station in Mexico to transport flows from the Tijuana collection system to the Public Law 106-457 facility (sized to pump 34 mgd), and a pipeline to return up to 59 mgd treated effluent from the Public Law 106-457 facility to SBIWTP for discharge.

- ◆ A Public Law 106-457 treatment plant would be constructed in the area conceptually presented in the Master Plan (in the Alamar River basin).
- ◆ The plant would have a 59-mgd capacity consistent with IBWC Minute 311 and the Master Plan. Future expansion beyond the 59 mgd capacity recommended in the Master Plan was not considered.
- ◆ Secondary treatment would be performed in compliance with the Federal Water Pollution Control Act (Clean Water Act).
- ◆ Treated effluent would comply with the water quality requirements of the USIBWC's NPDES Permit No. CA0108928 and could be discharged through the SBOO.
- ◆ Disposal of all sludge produced would be the responsibility of the service provider under the fee-for-service contract established as part of Public Law 106-457, as amended.
- ◆ The Master Plan assumed that operations would begin in 2006. However, for modeling purposes, the SEIS assumed operations would commence in 2009 as a worst-case scenario.

### **Discharge Options**

Alternative 4 also includes two options for discharging secondary treated effluent from the Public Law 106-457 treatment facility.

Option I consists of discharging offshore in the United States through the SBOO.

Option II consists of retaining treated effluent in Mexico and discharging it at the shoreline in Mexico at Punta Bandera using a pump station at the Public Law 106-457 plant (sized to pump up to an average of 59 mgd) and a force main between the plant and Pump Station 1/1A. From Pump Station 1/1A treated effluent would be conveyed via the OCC, bypassing treatment at the SABWWTP to be discharged into the shoreline at Punta Bandera. It is also assumed that Mexico would improve its OCC (i.e., replace it with a pipeline that increases capacity) to convey the treated effluent to Punta Bandera.

#### **1. Treatment Option A: Operation of SBIWTP as Advanced Primary Facility, Secondary Treatment in Mexico**

Under Alternative 4 Option A, the SBIWTP would continue to operate as an advanced primary facility for average flows of 25 mgd and peak flows of 50 mgd with 25 mgd of primary treated effluent sent to a secondary treatment facility to be constructed in Mexico (Public Law 106-457 facility). All other flows would remain within Mexico, with 25 mgd being conveyed to the SABWWTP via the PCL for treatment. Up to 34 mgd of raw sewage would be pumped to the Public Law 106-457 treatment facility, via a new Tijuana pumping station and conveyance line.

Under Alternative 4 Option A, both options would result in the discharge of 6 mgd of untreated flows to the shoreline in Mexico in 2004. These flows would be eliminated once the Public Law 106-457 facility begins operation in 2009.

The principal difference between the discharge options is the discharge location and volume of secondary treated effluent. Option I would result in discharges up to 59 mgd of secondary treated effluent offshore in the United States, and Option II would result in coastal discharges in Mexico of up to 84 mgd of secondary treated effluent to the shoreline at Punta Bandera.

Facilities for this alternative would be designed to ensure compliance with water quality standards of the United States and Mexico, and in accordance with USIBWC's NPDES permit limitations. Final design of the treatment facility would be subject to approval of both sections of the IBWC in accordance with IBWC Minute 311.

## **2. Treatment Option B: Cease Operation of SBIWTP, Secondary Treatment in Mexico**

Under Alternative 4 Option B, SBIWTP operation would cease. Up to 59 mgd of wastewater flows would be conveyed directly to the Public Law 106-457 facility for secondary treatment. Flows beyond 59 mgd generated by the City of Tijuana would be retained in Mexico and conveyed to the SABWWTP via the PCL for treatment.

This alternative would require new facilities in the United States and Mexico. A return effluent pipeline and connection to the SBOO discharge at the blending structure would be constructed in the U.S. The facilities required for this option would be similar to those identified for Option A, with two exceptions:

- ◆ There would be no pump station at the SBIWTP
- ◆ The Tijuana pump station would be sized to pump up to 59 mgd of raw sewage to the Public Law 106-457 treatment facility

In addition, the treatment process at the secondary treatment plant in Mexico would differ. With Option B, the treatment process would include preliminary treatment (screening and grit removal) as well as primary sedimentation of the raw wastewater before secondary treatment. Sludge digestion and handling would be provided for the primary and secondary sludge.

## **3. Treatment Option C: Bajagua Project, LLC Proposal – Operation of SBIWTP as Advanced Primary Facility, Secondary Treatment in Mexico**

This alternative is described in Section II.A of this Record of Decision

## **E. Alternative 5: Secondary Treatment in the United States at SBIWTP**

Under Alternative 5, secondary treatment facilities (completely mixed aerated (CMA) ponds or activated sludge) would be constructed at the SBIWTP to treat 25 mgd of wastewater with disposal through the SBOO. This alternative would require Mexico to handle all flows beyond the 25 mgd capacity of the SBIWTP. Within Mexico, flows would be conveyed to the SABWWTP (25 mgd capacity) via the PCL and would be discharged at Punta Bandera. Any remaining flows would be discharged untreated into the shoreline at Punta Bandera.

The alternative of constructing secondary treatment facilities in the United States was analyzed in prior NEPA documents for the SBIWTP. The 1994 Final EIS identified activated sludge facilities as the preferred alternative and this treatment option was approved in a 1994 Record of Decision issued by the USIBWC and EPA. This NEPA evaluation was later supplemented by a 1999 Final SEIS, which

evaluated treatment options for providing secondary treatment at the SBIWTP. Options evaluated in the 1999 SEIS included a CMA pond system at the former Hofer site as well as the following two options for an activated sludge treatment process at the SBIWTP:

- ◆ Activated Sludge with Flow Equalization Basins (FEB), Option B-1
- ◆ Activated Sludge with Expanded Capacity, Option B-2

In 1999 USIBWC and EPA issued a Record of Decision selecting a CMA pond system at the Hofer site as the means for achieving secondary treatment for the SBIWTP's effluent, and the two agencies sought congressional approval to raise the funding limits so the agencies could implement this decision. However, Congress declined to raise the funding limits or take any other action to fund construction of CMA ponds and since then has not taken any other action to fund construction of CMA ponds or activated sludge secondary treatment facilities in the United States to treat the SBIWTP's effluent. The construction of a CMA pond system and the construction of activated sludge secondary treatment facilities (the decision made in 1994 ROD) at the SBIWTP site were again evaluated in the Final SEIS issued in July 2005 as options for bringing the SBIWTP into compliance with the CWA and its NPDES permit. The CMA pond system at the former Hofer site is referred to as Alternative 5 Option A. The activated sludge options, with flow equalization basins and with expanded capacity, are referred to as Alternative 5 Options B-1 and Option B-2, respectively.

### **1. Option 5A: Completely Mixed Aeration (CMA) Ponds at SBIWTP**

Alternative 5A includes a treatment pond option capable of treating 25 mgd average flows with peaks of 50 mgd. The CMA ponds would be located at the former Hofer site adjacent to facilities at the SBIWTP. This alternative assumes that conventional primary treatment, rather than advanced primary treatment, would be provided at the SBIWTP to fully optimize the pond system. The new facilities required for this alternative would include the following major elements:

- ◆ Four ponds having a total volume of 147 million gallons, each divided into five cells: four anaerobic digester pits (ADPs) receiving primary effluent followed by one CMA cell, which receives effluent from all of the ADPs. The ADPs would have surface aerators and the CMA cells would be completely mixed and aerated.
- ◆ Two surface aerated ponds (27 million gallons each) divided into two cells, each pond receiving effluent from the CMA cells.
- ◆ Distribution structures, pump stations, and a new control building.

This alternative would cover about 36 acres of land and have a total pond surface area of about 29 acres.

### **2. Options 5B-1 and 5B-2: Activated Sludge Secondary Treatment at SBIWTP**

Alternative 5 Options B-1 and B-2 would provide secondary treatment at the SBIWTP in the United States using activated sludge treatment.

### **Activated Sludge with Flow Equalization Basin (Alternative 5 Option B-1)**

For the Alternative 5 Option B-1, activated sludge secondary treatment facilities would be constructed at the existing SBIWTP site. This alternative would result in an average flow of 25 mgd into the SBIWTP with flow equalization basins to accommodate peak flow storage and subsequent off-peak discharge to the secondary activated sludge facility. Flow equalization basins capable of storing peak flows greater than 25 mgd would be constructed for this alternative. A storage volume of 7 million gallons would be required. Accordingly, the average flow through both the advanced primary and secondary portion of the plant would be 25 mgd. Flow through the primary portion of the plant would follow the daily flow variations with a low flow of about 3.5 mgd and a peak flow of 50 mgd. Before this variable flow enters the secondary portion, it would be equalized by the basins to a steady rate of 25 mgd.

The flow equalization basins would be situated within the existing SBIWTP footprint. Proposed new facilities would include the following major elements:

- ◆ One 7-million gallon equalization basin and a pump station capable of pumping up to 21.50 mgd to the activated sludge process.
- ◆ Six single-pass conventional activated sludge tanks with fine bubble diffusers and anoxic zone selectors, including one aeration blower structure with three blowers.
- ◆ Eight secondary sedimentation tanks with return-activated sludge pump facilities, a secondary skimming pump station, and an electrical local control center.
- ◆ Two 27-foot-diameter dissolved air flotation thickeners with chemical addition facilities.
- ◆ One 34-foot-diameter sludge storage tank.
- ◆ Extension of the support facilities such as yard piping to accommodate the expanded site and facilities for the secondary treatment facilities.

### **Activated Sludge with Expanded Capacity (Alternative 5 Option B-2)**

Under Alternative 5 Option B-2, activated sludge secondary treatment facilities would be constructed on the existing SBIWTP property and at the 40-acre former Hofer site as described in the 1999 Final EIS. This alternative would use activated sludge as the secondary treatment process and the capacity of the facilities would be expanded to accommodate peak flows.

For this alternative, an average flow of 25 mgd with peak flows up to 50 mgd would be treated by the advanced primary and the secondary facilities. The proposed new facilities, which would be located on the current SBIWTP property, would include these major elements:

- ◆ Six single-pass conventional activated sludge tanks with fine bubble diffusers and anoxic zone selectors, including one aeration blower structure with four blowers.
- ◆ Sixteen secondary sedimentation tanks with return-activated sludge pump facilities, a secondary skimming pump station, and an electrical local control center.

- ◆ Two 27-foot-diameter dissolved air flotation thickeners with chemical addition facilities.
- ◆ One 34-foot-diameter sludge storage tank.
- ◆ Extension of the support facilities such as yard piping to accommodate the expanded site and facilities for the secondary treatment facilities.

#### **F. Alternative 6: Secondary Treatment in the U. S. and in Mexico**

Alternative 6 is a combination of the treatment processes described for Alternatives 4 and 5, with secondary treatment facilities being constructed at the SBIWTP in the United States and in Mexico. Under Alternative 6, the secondary treatment facilities constructed at the SBIWTP (activated sludge or CMA ponds) would treat 25 mgd of wastewater with disposal to the SBOO. Flows beyond the SBIWTP capacity would be treated in Mexico at either the existing SABWWTP (25 mgd) with discharge to Punta Bandera or at a new Public Law 106-457 facility (34 mgd secondary treatment facility) with disposal to the SBOO.

#### **G. Alternative 7: SBIWTP Closure/Shutdown**

Alternative 7, which would be necessary if the SBIWTP could not otherwise achieve compliance with the federal CWA through other means, assumes that the SBIWTP would be closed if CWA compliance cannot be achieved. It also assumes implementation of the following projects in Mexico:

- ◆ Tijuana Sewer Rehabilitation Project, certified by the Border Environment Cooperation Commission (BECC) in 2001, which includes 429,034 feet of sewer lines, laterals, collectors, subcollectors, and interceptors. Some of these projects are already under construction.
- ◆ Rehabilitation and expansion of the San Antonio de los Buenos Plant, from 17 to 25 mgd. The renovation work was completed in early 2004.
- ◆ Construction of the four Japanese Credit Program wastewater treatment plants to be constructed in Mexico.
- ◆ Renovation and rehabilitation of the original conveyance channel.

In addition, this alternative assumes that Mexico would construct the improvements identified under the "preferred option" in the *Potable Water and Wastewater Master Plan for Tijuana and Playas de Rosarito*. The improvements to wastewater collection, pumping, and treatment would consist of constructing five new wastewater treatment plants (including the four Japanese Credit Program plants and a regional wastewater treatment plant in the Alamar River area) and expanding two existing plants. Related infrastructure to support these improvements would include new pumping facilities and new pipelines.

With Alternative 7, untreated flows would continue to be discharged to the shoreline in Mexico south of the San Antonio de los Buenos treatment works. Untreated flows discharged to the shoreline are projected to be 31 mgd in 2004. This volume would increase to 40 mgd by 2009 and to 59 mgd by 2023.

### **IV. ENVIRONMENTALLY PREFERRED ALTERNATIVE**

The Council on Environmental Quality (CEQ) regulations for implementing the National Environmental Policy Act (NEPA) require that the Record of Decision specify "the alternative or alternatives which were considered to be environmentally

preferable" (40 C.F.R. §1505.2(b)). The environmentally preferable alternative is the alternative that will cause the least damage to the biological and physical environment. It is the alternative that best protects, preserves, and enhances historic, cultural, and natural resources.

The environmentally preferred alternative is to construct a new 59 mgd secondary treatment plant and supporting facilities in Mexico (Alternative 4), consistent with Public Law 106-457, as amended, and IBWC Minute 311, and to discharge the treated effluent offshore through the SBOO (Discharge Option I). Construction of new facilities in Mexico to treat Tijuana sewage is environmentally preferable because it would address long-term sewage treatment needs of the region by treating current and future projected increased raw sewage flows in Tijuana, providing secondary treatment for not only the 25 mgd of Tijuana raw sewage currently treated at the SBIWTP and also secondary treatment for up to an additional 34 mgd of such sewage originating from Tijuana. The additional secondary treatment capacity would significantly expand and improve the existing wastewater infrastructure for the Tijuana/San Diego region and benefit public health and the environment in the Tijuana River Valley and Estuary since it would reduce raw sewage flows from Tijuana into the U.S. that result in contamination of the Tijuana River and south San Diego beaches.

## **V. MEANS TO AVOID OR MINIMIZE ENVIRONMENTAL EFFECTS**

NEPA regulations and guidance require the Record of Decision to contain a concise summary of the mitigation measures which the agency has committed itself to adopt. The USBWC commits to the following mitigation measures:

### **A. Terrestrial Biological Resources**

- ◆ Mitigation would be undertaken for the potential loss of non-native grassland associated with the construction of pipelines connecting the SBIWTP and the Bajagua treatment plant site. Mitigation would be undertaken typically at a 0.5 to 1 mitigation ratio. Mitigation may be accomplished with preservation or restoration/creation of similar or better quality habitat. The mitigation completed for impacts to non-native grassland would offset the temporary loss of foraging habitat for raptors. With incorporation of this mitigation measure, impacts to nonnative grasslands would be mitigated to a less than significant level.
- ◆ Standard techniques for reducing construction noise impacts such as using noise suppressing mufflers on construction equipment and complying with the local noise control ordinance would be undertaken to reduce potential noise impacts on least Bell's vireo in the vicinity of the SBIWTP to a less than significant level.
- ◆ Confirmatory surveys and directed searches for least Bell's vireo, and southwestern willow flycatcher in the vicinity of the pipeline alignment along the Alamar River shall be conducted. Vireo and flycatcher surveys/directed searches shall be initiated between mid-March and mid-May prior to the initiation of construction. If the least Bell's vireo or the southwestern willow flycatcher is confirmed to be present in riparian habitats along the pipeline corridor, the corridor shall be adjusted to avoid these habitats and provide the appropriate buffers. Depending on the proximity of construction activity, adjusting the construction schedule to avoid noise and glare impacts during critical life stages may also be required.
- ◆ At the SBIWTP site, generally accepted measures and practices in the industry to effectively address potential adverse effects to the least Bell's vireo from construction noise will be required. Specifically, during the least Bell's vireo's

breeding season (March 15 to September 15) measures will be required to ensure that construction noise not exceed ambient noise levels of 60 decibels hourly (dBA  $L_{eq}$ ) at the edge of riparian habitat constituting least Bell's vireo territories. A qualified acoustician will establish monitoring stations where activities from construction may infiltrate the least Bell's vireo habitat, and will monitor noise levels during construction activities and verify that the average hourly noise levels do not exceed 60 dBA or ambient levels at those stations. If noise from construction activities exceeds these levels, construction activities will be modified or curtailed to ensure that noise levels do not exceed 60 dBA  $L_{eq}$  or average ambient levels within or immediately adjacent to suitable least Bell's vireo habitat.

- ◆ In addition, surveys of raptor nests and roosts shall be conducted in the vicinity of the pipeline alignment along the Alamar River prior to the initiation of construction. If raptor nests or roosts are confirmed to be present, the pipeline location will be adjusted to avoid these habitats and provide appropriate buffers. Depending on the proximity of construction activity, adjusting the construction schedule to avoid noise and glare impacts during critical life stages may also be required by USIBWC.
- ◆ Mitigation would be undertaken for the loss of 33.0 acres of annual grassland at the Bajagua treatment plant site. Mitigation would be required, typically at a 0.5 to 1 mitigation ratio. Mitigation may be accomplished by preserving 17.0 acres on-site. Adequate land is available for mitigation including 11.0 acres of annual grassland and 48.4 acres of disturbed habitat, portions of which would be rehabilitated for mitigation. Removal of the cattle ranch upon initiation of construction, will allow the area to naturally revegetate into annual grassland. Temporary construction staking or fencing will be erected under the supervision of a qualified biologist at, or near the edge of the preserved habitat, prior to any brushing or grading activities to limit disturbance of the habitat. The mitigation completed for impacts to annual grassland would offset the temporary loss of foraging habitat for raptors. With incorporation of this mitigation measure, impacts to annual grasslands would be mitigated to a less than significant level.

#### **B. Cultural Resources**

In the event cultural materials are encountered during construction, the contractor shall immediately suspend work in the area of the find until the material can be evaluated by a qualified cultural resource specialist. Cultural resources discovered during excavation would be evaluated for NRHP eligibility following their discovery or considered eligible for listing by default and subjected to impact mitigation as called for in the Programmatic Agreement. Impacts to historic properties discovered within the excavation path would be mitigated to a level below significance through implementation of the terms of the Programmatic Agreement. With incorporation of this mitigation measure into project planning, impacts to cultural resources would be considered mitigated to a less than significant level.

#### **C. Paleontological Resources**

Due to the potential for disturbance to paleontological resources in the highly fossiliferous San Diego formation at the SBIWTP and in the surrounding area, paleontological monitoring of construction of pipelines and the pump station would be required of the contractor by USIBWC. A Paleontological Resource Mitigation Plan will be prepared by a qualified paleontologist and implemented by the contractor. The plan will identify:

- ◆ Specific areas to be monitored during excavation and other ground-disturbing activities;
- ◆ Procedures for recovery and preservation of paleontological material found on the site (including transfer of fossils to repositories); and
- ◆ Reporting of these findings.

With incorporation of this mitigation measure into project planning, impacts to paleontological resources would be considered mitigated to a less than significant level.

#### **D. Best Management Practices**

The following best management practices would also be implemented to avoid or minimize adverse effects:

- ◆ Facilities would be sited, designed and constructed in accordance with applicable engineering standards for seismic resistance.
- ◆ Recommendations of the geotechnical site investigation would be incorporated into project design and planning to avoid or minimize erosion and sedimentation of natural drainage areas associated with hillside grading.
- ◆ Site watering would be conducted during ground-disturbing construction activities to reduce generation of fugitive dust.

### **VI. DISCUSSION OF ISSUES AND FACTORS**

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The USIBWC received a total of 35 responses on the Draft SEIS. Each comment letter and testimony has been reprinted in Appendix H of the Final SEIS, which includes responses to each of the issues raised. The USIBWC took into consideration twelve major issues identified during the agency and public consultation process.

#### **1. Need for Comprehensive Approach**

Several comment letters raised the issue that the scope of Draft SEIS was too narrow, that the alternatives would fall short of a comprehensive solution to chronic sewage pollution during rainy season (wet-weather flows), and that there was a need for a comprehensive approach to address longstanding cross-border contamination.

The USIBWC identified that the purpose of this SEIS is to evaluate alternatives for bringing the SBIWTP into compliance with the Clean Water Act (CWA) and the plant's NPDES Permit. The purpose of this SEIS is not to evaluate alternatives that would comprehensively address all of the sanitation needs of the San Diego/Tijuana region, but rather, is limited to those reasonable and feasible alternatives that would bring the SBIWTP into compliance with the CWA and the plant's NPDES Permit. Given this limited purpose, the SEIS considers various alternatives in the U.S. and Mexico that would bring the SBIWTP into compliance, including alternatives that are consistent with Public Law 106-457, as amended, that would also provide additional sewage treatment capacity to further address and prevent pollution from estimated future sewage flows originating from the Tijuana region, consistent with Public Law 106-457, as amended.

Wet weather flows have for decades, and continue to be an issue in the Tijuana River Watershed. This is due, in part, to areas within the City of Tijuana that either do not have a sewage collection system or in which the existing collection system is in need of rehabilitation. During rain events, raw sewage flows from these areas via

the Tijuana River into the U.S. To address this issue, the EPA through the BECC has provided \$18 million to the City of Tijuana to implement the Tijuana Sana Project. This project, which is ongoing, consists of rehabilitating portions of the Tijuana sewage collection system, including areas most likely to spill and result in sewage flows that enter into the U.S. System rehabilitation includes replacement of 30,250 meters of wastewater collection laterals and 16,600 meters of collectors and subcollectors. Currently, the City of Tijuana has applied for a second grant through the BECC to continue the work of rehabilitation the City's sewage collection system. Potential impacts of wet-weather flows, largely the result of non-point sources through the Tijuana River watershed, are beyond the scope of this SEIS which is intended to evaluate the alternatives for bringing the SBIWTP into compliance with the Clean Water Act and its NPDES permit. The SBIWTP does not, and could not, treat wet weather flows; but rather was constructed to capture and treat dry-weather wastewater flows from point sources. Improvements at the watershed level are anticipated as wastewater discharges are removed from the Tijuana River for treatment and routed for controlled and proper disposal.

While this SEIS does not purport to comprehensively address the treatment of all raw sewage originating from the Tijuana Region, USIBWC has considered the existing and planned wastewater treatment infrastructure in the Tijuana region, as well as current and projected future wastewater treatment flows and the long-term needs of the San Diego/Tijuana Region. In particular, USIBWC has reviewed the Potable Water and Wastewater Master Plan for Tijuana and Playas de Rosarito (Master Plan) issued in 2003 by the Comision Estatal de Servicios Publicos de Tijuana (CESPT) which defines an integrated strategy for water and wastewater services to meet the needs of present and future generations in regard to public health, quality of life and environmental protection. This comprehensive Master Plan was funded by EPA, which in accordance with Public Law 106-457, as amended, analyzed the short and long-term potable water and wastewater needs of the Tijuana-Playas de Rosarito area in Baja California, Mexico. For a copy of this Master Plan, see <http://www.epa.gov/region9/water/tijuana/index.html#master>.

## 2. Impacts In Mexico

Two commentors indicated that the Draft SEIS did not address impacts to resources in Mexico associated with the Preferred Alternative and did not identify mitigation measures for such impacts.

Environmental resources in Mexico were evaluated only when alternatives with construction or operations in Mexico have the potential to impact resources in the United States or would be considered as trans-boundary effects. Although construction of the proposed facilities in Mexico may pose impacts at the site to geological resources, cultural resources, noise, land use, socioeconomics, public health, environmental justice and energy, such impacts are anticipated to occur in proximity to the construction activity area and are not likely to result in significant trans-boundary impacts within the U.S. Before construction of any Public Law facility in Mexico, a review of potential environmental impacts in Mexico will be conducted in accordance with the applicable environmental impact review process in Mexico. USIBWC anticipates that if the Mexican authorities identify potential impacts to Mexican resources during the review process, those impacts and any potential additional measures the Mexican authorities believe would be appropriate will be addressed through the contracting process.

Another commentor requested site-specific surveys for sensitive species at the Preferred Alternative treatment plant site and along the pipeline corridor(s).

The appropriate surveys required to adequately assess impacts to the species of concern have already been conducted and were forwarded to the U.S. Fish and Wildlife Service (USFWS). A Quino checkerspot butterfly habitat site assessment is not required because the vegetation required to support the Quino checkerspot butterfly was not found on the Bajagua treatment plant site. Appropriately timed surveys for spring blooming annuals for sensitive plant species, including Otay tarplant and San Diego thornmint were conducted in early and late spring and fall and have been provided to the U.S. Fish and Wildlife Service. In addition, the jurisdictional wetland analysis conducted on the Bajagua treatment plant site found no vernal pools on the site. A copy of the two site assessments conducted in Mexico was sent to the U.S. Fish & Wildlife Service.

The Draft SEIS (p. 5-5) included the recommendation to conduct surveys of least Bell's vireo and southwestern willow flycatcher. However, because arroyo toads do not migrate to the U.S., no trans-boundary impacts would occur and no mitigation would be undertaken.

Prior to construction of any Public Law facility in Mexico, a review of potential environmental impacts in Mexico will be conducted in accordance with the applicable environmental review process in Mexico. Notwithstanding the above, the USIBWC will consider incorporating a minimum buffer of 100 feet between pipelines and wetlands to minimize impacts to the Alamar River.

Pursuant to Section 7 of the Endangered Species Act, the USIBWC consulted with the U.S. Fish and Wildlife Service (please see Section VII.B of this Record of Decision for additional details regarding this consultation).

### **3. Requests For Clarification/Additional Information on NPDES Permit and Facility Regulation**

Several commentors requested additional information on the NPDES permit for the proposed new, Mexican secondary treatment facility and how that facility in Mexico would be regulated.

The current NPDES permit for the SBIWTP is held by the USIBWC, and the USIBWC plans to consult with the Regional Water Quality Control Board, San Diego Region regarding any renewed, revised or future permits for increases in the flow rate of effluent discharged through the South Bay Ocean Outfall. These consultations will include: discussions of the appropriate parties to hold the renewed/revised/future permit; when the renewal application must be submitted; the amount of time required to process the application; and, when the draft permit will be available.

IBWC Minute 311 provides for supervision of the project by the IBWC, which intends to monitor the progress and status of performance of any contract executed to ensure fulfillment of the objectives of the Minute and evaluate the degree to which the service provider of the facilities in Mexico has complied with the terms of the contract. The contract with the service provider will require that the service provider ensure treatment to the secondary level at the facility in Mexico in compliance with applicable water quality laws of the U.S., the State of California and Mexico. In addition, IBWC Minute 311 provides for oversight by a Binational Technical Committee composed of appropriate U.S. and Mexican technical advisors, presided over by the IBWC. IBWC Minute 311 further provides that the Binational Technical Committee include representatives from the State of California, EPA, the Mexican National Water Commission and the Government of Baja California.

#### **4. Funding Availability For Other U.S./Mexico Border Projects**

One commentor raised concerns that funding for the Preferred Alternative would exhaust EPA/NADBank Funds for other U.S./Mexico border projects and questioned whether any of the alternatives would be able to meet the court-ordered compliance schedule.

Funding for the operation, maintenance and reimbursement of private capital invested for development of any project constructed under Public Law 106-457, as amended, would be sought through the annual appropriations process. This is separate and apart from funding for Mexican border infrastructure projects obtained through an annual earmark appropriation to the EPA. EPA does not intend to use its border infrastructure money to fund the upgrade of the SBIWTP. Thus, implementation of Alternative 4C should not come at the expense of any other California or Baja border projects traditionally funded by EPA.

#### **5. Compliance with Court-Ordered Schedule**

Several commentors were concerned about the ability of the Preferred Alternative to meet the court-ordered compliance schedule.

The USIBWC estimates that all alternatives, which include major construction, would require approximately two years for facility construction. However, implementation of any of the alternatives will also require that necessary funding be made available and that necessary regulatory approvals in the U.S. and Mexico be obtained. The selected alternative will be required to comply with the court-ordered schedule for compliance.

#### **6. Request for Clarifications and/or Additional Information**

One commentor requested additional information on the Preferred Alternative relative to details on the Return Effluent Pipeline, depth of the aeration/clarifier basin relative to groundwater and the Amount of cut/fill required at treatment plant site and location of borrow sites.

The effluent return line for the Preferred Alternative would be connected directly to the flow distribution structure where the land portion of the SBOO begins. Given that the effluent return line would operate by gravity, the pressure in the pipe will be automatically controlled by the discharge occurring at atmospheric pressure at the mentioned large flow distribution structure. At this structure, the effluent of the South Bay Water Reclamation Plant also joins the SBOO and the connection would be made in a similar manner to avoid splashing due to any excess energy.

During final design of the Preferred Alternative the pipe diameter would be checked to insure the provision of adequate capacity and the connection to SBOO checked for adequate backflow prevention.

Aeration basin or clarifier depth, as well as cut and fill information is not normally shown in conceptual plans; this information will be shown in a later design phase.

#### **7. Private Company/Sole-Source Contract**

Several commentors expressed concerns that the Preferred Alternative would be constructed and operated by a private company with a sole-source contract. Public Law 106-457, as amended, provides for private involvement in the construction and operation of the proposed secondary treatment facilities in Mexico consistent with Public Law 106-457, as amended. That legislation authorizes USIBWC, notwithstanding any provision of Federal procurement law, to enter into a multiyear

fee-for-services contract with the service provider for secondary treatment services as provided for under the statute. Implementation of the selected alternative will be subject to successful completion of contract negotiations, execution of appropriate contract documentation, and the appropriation of necessary funding consistent with Public Law 106-457, as amended. Any payment by the U.S. Government will be subject to the availability of future appropriations. Under Public Law 106-457, as amended, the fee-for-service provider will be required to use competitive procedures, consistent with applicable U.S. and Mexican laws, in the procurement of property or services for the engineering, construction, and operation and maintenance for the Mexican facility.

### **8. Community Input**

One comment letter indicated concern about whether the residents of the Tijuana region were given an opportunity to participate in the approval and oversight of necessary permits for the Preferred Alternative. This same commentor also questioned whether information about effluent quality from the Preferred Alternative would be available to American and Mexican citizens. Another commentor was concerned about outreach in Mexico, especially within the Alamar River Valley.

The USIBWC has included public participation as an integral part of its decision-making. The IBWC has held citizen forums, a public scoping meeting, a public hearing to take comments, and has otherwise complied with all public participation requirements applicable to this project. A Spanish translation of the Draft SEIS was also made available on the USIBWC website. Any public outreach to be undertaken in Tijuana will be conducted pursuant to applicable Mexican law.

All discharge information will be subject to the same reporting and disclosure requirements which govern all discharges subject to the laws of the United States and California.

### **9. Concerns about the Existing SBOO**

One commentor expressed concerns about the existing the South Bay Ocean Outfall. Specifically, the commentor states the ocean surface over the outfall is contaminated with viruses and other contaminants that are not being measured and there are frequent reports of a visible plume and/or sewage-like odor. In addition, the commentor states high bacterial counts, odors and discoloration occurred at 25 mgd in violation of the NPDES permit.

With the exception of the deepest outfalls, the plume of most outfalls surfaces during the winter when due to the cooling of the surface water, there is little density variation along the water column. The lighter effluent mixes as it rises with surrounding water that has the same density at any depth. The mixing results in a plume that regardless of the amount of dilution is always lighter than the ambient, which results in surfacing. At times when there is some density stratification, the frequency of surfacing depends on the depth of the discharge and the design of the diffuser. The SBOO diffuser was designed to minimize surfacing by selecting very small ports discharging horizontally. Surfacing, per se, is not a violation and there are no body contact standards in the area of the discharge. The body contact standards apply to the protected areas of the kelp beds (sport fishing) and within a coastal band 300 ft wide or to a depth of 30 ft (bathing area).

On the subject of the performance of the SBOO outfall, two studies were completed in 2004. The first report, *Compliance Assessment and Environmental Effects Study of the International Treatment Plant (ITT) Receiving Water Quality Monitoring Program*, was prepared by Science Application International Corporation and Robert Smith (the final report was dated April 2004). The second report, *Evaluation of*

*South Bay International Wastewater Treatment Plant Receiving Water Quality Monitoring Program to Determine its Ability to Identify Source(s) of Bacterial Exceedances* (August 2004) was prepared by the Scripps Institution of Oceanography, and is referred to in response to comment no. 6-16 (Appendix H of the Final SEIS). Both reports find no evidence of any adverse impacts from the discharges either as a source of bacterial exceedances at the shore or to the marine environment in the area of the outfall. With regard to the marine environment, the SAIC report focused on the impacts to receiving water environment in the zone near the diffuser and found no detectable adverse impacts to water quality, sediment quality, benthic infauna, fish and macroinvertebrates, and fish tissue contaminant concentrations (bioaccumulation) related to the discharges from the SBIWTP through the SBOO.

The elevated bacteria counts on the surfacing plume in the area of the discharge are not in violation of the NPDES permit nor the Ocean Plan of California. The values presented actually indicate that the diffuser is performing much better than predicted in the design and is attaining a higher initial dilution.

### **10. Mexico's Industrial Pretreatment and Source Control Program**

One commentor requested that specific compliance goals for Mexico's industrial pretreatment and source control program be included in the NPDES permit for the Preferred Alternative.

Currently, the City of Tijuana has limited pretreatment standards and no toxicity standards. USIBWC has recently conducted an optimization study to identify potential interim measures that would optimize the SBIWTP's current treatment processes, including measures that would reduce toxicity and/or improve total suspended solids removal. USIBWC is currently evaluating implementation of possible measures. The conditions for any modified or future NPDES permit for the SBIWTP will be determined by the California Regional Water Quality Control Board, San Diego Region.

### **11. Identification of Preferred Alternative in Draft SEIS**

One commentor expressed concern that the Preferred Alternative was identified in the Draft SEIS before public input.

The CEQ regulations implementing NEPA expressly provide that an agency "[i]dentify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternatives in the final statement unless another law prohibits the expression of such a preference" 40 C.F.R. §1502.14(e). The USIBWC considered comments on the Draft SEIS concerning the preferred and other alternatives, and addressed these comments in the Final SEIS (see Appendix H).

### **12. Japanese Credit Plant Effluent**

Several commentors raised concerns about the disposal of effluent from the Japanese Credit Plants.

Tijuana's Comision Estatal de Servicios Publicos de Tijuana (CESP-T) is currently working with the Japanese Credit Bank (JBIC) to fund the construction of four wastewater treatment plants. Three of these plants (La Morita, Monte de los Olivos, and El Florido) will be constructed within the Tijuana River Watershed and will have an ultimate total capacity of 30.5 mgd. The fourth plant (Tecolote-La Gloria), which

is located along the Pacific coast south of the San Antonio de las Buenas wastewater treatment plant and not near the Tijuana River, will have a capacity of 8.7 mgd. Initial construction of these wastewater treatment plants is anticipated to begin in late 2005 with phased-operation commencing in mid-2007. It is not anticipated that these plants will be treating at their full capacity until sometime after 2007. Although these plants have the potential to discharge into the Tijuana River, Mexico has not made a decision as to where these plants may discharge, and the Mexican government has not requested at this time that these discharges be routed to the SBOO, which is located on the U.S. side of the border, for discharge into the Pacific Ocean. For more information on the discharge alternatives regarding these plants, please see "Identification and Evaluation of Effluent Disposal Alternatives for the Treated Wastewater for Tijuana, B.C., prepared by CSI Ingenieros for EPA, North American Development Bank, and CESP-T, June 2004."

The purpose and need of this SEIS is to evaluate potential alternatives for bringing the SBIWTP into compliance with the CWA and the plant's NPDES permit. The disposition of effluent from the Japanese Credit plants is beyond the scope of this SEIS. Nonetheless, related impacts were addressed in the SEIS as part of the cumulative impacts analysis in order to provide background and context.

## **VII. COMMENTS ON FINAL SEIS**

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The USIBWC made the Final SEIS available for public review and comment on July 22, 2005 and notices of availability were published in the Federal Register on July 22, 2005 and July 29, 2005. The USIBWC also invited written comments to be submitted on the Final SEIS on or before August 24, 2005. The USIBWC received one comment letter on the Final SEIS from the State of California Water Resources Control Board. A number of the comments were previously addressed in the Final SEIS, either in the body of the SEIS or in the responses to comments submitted on the Draft SEIS (Appendix H of the Final SEIS). The Final SEIS contains information on these issues and USIBWC responses. Table 1 presents a summary of the comment as well as the Subchapter of the Final SEIS and/or the Response to Comment number in which the comment was addressed.

**Table 1. Summary of Comments on the Final SEIS**

Comment	Final SEIS Subchapter	Response to Draft SEIS Comment
Significant unresolved technical issues related to Alternative 4C (project design criteria; project reliability; permitting; construction, operations and maintenance budgets; and feasibility of constructing within court-ordered compliance schedule)	--	26-30, 26-31
Request for implementation of a variation of Alternative 6	-	26-8
Implementation of Alternatives 5A or 5B could meet court-ordered compliance schedule	-	12-27
Construction of 25 mgd plant at SBIWTP should be included in any Preferred Alternative	-	12-26, 12-27
Comprehensive solution must address containment/disposal of effluent from Japanese Credit Plants	1.7.5, 2.4 and 4.12	12-27, 21-2, 26-39, 26-49

The comments on the Final SEIS also raised several new issues (i.e., issues not raised during public review of the Draft SEIS). The comments and the USIBWC's responses are summarized below:

**1. Formation of a Binational Technical Committee**

The commentator raised the issue that the binational technical committee, called for by IBWC Minute 311, has not yet been organized and has never met.

The USIBWC concurs that IBWC Minute 311 provides for oversight by a Binational Technical Committee composed of appropriate U.S. and Mexican technical advisors, presided over by the IBWC. IBWC Minute 311 further provides that the Binational Technical Committee includes representatives from the State of California, EPA, the Mexican National Water Commission and the Government of Baja California. The USIBWC anticipates formation of the committee by the end of October 2005.

**2. Coordination with Mexican Section of IBWC Regarding Alternative 4C**

The commentator indicated that Mexico has formally raised a number of significant questions and issues regarding Alternative 4C.

The proposed facilities included in the Preferred Alternative are the subject of ongoing consultations with the Government of Mexico. Implementation of the selected alternative will require the issuance of all necessary permits and obtaining necessary approvals from the relevant Mexican authorities. The USIBWC understands that Mexico must have a decisive role in the approval of various aspects of the project to be constructed in Mexico, including final site selection and treatment technology, design, construction, operation, maintenance, reuse of the effluent, and other contracting and administration aspects of the project. In the event that Mexico requests modifications of any aspects of Alternative 4C, including modification of the site location, USIBWC will evaluate what actions may be necessary in view of those requested modifications, including whether any supplementation of the Final SEIS or this Record of Decision is required.

**3. Re-evaluation of Time Period Required to Implement Preferred Alternative**

The commentor requested that the USIBWC reevaluate the time period required to implement the Preferred Alternative compared to other alternatives evaluated in the Final SEIS.

The amount of time required to address Mexico's concerns, obtain the necessary permits and approvals for the project, as well as the contracting and construction timelines were all considered in the estimation of the time needed to implement the Preferred Alternative. Therefore, no re-evaluation is necessary.

In selecting Alternative 4C, compliance with the deadlines set forth in the court-ordered schedule for the SBIWTP referenced above has been of critical importance to USIBWC in making its decision to select Alternative 4C. USIBWC believes construction of new secondary treatment facilities in Mexico is the approach most likely to enable timely compliance with the court-ordered schedule because there is federal legislation, recently reauthorized, expressly providing for the secondary treatment of the SBIWTP's effluent and authorizing funding for such facilities under a multiyear fee-for-services contract. USIBWC believes any alternatives that involve construction of new secondary treatment facilities in the United States could not meet the court-ordered compliance schedule because there is presently not adequate funding available for construction of such facilities in the United States under Section 510(b) of the Water Quality Act of 1987. Further, there is no Congressional legislation authorizing new funds for such new facilities in the United States. Therefore, the USIBWC has been unable to implement the previously issued Records of Decision for the SBIWTP deciding upon construction of secondary treatment facilities in the United States (see Section II.C above.) In view of the history of legal challenges and/or political opposition to the construction of new secondary treatment facilities at the SBIWTP, Congress' failure to fund new secondary treatment facilities in the U.S. when USIBWC previously recommended such facilities, Congress' passage of legislation expressly providing for secondary treatment of the SBIWTP's effluent in Mexico, Congress' recent reauthorization of that legislation, and the execution by the governments of the United States and Mexico of IBWC Minute 311 which provides a framework to construction of new facilities in Mexico to provide secondary treatment for the SBIWTP's effluent in Mexico, USIBWC believes secondary treatment facilities in Mexico presents the approach most likely to be funded by Congress and which will enable USIBWC to timely comply with the court-ordered compliance schedule.

**4. Include Interim Measures to Improve Total Suspended Solids and Toxicity Removal at SBIWTP**

The commentor requested that interim measures to improve total suspended solids and toxicity removal from effluent at the SBIWTP be included in the Preferred Alternative, regardless of which alternative is selected.

The South Bay International Wastewater Treatment Plant Optimization Study (August 8, 2005) provides recommendations that reflect promising ways of removing additional total suspended solids (TSS) from the SBIWTP effluent. The USIBWC is currently evaluating the recommendations of the Optimization Study and anticipates implementing interim measures with remaining project funds.

## **VIII. COMPLIANCE WITH ENVIRONMENTAL REQUIREMENTS**

### **A. NPDES Permit**

A NPDES permit for the SBIWTP for Section 402 Clean Water Act compliance and California Ocean Plan standards was issued by the San Diego Regional Water Quality Control Board (SDRWQCB) on November 14, 1996 (Permit No. CA108928). The NPDES permit for the SBIWTP authorizes discharge from a secondary wastewater treatment plant using activated sludge. SDRWQCB also issued a Cease and Desist Order for the interim advanced primary discharge. The USIBWC intends to modify the NPDES to reflect an increased discharge volume of secondary effluent via SBOO.

### **B. U.S. Fish and Wildlife Service**

The U.S. Fish and Wildlife Service (USFWS) is responsible for oversight of the federal Endangered Species Act (ESA). As required by Section 7 of the ESA, the EPA and the USIBWC consulted with the USFWS on potential impacts evaluated in the Draft SEIS. By supplemental letter dated June 30, 2005, the USIBWC identified specific measures to address potential adverse affects in the vicinity of the SBIWTP related to construction noise.

In a letter dated July 11, 2005, the USFWS concurred with the USIBWC's determination that by implementing mitigation measures the action was not likely to adversely affect endangered species.

### **C. National Historic Preservation Act**

Regarding the National Historic Preservation Act, the USIBWC consulted with the California State Historic Preservation Officer (SHPO) regarding potential impacts to cultural and paleontological resources. On June 8, 2005, the SHPO concurred with the USIBWC's determination that there are no historic properties that may be affected by the action.

### **D. Coastal Consistency**

A Coastal Consistency Determination (Determination) was submitted to the California Coastal Commission (Commission) in April 2005. This Determination, included in Appendix I of the Final SEIS, evaluated the Bajagua Project, LLC proposal – Operation of the SBIWTP as Advanced Primary Facility, Secondary Treatment in Mexico with discharge to the United States via the South Bay Ocean Outfall (Alternative 4C, Option I) for the SBIWTP in consideration of the California Coastal Act of 1976, as amended January 2005 and the Coastal Zone Management Act of 1972, as amended. Based on this information, the USIBWC determined that the implementation of the Bajagua Project, LLC proposal (Alternative 4C, Discharge Option I) would not result in direct, adverse impacts to the coastal zone. The Determination was approved by the Commission on June 9, 2005.

### **E. Air Quality**

Construction of the Bajagua Project, LLC project pump station, portions of the force main and return flow pipeline in the United States would require grading, excavation and possibly compaction over a 6-month period. Air pollutant emissions from construction of pipelines from the SBIWTP to, and in, Mexico would be negligible. Construction-related emissions in the United States would be below significance threshold values, including de minimis levels established under the conformity provisions of the Clean Air Act. Air quality impacts of construction activities at the

Rio Alamar site in Mexico (approximately 3.5 miles southwest of the SBIWTP) would not be discernible in the United States because of distance. Upon operation of the SBIWTP following construction, air quality would be similar to existing conditions. For these reasons, air quality impacts of Alternative 4C would not be considered significant. In addition, as stated in Chapter 6.1.6.2, the total direct and indirect emissions from Alternative 4C, Option 1, fall below the general conformity de minimus thresholds of EPA's general conformity regulations, and a conformity determination is not required.

Alternative 4C would result in construction of the Bajagua Project, LLC project pump station and portions of the force main and return flow pipeline in the United States. The force main and return flow pipeline would be underground. The pump station is not expected to be a source of odors. Therefore, no changes in odor emissions are expected to occur.

The construction contractor would be responsible for obtaining a valid authority-to-construct permit before construction begins.

The SBIWTP has an air permit for current operations, but expanding operations under any alternative would require that the permit be modified.

## ***IX. SUMMARY OF DECISION***

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In conclusion, the USIBWC finds that the Bajagua Project, LLC proposal (Alternative 4C, Option 1) represents the wastewater treatment option that best services overall public interest and is consistent with the National Environmental Policy Act, Clean Water Act, and other federal, states and local plans and policies. The decision takes into account the direct, indirect, transboundary and cumulative impacts from the alternative. This alternative includes all practicable means to avoid or minimize environmental harm, while providing for the treatment of wastewater from Tijuana, Baja California, Mexico as described in existing international agreements and Public Law 106-457, as amended.

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## DEVELOPMENT AGREEMENT

This Development Agreement (this "Agreement") is entered into as of the 7<sup>th</sup> day of February 2006 between the United States Section of the International Boundary and Water Commission, United States and Mexico, ("USIBWC" or "Grantor") and Bajagua LLC, a Delaware limited liability company ("Bajagua or Grantee").

### BACKGROUND

- A. The USIBWC owns and operates the South Bay International Wastewater Treatment Plant (SBIWTP) located at 2415 Dairy Mart Road, San Diego County, San Diego, California, providing treatment of 25 million gallons per day (MGD) of wastewater from the City of Tijuana, Baja California, Mexico, and discharges effluent from the treatment plant through the South Bay Ocean Outfall (SBOO) to waters of the United States in the Pacific Ocean within the San Diego region. The SBOO is jointly owned and operated by the City of San Diego, California and the USIBWC. Discharges from the treatment plant have not complied with the effluent standards and limitations based on secondary treatment contained in the National Pollution Discharge Elimination System (NPDES) permit for carbonaceous biochemical oxygen demand ("CBOD") and total suspended solids ("TSS") or the effluent standards and limitations for acute and chronic toxicity. The treatment plant exceeds effluent limitations because it was built as an advanced primary treatment plant, and the USIBWC lacks funding to build a facility to provide secondary treatment.
- B. The Tijuana River Valley Estuary and Beach Cleanup Act of 2000, Pub. L. No 106-457 (the "Public Law, as amended"), amended by Pub. L. No. 108-425 (H.R. 4794), 118 Stat. 2420 (codified as amended at 22 U.S.C. 277d 43-46) (2004), authorizes and directs the USIBWC to provide for secondary wastewater treatment in Tijuana, Mexico for treating the effluent from the SBIWTP, if such treatment is not provided for at a facility in the United States, and additional sewage emanating from the Tijuana, Mexico area. The Public Law, as amended, provides that the USIBWC may enter into a fee for services contract with a contractor to carry out the secondary treatment requirement envisioned by the Public Law, as amended, and, subject to the availability of funds appropriated to it for this purpose, to make payments under such contract.
- C. The International Boundary and Water Commission, United States and Mexico have concluded IBWC Minute 311 (Recommendations For Secondary Treatment in Mexico of the Sewage Emanating from the Tijuana River Area in Baja California, Mexico). Minute 311 is an agreement that provides the framework for the design, construction, operation and maintenance of wastewater facilities in Mexico to provide secondary treatment for sewage originating in the Tijuana, Baja California, Mexico area, including sewage currently treated to the advanced primary level at the SBIWTP. Minute 311 contemplates, consistent with the Public Law, as amended, that facilities will be constructed, operated and maintained in Mexico through a public-private participation arrangement.
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- D. The United States District Court for the Southern District of California issued an Order Setting Compliance Schedule (the "Court Order") on December 6, 2004 in *People of the State of California, Ex Rel. The Regional Water Quality Control Board, San Diego Region v. Duran*, Case No. 01-CV-0270-BTM (JFS) (consolidated with Case No. 99-CV-2441), which establishes several milestone dates that the USIBWC is required to meet in the process of bringing discharges from the SBIWTP into full compliance with applicable permits and legal requirements. The Court Order requires, among other dates, that the construction of facilities be completed not later than August 24, 2008 and that SBIWTP achieve full compliance with applicable effluent standards and limitations not later than September 30, 2008. Any schedule for completion of project facilities, including milestone dates, that is not in conformance with the Court Ordered Compliance Schedule is subject to approval by United States District Court.
- E. On September 30, 2005, USIBWC published a Record of Decision (ROD) for the Final Supplemental Environmental Impact Statement for Clean Water Act Compliance at the SBIWTP selecting the Public Law Alternative 4C, Option 1, Bajagua Project, LLC Proposal, for the design, construction, operation and maintenance of wastewater facilities in Mexico for achieving compliance with the Court Order and IBWC Minute 311. This alternative was selected with the provision that the proposed facilities to be designed and constructed under the alternative selected in the ROD are the subject of ongoing consultations with the Government of Mexico.
- F. Through a process consistent with the Public Law, as amended, and on the basis of further discussions with Grantee, Grantor wishes to confer upon Grantee, as Contractor to the USIBWC, the exclusive right to pursue a Fee-for-Services agreement for the acquisition of permits, approvals, financing and other prerequisites to the design, construction, ownership, operation, maintenance of facilities in Mexico intended to process 59 MGD of wastewater originally emanating from the Tijuana, Mexico area, in order to achieve, among other benefits, compliance with the Court Order in a manner consistent with the Public Law, as amended, and Minute 311. Such facilities will be located in the United States and in Mexico and will include a treatment plant, pipelines, pumping stations, disposal systems, and other subsystems that make-up a complete and useable wastewater treatment system.
- G. The Grantee wishes to obtain such exclusive right as Contractor to the USIBWC, with the intent that it will furnish, with oversight by the IBWC, all necessary financing, labor, management, supervision, concessions, authorizations, permits, equipment, supplies, materials, transportation, and any other incidental services for the complete ownership, operation, maintenance, repair, upgrades, and improvements to the wastewater treatment system.
- H. Grantee understands that nothing in the Public Law, as amended, waives the Anti-Deficiency Act, Title 31 U.S.C. Section 1341 et seq., and furthermore, that the Public Law, as amended, requires zero cancellation liability on the part of the USIBWC in connection with termination of this Agreement. **There is no full faith and credit of the United States pledged under this Agreement to make any payment to the Grantee for expenses or costs incurred prior to or during the non-binding negotiations of this**

Agreement, or for any costs incurred in the performance of work by Grantee after signature of the Agreement. USIBWC's obligation to make payments for wastewater treatment services rendered will be subject to the availability of annual funds duly appropriated by the U.S. Congress to it for such purpose. This Agreement does not constitute a guarantee of any current or future payments by the USIBWC and nothing in this Agreement shall be construed as requiring the U.S. Government to appropriate or obligate funds for any purpose, including but not limited to, the design, development, financing, permitting, construction, operation or maintenance of any wastewater facilities, or for repayment of any funds expended or committed by Grantee in connection with development of the Project Facilities, or for the treatment of wastewater utilizing the Project Facilities.

## AGREEMENTS

### ARTICLE I

#### DEFINITIONS

"Agreement" means this Development Agreement.

"BTC" means the Bi-National Technical Committee established by the IBWC pursuant to Minute 311.

"Court Order" means the Order Setting Compliance Schedule issued by the United States District court for the Southern District of California on December 6, 2004 in *People of the State of California Ex Rel The Regional Water Quality Control Board San Diego Region v. Duran*, Case No. 01-CV-0270-BTM (JFS) (consolidated with Case No. 98-CV-2441).

"Fee-for-Services Contract" means the contract for providing twenty years of wastewater treatment services to be negotiated by Grantor and Grantee on the basis of the Term Sheet.

"Grantee" means Bajagua, LLC, a Delaware limited liability company.

"Grantor" means United States Section, International Boundary Water Commission, United States and Mexico.

"IBWC" means the International Boundary and Water Commission, United States and Mexico.

"Implementing Minute" has the meaning set forth in Section 4.3.

"Mexican Facilities" means the portion of the Project Facilities to be constructed and operated in the United Mexican States.

"Mexican Government" means the government of the United Mexican States.

"Mexican Section" means the Mexican Section, International Boundary and Water Commission, United States and Mexico.

"Minute 311" means IBWC Minute 311 (Recommendations for Secondary Treatment in Mexico of the Sewage Emanating from the Tijuana River Area in Baja California, Mexico), as formally approved by the U.S. Government on February 23, 2004 and by the Government of Mexico on March 3, 2004.

"Parties" means "Grantor" and "Grantee," each being individually a "Party."

"Project Facilities" means all land, easements, rights of way, pipelines, buildings, structures and equipment obtained, constructed or otherwise used or to be used by Grantee to provide secondary treatment for up to 25 MGD of primary treated wastewater discharged by the SBIWTP and up to 34 MGD of untreated wastewater discharged by sources in the Tijuana, Mexico area.

"Public Law, as amended" means the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, Pub. L. No 106-457, amended by Pub. L. No. 108-425 (H.R. 4794), 118 Stat. 2420 (codified as amended at 22 U.S.C. 277d 43-46) (2004).

"RWQCB" means the Regional Water Quality Control Board, San Diego Region.

"SBIWTP" means the South Bay International Wastewater Treatment Plant located near San Diego, California.

"SBIWTP Land Use Agreement" has the meaning set forth in Section 3.4.

"SBOO" means the South Bay Ocean Outfall located off San Diego, California.

"Subcontract" means the contract to be awarded by Grantee for design, construction and operation of the Project Facilities.

Term Sheet" means the non-binding Fee-for-Services Contract Term Sheet attached hereto as Exhibit B".

"Uncontrollable Circumstances" means circumstances beyond the reasonable control of Grantee, including without limitation Acts of God, or of the public enemy, acts of government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. Uncontrollable Circumstances shall not include acts of the Mexican Government relating to the activities of Grantee described in Sections 3.1.

"U.S. Facilities" means the portion of the Project Facilities to be constructed and operated in the United States of America.

"U.S. Government" means the government of the United States of America.

## ARTICLE II

### GRANT OF EXCLUSIVE RIGHTS

2.1 Grant of Exclusive Development Rights. Until and unless this Agreement is terminated in accordance with the provision of Article 5:

(a) Grantor grants to Grantee the exclusive right as Contractor of the USIBWC to pursue the acquisition of permits approvals, financing and other prerequisites to the design, construction, ownership, operation and maintenance of all land, rights of way, facilities and services in Mexico to provide secondary treatment and effluent discharge for up to 25 MGD of advanced primary treated wastewater discharged by the SBIWTP and 34 MGD of untreated wastewater discharged by sources in the Tijuana, Mexico area, all subject to the terms and conditions required by the IBWC and the Government of Mexico.

(b) Grantor will not directly or indirectly grant any rights to any third party, nor authorize or permit any third party to undertake activities that are inconsistent with the rights granted to Grantee pursuant to Section 2.1(a), nor will Grantor provide to any third party any designation or characterization that would be inconsistent with the descriptions set forth in Section 2.1(b). This provision does not affect in any way the USIBWC's continuing and unimpeded operation or measures to achieve compliance with the NPDES permit of the SBIWTP and in no way prevents the USIBWC from recognizing the rights of the Mexican Section and the Government of Mexico. Furthermore, this provision in no way prevents the Government of Mexico from granting any rights, directly or indirectly, to any third party in Mexico which may be perceived as inconsistent with this Agreement

2.2 Acknowledgement of Grantee Rights. Grantee acknowledges that it is undertaking the activities contemplated by Section 2.1 at its own risk and expense and that neither Grantor nor any other branch of the U.S. Government, shall have any financial responsibility in respect to activities undertaken by Grantee.

## ARTICLE III

### OBLIGATIONS OF GRANTEE

3.1 Development Activities. Grantee shall achieve the following activities, at its sole expense:

(a) Obtain all rights necessary to purchase the real estate necessary for the Project Facilities in Mexico on or before September 12, 2006, subject to the approval of the IBWC and the BTC regarding site selection;

(b) Obtain all rights necessary to acquire rights-of-way in Mexico and the United States for the siting of, or use in connection with, the Project Facilities on or before September 12, 2006, subject to the approval of the IBWC and the BTC;

(c) Obtain all permits necessary to commence construction of the Project Facilities, both in Mexico and in the United States on or before May 2, 2007, including an

NPDES permit for the Mexican facility, to the extent allowed by the RWQCB, for the discharge coming into the United States at the border of the United States and Mexico;

(d) Make all reasonable efforts to obtain on or before September 12, 2006, a new NPDES permit for the discharge from the Project Facilities into the United States land outfall pipeline.

(e) Obtain on or before May 2, 2007 from the Mexican Government, in form and substance satisfactory to Grantee and IBWC, all necessary approvals to treat to secondary standards up to 34 MGD of untreated wastewater discharged by sources in the Tijuana, Baja California, Mexico area, and 25 MGD currently treated to the advanced primary level at the SBIWTP;

(f) Award, execute and deliver, on or before May 2, 2007 subject to the procedures set forth in Section 3.2, the Subcontract and other contracts necessary for construction of the Project Facilities in accordance with Mexican law, the Public Law, as amended, Minute 311, and the approval of IBWC and the BTC;

(g) Secure, on or before May 2, 2007, with the proceeds deposited in a trust account, all debt and equity financing (in an 80/20 ratio) necessary to construct the Project Facilities and to provide for necessary and appropriate ancillary costs including, without limitation, engineering fees, financing costs and expenses, bond insurance, interest during construction, a debt service reserve, a developer fee and working capital reserves;

(h) In connection with the financing of the cost of construction of the Project Facilities, Grantee will enter into an agreement with an institutional trustee in the United States, which will act as trustee of the proceeds of the construction financing. The trustee will release construction funds and all ancillary costs and expenses, including the developer fee, according to a draw schedule agreed to by the Grantor. No Development Fee will be paid to the Grantee until the Project Facilities are fully operational and effluent is in full compliance with all effluent standards, including NPDES permit(s) standards;

(i) Project facilities will be fully operational and in compliance with all applicable effluent standards and limitations including NPDES permit(s) by September 30, 2008. Any schedule for completion of project facilities, including milestone dates, that is not in conformance with the Court Ordered Compliance Schedule is subject to approval by United States District Court. Grantee will indemnify Grantor for any fines or costs imposed on the Grantor for failure to meet the September 30, 2008 Court ordered deadline.

3.2 Procedures for Award of Subcontract. In general, the Grantee proposes, subject to approval by the IBWC, that the Subcontract for the design, construction, operation and maintenance of Project Facilities, shall be procured through the use of competitive procedures, consistent with Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) and consistent with Minute 311, which requires the use of competitive procedures applicable in Mexico, and in compliance with the Court Order, as may be amended.

(a) Solicitation documentation relating to the Subcontract prepared by Grantee for general distribution (including Requests for Qualifications and Requests for

Proposals) shall be submitted for review, comment and approval by the IBWC and the BTC before distribution to prospective contractors. The solicitation documentation shall be in accordance with Mexican procurement law and shall be approved by the IBWC.

(b) Grantee shall negotiate the terms and conditions of the Subcontract with a contractor selected in cooperation with the BTC and the IBWC and will provide to the IBWC copies of the proposed execution version of the Subcontract for approval. Grantee will not execute and deliver the Subcontract absent the approval of the IBWC.

3.3 Negotiation and Drafting of Fee for Services Contract. Promptly following the execution and delivery of this Agreement, Grantee shall negotiate with Grantor in good faith the terms and conditions of a final form of Fee-for-Services Contract based on the Term Sheet. The final form of the Fee-for-Services Contract will be completed on or before March 31, 2006.

3.4 Negotiation and Drafting of SBIWTP Lease or License. Promptly following the execution and delivery of this Development Agreement, Grantee shall negotiate with Grantor in good faith the terms and conditions of a license (the "SBIWTP Land Use Agreement") to use, at no or nominal cost to Grantee, such portions of the SBIWTP site as are necessary to construct, operate and maintain, for the term of the Fee-for-Services Contract, those pumps, pipelines, and other U.S. Facilities that are to be located on the SBIWTP site.

3.5 Preparation of the Critical Path Schedule. Promptly following the execution and delivery of this Agreement, Grantee shall generate a "Critical Path Schedule" for the Project Facilities utilizing Critical Path Management Method (CPMM) software to define, track, and report the design and construction phases of the Project Facilities from the date of this Agreement until the beginning of NPDES compliant operation and maintenance of the Project Facilities. The Critical Path Schedule shall be updated daily and be in accordance with the provisions of the Court Order. Grantee shall provide Grantor full access to Grantee's Critical Path Schedule to enable Grantor to comply with the provisions of the Court Order requiring a Critical Path Schedule.

3.6 Cost Expectations. Grantee shall undertake the efforts and activities described in this Article III with the objective of minimizing the amount to be paid by the IBWC under the Fee-for-Services Contract. Grantee believes that the first full year cost to the IBWC under the Fee-for-Services Agreement will be between \$29 million and \$39 million and, based on currently available information and projections, is likely to cost approximately \$34 million. Grantee will exercise good faith efforts, consistent with developing, constructing and operating high quality, high reliability Project Facilities, to use value-engineering and other measures with a view to achieving a first full year cost of \$30 million or lower.

## ARTICLE IV

### OBLIGATIONS OF GRANTOR

4.1 Negotiation and Drafting of Fee-for-Services Contract. Promptly following the execution and delivery of this Agreement, Grantor shall negotiate with Grantee in good faith the terms and conditions of a final form of the Fee-for-Services Contract based on the Term Sheet. It is Grantor's expectation that such negotiation and drafting of the final form of the Fee-for-Services Contract will be completed on or before March 31, 2006. Grantor understands and acknowledges that Grantee will not issue solicitation for the Subcontract before negotiation and drafting of the final form of Fee-for-Services Contract are complete.

4.2 Implementation Minute. The Grantor shall undertake all reasonable efforts to negotiate and draft a new IBWC Minute for an operating lease arrangement contract, as provided for in Minute 311, for the financing and development of the engineering, construction, operation and maintenance of the facilities in Mexico.

4.3 Reasonable Efforts to Request Appropriation for Fiscal Year 2008. Grantor will make reasonable efforts to request appropriations in Grantor's budget for FY 2008. Reasonable efforts equate to requesting funding for the Fee-for-Services Contract in the Grantor's Budget request to the United States Department of State beginning in FY 2008. USIBWC's obligation to make any payments for wastewater treatment services rendered will be subject to the availability of annual funds duly appropriated by the U.S. Government to it for this purpose. This Development Agreement does not constitute a guarantee of any current or future payments by the USIBWC and nothing in this Development Agreement shall be construed as requiring the U.S. Government to appropriate or obligate funds for any purpose, including but not limited to, the design, development, financing, permitting, construction, operation or maintenance of any wastewater facilities, or for repayment of any funds expended or committed by Grantee in connection with development of the Project Facilities, or for the treatment of wastewater utilizing the Project Facilities. There is no full faith and credit of the United States pledged under this Agreement to make any payment to the Grantee for any expenses or costs incurred before, during or after the Development Agreement or Fee for Services Agreement.

4.4 Negotiation and Drafting of SBIWTP License. Promptly following the execution and delivery of this Agreement, Grantor shall negotiate with Grantee in good faith the terms and conditions of the SBIWTP Land Use Agreement.

4.5 Execution and Delivery of Fee-For-Services Contract. At such time as:

- (a) Grantee has accomplished all of the tasks set forth in Section 3.1 to the satisfaction of the Mexican authorities and the IBWC;
  - (b) The new NPDES permit referred to in Section 3.1(d) and Section 4.1 has been issued; and
- 

(c) Grantee has established, to the reasonable satisfaction of Grantor, that the total first full year cost for wastewater treatment services under the Fee for Services Contract (i) reflects local market costs, as determined by a competitive bidding process pursuant to applicable U.S. and Mexican laws and (ii) does not exceed \$39 million; then, simultaneously with

- (A) acquisition of the Mexican real estate referred to in Section 3.1(a);
- (B) acquisition of the rights-of-way referred to in Section 3.1(b); and
- (C) closing of the debt and equity financings referred to in Section 3.1(f),

Grantor shall execute and deliver the Fee-for- Services Contract and the SBIWTP Land Use Agreement.

## ARTICLE V

### TERMINATION

5.1 Automatic Termination. This Agreement shall automatically terminate and be of no further force and effect:

- (a) If the dates called for in this agreement that require approval by the United District Court are not approved by the United States District Court; or
- (b) upon written agreement of the Parties; or
- (c) upon the effective date of the Fee-for-Services Contract.

5.2 Termination by Grantee. Grantee may terminate this Agreement upon thirty (30) days written notice to Grantor if:

- (a) The final form of the Fee-for-Services Contract acceptable to both Parties has not been negotiated and drafted by March 31, 2006.

5.3 Termination by Grantor. Grantor may terminate this Agreement upon written notice to Grantee if:

- (a) The final form of Fee-for-Services Contract acceptable to both Parties has not been negotiated and drafted by March 31, 2006; or
- (b) By May 2, 2007 the USIBWC has not obtained reasonable assurance of appropriation (i) for the Fee-for-Services Contract, and (ii) for IBWC funding for the administration and oversight of the design, construction, operation and maintenance of the Project Facilities; or
- (c) Grantee fails to achieve on a timely basis, for reasons other than uncontrollable circumstances, any of the obligations of the Grantee under Article III of this

agreement or any milestone dates set forth herein, including but not limited to those listed in Exhibit A.

5.4 No Monetary Recourse. If this Agreement is terminated for any reason set forth in Article V, neither Party shall have any right to sue nor have recourse to the other for damages, compensation or other monetary relief.

## ARTICLE VI

### MISCELLANEOUS

6.1 Approval of Submittals. Whenever any Grantor approval is contemplated hereunder, Grantor shall make good faith efforts to evidence approval (or disapproval) or the recommendation or document under consideration within twenty (20) business days after receipt of relevant materials from Grantee. If review is not completed in the 20-day time frame then schedule relief equal to one day for every day past the 20-days shall be afforded to Grantee. If review does not result in an approval it shall not count against the 20-day requirement. Should the Grantor disapprove submittal due to incompleteness or poor quality then Grantee shall resubmit submittal.

6.2 Notices. Any and all notices, elections or demands permitted or required to be made under this Agreement shall be in writing, signed by the Party giving such notice, election or demand and shall be delivered personally, or sent by reputable overnight courier or by registered or certified mail, return receipt requested, to the other Party, at its address set forth in this Agreement, or at such other address as may be supplied by written notice given by such Party to the other Party in conformity with the terms of this Section 6.1. Notices shall be effective upon receipt. All notices to Grantor shall be sent to the International Boundary and Water Commission, United States Section, 4171 North Mesa, C-100, El Paso, Texas 79902, Attn: Commissioner, and shall be copied to Susan E. Daniel, Esq., International Boundary and Water Commission, United States Section, 4171 North Mesa, C-100, El Paso, Texas 79902. All notices to Grantee shall be sent to Bajagua, LLC, 160 Industrial Street, Suite 200, San Marcos, California 92078, Attn: Mr. Enrique Landa and shall be copied to Irwin M. Heller, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popco, P.C., One Financial Center, Boston, MA 02111.

6.3 Successors and Assigns. Subject to the restrictions on transfer set forth herein, this Agreement, and each and every provision hereof, shall be binding upon and shall inure to the benefit of the Parties, their respective successors, successors-in-title and assigns, and each and every successor-in-interest to any Party shall hold such interest subject to all of the terms and provisions of this Agreement. Nothing in this Agreement express or implied is intended or shall be construed to give any third party any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenant, condition or provision herein contained.

6.4 Amendments. Amendments may be made to this Agreement from time to time only in writing that is executed by both Parties.

6.5 No Waiver. The failure of either Party to insist upon strict performance of a covenant hereunder or of any obligation hereunder, irrespective of the length of time for which

such failure continues, shall not be a waiver of such Party's right to demand strict compliance in the future. No consent or waiver, express or implied, to or of any breach or default in the performance of any obligation hereunder, shall constitute a consent or waiver to or of any other breach or default in the performance of the same or any other obligation hereunder.

6.6 Entire Agreement. This Agreement and the Exhibit constitute the full and complete agreement of the parties hereto with respect to the subject matter hereof.

6.7 Captions. Titles or captions of Articles or Sections contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

6.8 Counterparts. This Agreement may be executed in any number of counterparts, all of which together shall for all purposes constitute one Agreement, binding on both Parties notwithstanding that all Parties have not signed the same counterpart.

6.9 Applicable Law; Jurisdiction. This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted, construed and enforced in accordance with federal law.

6.10 Notice to Proceed. The signing of this agreement constitutes Notice to Proceed with the provisions set forth in this Agreement.

IN WITNESS WHEREOF, the Parties have mutually executed and delivered this Agreement as of the date first written above.

**INTERNATIONAL BOUNDARY AND WATER  
COMMISSION, UNITED STATES SECTION**

By: \_\_\_\_\_  
Carlos Marin, Acting Commissioner

Date: \_\_\_\_\_

**BAJAGUA, LLC**  
By: Bajagua Water, LLC, its  
Managing Member

By: \_\_\_\_\_  
Enrique Landa, its Manager

Date: FEB 7 2006





Dan Skopec  
Acting Secretary

# California Regional Water Quality Control Board

## San Diego Region

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Arnold Schwarzenegger  
Governor

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(858) 467-2952 • Fax (858) 571-6972  
[http:// www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego)

April 27, 2006

In reply refer to:  
**POTW:01-732.02:ACOE**

Mr. Carlos Marin, Acting Commissioner  
International Boundary and Water Commission  
United States Section  
4171 North Mesa Street, C-310  
El Paso, Texas 79902

Dear Acting Commissioner Marin:

**SUBJECT: REPORTS OF WASTE DISCHARGE, IBWC INTERNATIONAL  
WASTEWATER TREATMENT PLANT, NPDES PERMIT NO. CA0108928**

This letter is in response to the submission of two Reports of Waste Discharge (ROWDs) received by the Regional Board on March 27, 2006. Both ROWDs are for the discharge of up to 25 million gallons per day (MGD) of treated municipal sewage from the International Wastewater Treatment Plant until September 30, 2008 and up to 59 MGD after that date, and describe the same waste sources, waste characterization, and treatment processes. Bajagua submitted both ROWDs, but one lists Bajagua LLC (Bajagua) as the applicant while the other lists the United States Section International Boundary and Water Commission (IBWC) as the applicant.

The ROWD submitted by Bajagua which lists IBWC as the applicant is incomplete because it has not been executed by you in your capacity as principal executive officer of IBWC, as required by Title 40, Code of Federal Regulations, Part 122 – EPA Administered Permit Programs: National Pollutant Discharge Elimination System (NPDES) [40 CFR 122.22(a)(3)]. IBWC has not provided any documentation that Mr. Jim Simmons, "Managing Member" of Bajagua, who purported to execute the ROWD on behalf of the IBWC, is authorized to do so by the cited NPDES regulation, or even by any agreement attempting delegation of your responsibility to Mr. Simmons or Bajagua.

The ROWD listing Bajagua as the applicant also is incomplete because it is not clear that Bajagua, which proposes to discharge effluent derived from its secondary treatment of advanced primary effluent from the IWTP under the terms of a pending contract, is subject to the jurisdiction of the state under the terms of the Porter-Cologne Water Quality Control Act. [Division 7, commencing with Section 13000, of the Water Code; see Section 13260(a)]

*California Environmental Protection Agency*

April 27, 2006

It is not clear what involvement your agency has had with the preparation of either ROWD. Specifically, does your agency stipulate that the information provided in either ROWD is complete and satisfies the requirements of Sections 13376 and 13260 of the Water Code as well as those of the NPDES regulations governing applications for NPDES requirements? Can you delegate your responsibility under Section 122.22(a)(3) to execute any application for NPDES requirements for your agency to Mr. Simmons, or to a private entity such as Bajagua? Have you done so? In any case, the Regional Board would review such a delegation of authority to ensure compliance with the federal regulations.

Until convinced otherwise, I consider IBWC to be the only appropriate entity to receive NPDES requirements for any proposed discharge from the IWTP. No further work will be conducted by the Regional Board regarding the review of the ROWD until the IBWC unequivocally acknowledges, in writing, responsibility for the discharge and for compliance with any NPDES requirements issued by the Regional Board for the discharge in accordance with the signatory provisions of Section 122.22 for federal agencies.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter. If you have any questions, please call me at the above number or Mr. Michael McCann at (858) 467-2988 or e-mail at mmccann@waterboards.ca.gov.

Respectfully,

  
JOHN H. ROBERTUS  
Executive Officer

JHR:bdk:mv

cc: Attn: Jim Simmons  
Bajagua LLC  
160 Industrial Street, Suite 200  
San Marcos, CA 92078

Nancy Yoshikawa  
U.S. EPA Region 9  
75 Hawthorne St. WTR-5  
San Francisco, CA 94105

*California Environmental Protection Agency*





Dan Skopec  
Acting Secretary

# State Water Resources Control Board



Arnold Schwarzenegger  
Governor

## Office of Chief Counsel

1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

May 31, 2006

John J. Lormon, Esq.  
Procopio, Cory, Hargreaves & Savitch LLP  
530 B Street, Suite 2100  
San Diego, CA 92101

Dear Mr. Lormon:

### PETITIONS OF BAJAGUA LLC, SAN DIEGO REGION: NO REVIEW OF PETITIONS

The State Water Resources Control Board (State Water Board) will not accept for review the petitions you filed on behalf of Bajagua LLC. The basis for the petitions is a letter signed by the Executive Officer of the San Diego Regional Water Quality Control Board (San Diego Water Board).

According to the petitions, your client filed two Reports of Waste Discharge (ROWDs). The Executive Officer's letter explains why he questions whether your client was authorized to sign the ROWDs and asks several questions, which appear intended to determine whether the signature is adequate. The letter is addressed to the applicant listed on the ROWDs. This letter appears to be a preliminary step in evaluating completeness of the ROWDs and whether they comply with relevant regulatory requirements. The letter does not appear to be a final action of the San Diego Water Board or a denial of a permit.

Because the letter is not a final action, the State Water Board will not accept the petition. Should the San Diego Water Board act to deny a permit, a petition would be appropriate at that time.

Sincerely,

Elizabeth Miller Jennings  
Staff Counsel IV

cc: Mr. John Robertus [via email only]  
Executive Officer  
San Diego Regional Water Quality  
Control Board  
9174 Sky Park Court  
San Diego, CA 92124-1331

John W. Richards, Esq. [via email only]  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Floor [95814]  
P.O. Box 100  
Sacramento, CA 95812-0100

Continued next page

John J. Lorman

- 2 -

May 31, 2006

cc: Mr. Carlos Marin, Acting Commissioner  
International Boundary and  
Water Commission  
United States Section  
4171 North Mesa Street, C-310  
El Paso, TX 79902





Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board San Diego Region

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<http://www.waterboards.ca.gov/sandiego>

August 21, 2006

Post-it* Fax Note	7671	Date	8/21/06	# of pages	2
To	John Lormon	From	John Robertus		
Co./Dept	Procopio, Cory...	Co.	Water Board		
Phone #		Phone #	858-467-2987		
Fax #	619-744-5417	Fax #			

Mr. Jim Simmons  
Bajagua LLC  
160 Industrial Street, Suite 200  
San Marcos, CA 92078

## BAJAGUA REPORT OF WASTE DISCHARGE

Dear Mr. Simmons:

As I noted in my August 4, 2006 letter to Commissioner Carlos Marin of the International Boundary and Water Commission, United States Section (IBWC), I do not intend to recommend that the Regional Water Board issue NPDES requirements for a discharge of wastewater originating in Mexico through the South Bay Ocean Outfall unless the IBWC is named as a discharger. As a result, the Report of Waste Discharge submitted on behalf of Bajagua is not needed for the purpose of permitting any discharge from the International Wastewater Treatment Plant (IWTP), including any secondary treatment facility operated in conjunction with the IWTP by Bajagua or any other entity. In addition to the IBWC, the Regional Board may name IBWC contractors, including Bajagua, as jointly and severally responsible with IBWC for compliance with any NPDES requirements eventually issued for such a discharge.

The Report of Waste Discharge submitted on behalf of the IBWC is still incomplete, for reasons stated in our letters of April 27 and August 4, 2006. When the deficiencies have been corrected, this Report of Waste Discharge will be used as the basis for the issuance or modification of any NPDES requirements necessary to regulate a discharge from the IWTP and any secondary treatment facility operated in conjunction with the IWTP through the South Bay Ocean Outfall.

*California Environmental Protection Agency*



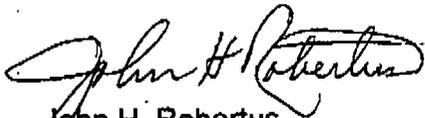
Mr. Jim Simmons

- 2 -

August 21, 2006

Please call me at the number on the letterhead if you have any questions or wish to discuss this matter further.

Respectfully,



John H. Robertus  
Executive Officer  
San Diego Regional Water Quality Control Board

cc: Alexis Strauss, U.S. EPA  
Carlos Marin, IBWC  
Carol Squire, Attorney General's Office

***California Environmental Protection Agency***

