

**REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**EXECUTIVE OFFICER SUMMARY REPORT
May 12, 2021**

ITEM 4

SUBJECT

NPDES Permit Reissuance: Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission, South Bay International Wastewater Treatment Plant, Discharge to the Pacific Ocean through the South Bay Ocean Outfall, San Diego County (Tentative Order No. R9-2021-0001, NPDES No. CA0108928). (*Vicente Rodriguez and Keith Yaeger*)

STAFF RECOMMENDATION

Adoption of Tentative Order No. R9-2021-0001 (Tentative Order; **Supporting Document No. 1**) is recommended.

KEY ISSUES

1. **Influent Limitations and Source Control Requirements.** The influent to the South Bay International Wastewater Treatment Plant (SBIWTP or Facility) is primarily comprised of wastewater from the City of Tijuana, Baja California, Mexico. The Tentative Order carries over influent limitations from the current Order, *Order No. R9-2014-0009, as Amended by Order Nos. R9-2014-0094, R9-2017-0024, and R9-2019-0012, NPDES No. CA0108928, Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission, South Bay International Wastewater Treatment Plant, Discharge to the Pacific Ocean via the South Bay Ocean Outfall* (Order No. R9-2014-0009). The United States (U.S.) Section of the International Boundary and Water Commission (USIBWC), the entity that owns and operates the SBIWTP, is also required to develop and implement an influent limitation study if USIBWC becomes aware that the influent has significantly changed. The Tentative Order also includes source control provisions that require USIBWC to communicate with interested stakeholders about any issues USIBWC has regarding influent quality. The U.S. Environmental Protection Agency (USEPA) strongly supports the inclusion of the influent limitations and the proposed source control provisions to protect the SBIWTP from pollutants that could pass through or interfere with its wastewater treatment processes or operations.
2. **Transboundary Flows.** Water and wastewater that flows across the U.S.-Mexico international border into the U.S. are referred to as “transboundary flows” in the Tentative Order. Transboundary flows impact the Tijuana River Valley of the U.S. at various points including the Tijuana River and Estuary, tributary canyons thereto, as well as downstream beach coastal waters of the Pacific Ocean. USIBWC has installed canyon collector systems to divert dry weather transboundary flows from some of the canyons located at the international border for treatment at the SBIWTP and disposal through the South Bay Ocean Outfall (SBOO) to the Pacific Ocean. The five canyon collector systems are located at Goat Canyon, Smuggler’s Gulch, Cañon del Sol, Silva Drain, and Stewart’s Drain (**Supporting Document**

No. 2). The Tentative Order regulates these canyon collector systems as part of the SBIWTP facility and requires that USIBWC properly inspect, operate, and maintain them to minimize the discharge of dry weather transboundary flows into the Tijuana River Valley and downstream into beach coastal waters of the Pacific Ocean.

- 3. Receiving Water Monitoring Requirements.** The Tentative Order includes a comprehensive, question-driven effluent and receiving water monitoring and reporting program similar to other recently adopted National Pollutant Discharge Elimination System (NPDES) permits in the San Diego Region. The Surfrider Foundation recommended that the Tentative Order be revised to also include implementation of a real-time prediction and reporting model for the South San Diego ocean region, including the SBOO, the Tijuana River and Estuary, and related receiving ocean waters, coastal waters, and beaches. The Tentative Order originally included an extensive monitoring program in the Tijuana River Valley. USIBWC disagrees with the San Diego Water Board's authority to require monitoring within the Tijuana River Valley as USIBWC asserts that they have no control over transboundary flows and transboundary flows are not discharges within the meaning of the Clean Water Act. While the San Diego Water Board disagrees with USIBWC's assertion, the Tentative Order was revised to scale back the Tijuana River Valley monitoring program to reduce duplicative monitoring that is already being conducted by several other entities in the Tijuana River Valley.

PRACTICAL VISION

Consistent with the mission of the Strategy for Healthy Waters chapter of the Practical Vision, the Tentative Order integrates all applicable technology-based requirements, water quality-based effluent limitations, and receiving water quality standards to optimize protection of water quality and beneficial uses in the Pacific Ocean. Additionally, the Tentative Order has provisions allowing for participation in regional monitoring and assessment programs in keeping with San Diego Water Board Resolution No. R9-2012-0069, *Resolution in Support of a Regional Monitoring Framework*.

DISCUSSION

The SBIWTP discharges secondary-treated wastewater to the Pacific Ocean through the SBOO, which is jointly owned and operated by USIBWC and the City of San Diego (City). The SBIWTP is authorized to discharge a monthly average of up to 25 million gallons per day (MGD) to the SBOO, and the City is authorized to discharge a monthly average of up to 15 MGD from South Bay Water Reclamation Plant (SBWRP). The total permitted flow from all dischargers to the SBOO is 40 MGD.

The discharge from the SBWRP is regulated by a separate individual NPDES permit issued to the City. The reissuance of the NPDES permit for the SBWRP is also being considered by the San Diego Water Board at today's meeting under Agenda Item No. 3.

The SBIWTP's discharge to the SBOO is currently regulated by Order No. R9-2014-0009, NPDES No. CA0108928. The Tentative Order will, if adopted, supersede Order No. R9-2014-0009 and reissue the NPDES permit for the SBIWTP discharge to the SBOO for a five-year term. The Tentative Order was developed based on information from USIBWC's reissuance application, self-monitoring reports, and other available sources (e.g., inspection reports, meetings, and emails with USIBWC). A description the SBIWTP and

the related facilities can be found in **Supporting Document No. 1**, Attachment F, section 2.1. The locations of these facilities are shown in the figures included in **Supporting Document No. 2**.

The Tentative Order was noticed for a public hearing and released for public review and comment for a 30-day period on February 23, 2021. The public comment period closed on March 25, 2021. The San Diego Water Board received five comment letters regarding the Tentative Order during the comment period (**Supporting Documents Nos. 3 through 7**). The San Diego Water Board received an additional comment letter from the City regarding the Tentative Order after the close of the comment period (**Supporting Document No. 8**). The San Diego Water Board Chair accepted the City's late comment letter into the record for this matter. Acceptance of this late comment letter will not prejudice any party or the Board because these comments are substantively the same comments on Agenda Item No. 3 but should also be applied to USIBWC's Tentative Order for consistency. The comment letters have been provided to San Diego Water Board Members for consideration and are available for review by interested persons upon request. The Response to Comments Report (**Supporting Document No. 9**) contains the San Diego Water Board responses to all the comments received and, if applicable, describes actions taken to revise the Tentative Order in response to the comments received. A copy of the Response to Comments Report and the Revised Tentative Order (**Supporting Document No. 1**) were provided to USIBWC.

The following is a summary of the most significant comments and the responses to those comments:

1. *USIBWC states that the San Diego Water Board lacks the authority to require communication, coordination, or binational meetings with the Mexican Section of the International Boundary and Water Commission, or any foreign governments.*

The comment on this issue is summarized and responded to in Comment No. 1.21 of the Response to Comments Report.

The San Diego Water Board recognizes that the reduction, prevention, and elimination of transboundary flows is a complex issue. The Tentative Order has been revised to focus on outcome-based requirements without specifying the method of compliance. The San Diego Water Board can require compliance with these outcome-based requirements because they do not require USIBWC to communicate, coordinate, or meet with the Mexican Section of the International Boundary and Water Commission or any foreign governments.

For instance, the Tentative Order has been modified to require USIBWC to consult or coordinate with "interested stakeholders" when appropriate. Interested stakeholders may include, but are not limited to, the San Diego Water Board, USEPA, the County of San Diego, the City of San Diego, the City of Imperial Beach, California State Parks, U.S. Fish and Wildlife, the California Department of Fish and Wildlife, non-governmental organizations (NGOs) (e.g., Tijuana-based Tijuana Calidad de Vida and Proyecto Fronterizo de Educación Ambiental, WILDCOAST, Surfrider Foundation San Diego, and San Diego Coastkeeper), and international partners, such as the Mexican Section of the International Boundary and Water Commission. While USIBWC is not required to consult or coordinate

with the Mexican Section of the International Boundary and Water Commission, the San Diego Water Board encourages and recommends USIBWC engage with a diverse group of interested stakeholders to address transboundary flows and source control issues. A diverse group of interested stakeholders will provide USIBWC with unique insights into the challenges and potential solutions for addressing transboundary flows and source control issues.

2. *USIBWC states that it is not subject to State of California (State) law regarding monitoring and reporting and the San Diego Water Board can only impose monitoring and reporting requirements to the extent authorized by the federal Clean Water Act (CWA).*

The comment on this issue is summarized and responded to in Comment No. 1.18 of the Response to Comments Report.

The CWA contains a waiver of federal sovereign immunity which subjects federal facilities, including the SBIWTP, to State water pollution laws. Specifically, section 313 of the CWA states: “Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution” (33 U.S.C. § 1323, subd. (a).) This waiver of federal sovereign immunity applies “to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever)” (33 U.S.C. § 1323, subd. (a).)

The clear language in section 313 of the CWA means USIBWC is subject to State monitoring and reporting laws, including California Water Code (Water Code) sections 13267 and 13383. Thus, the Tentative Order appropriately includes monitoring and reporting requirements based on federal and State law.

3. *USIBWC states that transboundary flows through the canyon collector systems are merely the movement of water from upstream to downstream sections of the same waterway, such that they are not discharges of a pollutant under the CWA and cannot be regulated by the San Diego Water Board.*

The comment on this issue is summarized and responded to in Comment No. 1.13 of the Response to Comments Report.

The Tentative Order serves as an NPDES permit under the federal CWA and waste discharge requirements (WDRs) under the Water Code. The CWA regulates discharges of a pollutant. As defined by the CWA, “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362, subd. (12).) USIBWC’s comment alleges that the mere movement of water through the canyon collector systems does not constitute the addition of a pollutant (i.e., they do not add any pollutants to the transboundary

flows). However, flows through the canyon collector systems often deposit sediment and other pollutants in the canyon collector systems. Successive transboundary flows may pick up, or resuspend, sediment and pollutants already in the canyon collector systems. These resuspended sediment and pollutants constitute the addition of pollutants to the transboundary flows. Thus, transboundary flows can constitute the discharge of a pollutant under the CWA subject to regulation by the San Diego Water Board.

Moreover, the Water Code does not rely on the CWA definition of “discharge of a pollutant.” Instead, the Water Code regulates the discharge of waste. Under the Water Code, the discharge of waste is not specifically defined, but broadly understood as the release of sewage or any other waste substance. (See Wat. Code, § 13050, subd. (d) [defining “waste”].) Transboundary flows often contain significant amounts of sewage and thus are waste. To the extent such waste flows through the canyon collector systems, that release constitutes a discharge. Thus, transboundary flows through the canyon collector systems can constitute the discharge of waste under the Water Code subject to regulation by the San Diego Water Board.

The San Diego Water Board has sufficient authority under the federal CWA and the Water Code to regulate transboundary flows.

4. *USIBWC states that Discharge Prohibition 3.1 is unclear and requires clarification.*

The comment on this issue is summarized and responded to in Comments No. 1.9 and 1.10 of the Response to Comments Report.

Discharge Prohibition 3.1 of the Tentative Order, states: “The discharge of waste from the Facility not treated by a secondary treatment process and not in compliance with the effluent limitations specified in section 4.1 of this Order, or to a location other than Discharge Point No. 001, unless specifically regulated by this Order or separate WDRs, is prohibited.”

Discharge Prohibition 3.1 is appropriately written to recognize the Tentative Order’s limited authorization to discharge secondary-treated wastewater through the SBOO and into the Pacific Ocean, upon compliance with certain conditions and requirements. (Tentative Order, § 2.1.; see also 33 U.S.C. § 1342; Water Code, § 13263.) Except as specifically regulated by the order, the Tentative Order does not purport to authorize any other discharges from the Facility.

However, Discharge Prohibition 3.1 also recognizes that other discharges from the Facility may be authorized and regulated by separate WDRs. If USIBWC is discharging waste from the Facility without appropriate WDRs, it should submit a report of waste discharge and seek appropriate permit coverage for the discharge. (Wat. Code, §§ 13260, 13263.)

The Fact Sheet in Attachment F of the Tentative Order, clarifies that Discharge Prohibition 3.1 “also applies to any dry weather discharges of waste overflowing the canyon collector systems.” (Fact Sheet, § 6.2.2.1.3., F-49.) In separate provisions, the Tentative Order also requires USIBWC to remediate certain types

of transboundary flows.

The Revised Tentative Order (**Supporting Document No. 1**) displays the changes made after the February 23, 2021, public release in red-underline for added text and ~~red-strikeout~~ for deleted text. Some changes have been made in response to the comments received, and other changes were made to correct minor editorial errors and to be consistent with the SBWRP Tentative Order for the SBOO which is also being considered by the San Diego Water Board at today's meeting under Agenda Item No. 3.

SIGNIFICANT CHANGES

The following are the significant differences between the Tentative Order and the current Order:

1. The Tentative Order requires USIBWC to monitor the receiving water for human marker (HF-183) when the overall compliance rate for bacteria receiving water limitations specified in the Order are below 90 percent at the offshore and kelp monitoring stations, or when bacteria receiving water limitations are exceeded more than 50 percent of the time at a single offshore or kelp monitoring station.
2. The Tentative Order requires USIBWC to prepare and submit a Climate Change Action Plan within three years of the effective date of the Order.
3. The Tentative Order includes several provisions which require USIBWC to remediate spill events and requests that USIBWC remediate other transboundary flows as much as reasonably possible for the protection of downstream water quality and beneficial uses.
4. The Tentative Order requires USIBWC to communicate, coordinate, and meet with interested stakeholders when appropriate. However, USIBWC may and is encouraged to include the Mexican Section of the International Boundary and Water Commission and any foreign governments as part of interested stakeholders.
5. The Tentative Order adds the Tijuana River Valley Monitoring Program to the Monitoring and Reporting Program in Attachment E of the Tentative Order. The Tijuana River Valley Monitoring Program is intended to evaluate the water quality and beneficial use impacts of canyon collector transboundary flows on waters of the U.S. and State.

COMPLIANCE RECORD

From August 2014 through January 2021, USIBWC reported 46 effluent violations and 45 deficient monitoring report violations. Details of these violations are contained in the compliance summary information provided in **Supporting Document No.1**, Attachment F, section 2.4. To address these violations, the San Diego Water Board issued three Staff Enforcement Letters and three Notices of Violation. USIBWC also received notifications of the violations through the California Integrated Water Quality System.

PUBLIC NOTICE

The Tentative Order was noticed and released for public review and comment on

February 23, 2021, with comments due March 25, 2021. The Notice of Public Hearing and Comment Period (Notice) was posted on the San Diego Water Board website for the duration of the comment period and sent to all interested parties. The Notice announced a public hearing to be held on May 12, 2021; availability of the Tentative Order for review; and provided instructions for submittal of written comments. A copy of the Notice is provided in **Supporting Document No. 10**. Notice of the public hearing on the Tentative Order was also provided in the Meeting Notice and Agenda for the May 12, 2021 San Diego Water Board meeting, which is posted on the Board website.

LEGAL CONCERNS

None

SUPPORTING DOCUMENTS

1. Revised Tentative Order
2. Location Map
3. Comment letter and attachments from USIBWC
4. Comment letter from the City of Imperial Beach
5. Comment letter from WILD Coast
6. Comment letter from San Diego Unified Port District
7. Comment letter from Surfrider Foundation San Diego
8. Comment letter from the City of San Diego
9. Response to Comments Report
10. Notice of Public Hearing and Comment Period