

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

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

ITEM 5

SUBJECT

Cease and Desist Order (CDO) for the United States Section of the International Boundary and Water Commission (USIBWC) South Bay International Wastewater Treatment Plant (SBIWTP) discharge to the Pacific Ocean through the South Bay Ocean Outfall (Tentative CDO No. R9-2021-0107). (*Vicente Rodriguez, Keith Yaeger*)

STAFF RECOMMENDATION

Adoption of the revised Tentative CDO No. R9-2021-0107 (Tentative CDO; **Supporting Document No. 1**) is recommended.

KEY ISSUES

The Tentative CDO addresses discharges from the SBIWTP that are taking place in violation of the requirements of the Order No. R9-2014-0009, *Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission South Bay International Discharge to the Pacific Ocean Through the South Bay Ocean Outfall* (2014 Permit), and threatening to take place in violation of the requirements of Tentative Order No. R9-2021-0001, *Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission South Bay International Discharge to the Pacific Ocean Through the South Bay Ocean Outfall* (2021 Permit). The Tentative CDO, if adopted by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), would require USIBWC to address shortcomings, inadequacies, and maintenance issues with regard to control measures at SBIWTP needed to attain consistent compliance with the requirements of the 2021 Permit.

PRACTICAL VISION

Consistent with the mission of the Strategy for Healthy Waters chapter of the Practical Vision, the Tentative CDO requires USIBWC to comply with all technology and water quality-based effluent limitations to optimize protection of water quality and beneficial uses in the Pacific Ocean.

DISCUSSION

Discharges from the SBIWTP through the South Bay Ocean Outfall to the Pacific Ocean are currently regulated under the requirements of National Pollutant Discharge Elimination System (NPDES) Permit No. CA0108928, which was issued by the San Diego Water Board as the 2014 Permit. The 2014 Permit expired on July 31, 2018, but remains in effect until such time as it is superseded by a new reissued NPDES permit. The San Diego Water Board will consider the reissuance of NPDES Permit No. CA0108928 in the 2021 Permit at the May 2021 San Diego Water Board meeting. (See Agenda Item 4.)

The SBIWTP treats sewage flows collected from the City of Tijuana, Baja California, Mexico that exceed the capacity of Tijuana's sewage treatment and conveyance facilities.

The SBIWTP also treats some transboundary flows in the canyons and gullies that empty from Tijuana into the Tijuana River Estuary on the United States side of the international border. Due to inoperable sluice gates on Junction Box 1 of the SBIWTP, USIBWC currently has no ability to control wastewater flows coming into the plant other than communications with USIBWC's counterparts in Mexico to limit flows. USIBWC reports that since approximately August 2020, the SBIWTP has been accepting influent flows from Mexico beyond the design capacity of the secondary treatment processes. Between November 2020 and January 2021, the excess flow has caused 46 exceedances of effluent limitations contained in 2014 Permit and threatens to continue violations of the same requirements in the 2021 Permit. Additionally, USIBWC has failed to timely submit transboundary flows reports, identify permit violations in monitoring reports, and submit written reports addressing the violations, as required by the 2014 Permit. USIBWC threatens to violate the same requirements in the 2021 Permit.

The Tentative CDO was noticed for a public hearing and released for public review and comment for a two-week period on March 30, 2021. The public comment period closed on April 13, 2021. The San Diego Water Board received two comment letters regarding the Tentative CDO during the comment period (See **Supporting Document No. 2 and 3**). The Response to Comments Report (**Supporting Document No. 4**) contains the San Diego Water Board's responses to the comments and when applicable describes actions taken to revise the Tentative CDO in response to the comments. A copy of the Response to Comments Report and the revised Tentative CDO were provided to interested parties.

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

1. *While it is undisputed that there have been a number of effluent limitation exceedances at the SBIWTP between November 2020 and January 2020, it's important to note that those exceedances occurred in lieu of millions of gallons of untreated transboundary flows flowing through the main channel of the Tijuana River.*

The Clean Water Act (CWA) imposes strict liability for NPDES permit violations based on self-monitoring reports. USIBWC is subject to enforcement for its violations of the 2014 Permit, regardless of the reason for the violations or good faith attempts to prevent or mitigate the violations. USIBWC's assertion that transboundary flows would directly enter the environment without its intervention does not excuse it from meeting compliance obligations to properly operate and maintain the SBIWTP, nor from the duty to comply with the effluent limitations and requirements of the 2014 Permit. Furthermore, while the San Diego Water Board suggested a time schedule order or cease and desist order that would temporarily modify the effluent limits and other provisions of the 2014 Permit to allow the SBIWTP to accept more flow from Mexico; USIBWC made no formal commitment to pursue those options. Accordingly, the San Diego Water Board did not issue an order to provide USIBWC with regulatory assurances for accepting the additional flows.

2. *Mexico is charged with controlling the conveyance system to the SBIWTP such that the flows are managed in accordance with the existing Minutes, at 25 mgd. Nothing in these international agreements vests the U.S. with the authority to cut Mexico off from sending flows to SBIWTP and, in fact, flows conveyed to SBIWTP are to be controlled*

and managed by Mexico through Mexico's conveyance system.

The San Diego Water Board disagrees that the management of flows into the SBIWTP is vested with Mexico and not controlled by USIBWC. USIBWC would have some control of the amount of flow entering the SBIWTP if the sluice gates at Junction Box 1 were properly functioning. At the San Diego Water Board hearing for the issuance of the first NPDES permit for the SBIWTP, USIBWC assured the San Diego Water Board that flows entering the SBIWTP could be controlled at the headworks by gate valves in the junction box. (See generally San Diego Water Board Hearing Transcript (October 10, 1996), Tentative Order No. 96-50 and Tentative Cease and Desist Order No. 96-52, 25:7-13, 96:8-12.) At the time, USIBWC did not qualify its control of influent flows as a matter of international agreement vested in Mexico. Based on USIBWC's previous statements and the San Diego Water Board's understanding of the SBIWTP, USIBWC does have a measure of control over the influent flows entering the SBIWTP.

The Tentative CDO requires USIBWC to make necessary repairs at the SBIWTP needed for proper operations and maintenance of the SBIWTP and to comply with the effluent limitations in the 2021 Permit if adopted. The Tentative CDO does not require USIBWC to "cut Mexico off from sending flows to the SBIWTP". USIBWC can take steps within its exclusive control to regulate the flows into the SBIWTP. For example, USIBWC could consider installation of flow equalization basins designed to provide consistent influent flow to downstream processes by retaining high flow fluctuations. Flow equalization basins could also dampen the concentration and mass flow of wastewater constituents by blending the wastewater in the equalization basins. This could improve the performance of the SBIWTP by providing a more uniform loading of organics, nutrients, and other suspended and dissolved constituents to subsequent downstream processes.

- 3. The Tentative CDO requires USIBWC to comply with specific repairs by specific dates, thus is directing a federal agency with regard to its use of federally appropriated funds, which may violate basic tenets of appropriations law and the Anti-Deficiency Act. The federal government is in full control of how federal funds are expended and the State has no control or authority to direct expenditure of federal funds. Anti-Deficiency Act requires that no agency commit to any expenditure before it receives an appropriation for that expenditure. USIBWC is provided funding for its operations and activities in an annual appropriation by Congress. USIBWC is also not authorized to have expenditures that were not authorized by Congress and submitted in advance by USIBWC.*

Compliance with USIBWC's permit and enforcement actions are reasonable and necessary expenses. (See Exec. Order No. 12088, supra, 43 Fed.Reg. at p. 47708 ["The head of each Executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget."], superseded in part by Exec. Order No. 13148, 65 Fed.Reg. 24595 (Apr. 26, 2000).) USIBWC cannot use its lack of federal appropriations as a shield to avoid compliance with its NPDES permit and related enforcement actions. The San Diego Water Board's mission is to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and

all beneficial uses. The Tentative CDO furthers that mission by ordering consistent compliance with USIBWC's permit and repairs necessary for the proper operation and maintenance of the SBIWTP.

In terms of the repair schedule, the San Diego Water Board requested USIBWC provide a schedule for repairs to the SBIWTP in the December 24, 2020 Compliance Evaluation Inspection Report; the February 5, 2021 Notice of Violation No. R9-2021-0035; and by email on March 12, 2021. USIBWC failed to respond to any of these requests. In the absence of a schedule, the San Diego Water Board included compliance dates that it believes are reasonably achievable. However, the San Diego Water Board can amend the time schedule to better align with USIBWC's budget and appropriations process if USIBWC provides a reasonable schedule with estimated project costs and explanation for the amended schedule.

The revised Tentative CDO (**Supporting Document No. 1**) displays the changes made after the March 30, 2021, public release in red-underline for added text and ~~red-strikeout~~ for deleted text.

PUBLIC NOTICE

The Tentative CDO was noticed and released for public review and comment on March 30, 2021, with comments due by April 13, 2021. The Notice of Public Hearing and Opportunity to Comment (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, provided availability of the Tentative CDO for review, and provided instructions for submittal of written comments. A copy of the Notice is provided in **Supporting Document No. 5**. Notice of the public hearing on the Tentative CDO was also provided in the Meeting Notice and Agenda for the May 12, 2021, San Diego Water Board meeting, which is posted on the San Diego Water Board website.

SUPPORTING DOCUMENTS

1. Revised Tentative CDO
2. Comment Letter from USIBWC
3. Comment Letter from Ms. Marquez-Waller
4. Response to Comments Report
5. Notice of Public Hearing