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Supporting Document No. 4

California Regional Water Quality Control Board
San Diego Region

Response to Comments Report

Tentative Cease and Desist Order No. R9-2021-0107

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

May 12, 2021



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INTRODUCTION

This report contains the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board or Board) responses to written comments received on Tentative Cease and Desist Order No. R9-2021-0107, *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* (Tentative CDO).

The San Diego Water Board provided public notice of the release of the Tentative CDO on March 30, 2021, and provided a period of two weeks for public review and comment on the Tentative CDO. The public comment period ended on April 13, 2021.

<u>Written comments were received from:</u>	<u>Page No.</u>
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2. Viviane Marquez-Waller	31

Comments and Responses

The summarized written comments and San Diego Water Board responses are set forth below. The responses include a description of any actions taken to revise the Tentative CDO in response to the comments. Proposed revisions to the Tentative CDO are in red-underline for added text and ~~red-strikeout~~ for deleted text.

COMMENTS AND RESPONSES

1. The United States Section of the International Boundary and Water Commission (USIBWC)

1.1. Comment

On March 25, 2021, USIBWC submitted a comment letter on Tentative Order R9-2021-0001 and attachments thereto. Because the Tentative CDO identifies as a basis and justification for issuance of [sic] threatened violations of Tentative Order R9-2021-0001, USIBWC hereby incorporates by this reference its March 25, 2021 comments and attachments into this response. See Attachment A, USIBWC March 25, 2021 “Public Comment Letter,” without attachments.¹

Response

Comment Noted. See Response to Comment Report for Tentative Order R9-2021-0001, *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 (2021 Permit)*. For consistency with the 2021 Permit, references to “canyon collectors” in the Tentative CDO have been revised to “canyon collector systems.”

Action Taken

None.

1.2. Comment

While it is undisputed that there have been a number of effluent limitation exceedances between November 2020 and January 2021, it is 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 (also referred to as River). In fact, earlier in 2020, the U.S. Environmental Protection Agency (EPA) and Regional Board had requested South Bay Wastewater International Treatment Plant (SBIWTP) take on additional similarly sized flows directly from the River as a “pilot project.” Indeed, the Tentative CDO rests on a number of factual inaccuracies and, what appears to be, a fundamental misunderstanding concerning the primary cause of the effluent exceedances. The primary cause of the effluent exceedances was due to a high volume of effluent from Mexico in excess of the SBIWTP’s design capacity that caused stress on the SBIWTP systems resulting in the exceedances noted in the Tentative CDO. It was not due to a failure in the SBIWTP equipment under normal operating circumstances.

¹ While the attachments to the previous comment letter are not included here, those exhibits and attachments to the comment letter, forwarded to the Regional Board on March 25, 2021 via email, FedEx, and FTP site should also be reflected in the administrative record for this action.

Response

The Tentative CDO includes findings that USIBWC violated Order No. R9-2014-0009, as amended by Order Nos. R9-2014-0094, R9-2017-0024 and R9-2019-0012, *Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission, South Bay International Discharge to the Pacific Ocean Via the South Bay Ocean Outfall* (2014 Permit). Specifically, between November 2020 and January 2021, USIBWC self-reported 46 exceedances of effluent limitations contained in the 2014 Permit. (Tentative CDO, ¶ 7.) These exceedances were self-reported by USIBWC to the San Diego Water Board under penalty of perjury. The San Diego Water Board agrees that the self-reported exceedances are undisputed.

The San Diego Water Board also agrees that the exceedances at the SBIWTP are attributable to the higher volume of wastewater flows entering the SBIWTP from Mexico. Flows to a treatment plant that exceed the treatment work's capacity can result in inadequate treatment, which can harm beneficial uses. However, the SBIWTP would have control of the amount of flow entering the SBIWTP if the sluice gates at Junction Box 1 were properly functioning. USIBWC is required to properly operate and maintain the SBIWTP. Proper operations and maintenance may include ensuring that flows entering the treatment works do not exceed design capacity. 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.²

USIBWC's comment also notes that the United States Environmental Protection Agency (USEPA), the San Diego Water Board, and USIBWC previously discussed a temporary river diversion to reduce or eliminate transboundary flows crossing the Tijuana River at the border. USEPA, the San Diego Water Board, and USIBWC engaged in extensive discussions on how the San Diego Water Board could provide regulatory assurances to USIBWC if it were to accept additional flows for treatment. The San Diego Water Board suggested a time schedule order or cease and desist order that would temporarily modify the 2014 Permit's effluent limits and other provisions. Treating additional flows could lead to violations of permit effluent limits. Thus, the modified effluent limits would have given USIBWC flexibility to treat additional flows within the appropriate regulatory mechanism.

However, USIBWC made no commitment that it would accept the additional flows. The San Diego Water Board did not issue an order to provide USIBWC regulatory

² Flow Equalization, United States Environmental Protection Agency Technology Transfer Publication (May 1974) at <<https://nepis.epa.gov/Exe/ZyPDF.cgi/2000QTKP.PDF?Dockey=2000QTKP.PDF>> [as of Apr. 17, 2021].

assurances. The San Diego Water Board understands that USIBWC was unwilling to commit because the order would not provide protection from citizen suits under the Clean Water Act (CWA). If the increased flow currently received by the SBIWTP is the “pilot project,” USIBWC provided no previous notification or indication of such to the San Diego Water Board as required by the 2014 Permit³, nor did USIBWC request regulatory protection for a “pilot project.”

USIBWC violated the 2014 Permit effluent limits and reporting requirements as explained in the Tentative CDO. The CWA imposes strict liability for National Pollutant Discharge Elimination System (NPDES)⁴ violations based on self-monitoring reports. (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013) (“Congress’ purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act.”); *Stoddard v. Western Carolina Regional Sewer Auth.* (4th Cir. 1986) 784 F.2d 1200, 1208; *U.S. v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 374 [“The regulatory provisions of the [CWA] were written without regard to intentionality”]; see also *U.S. v. Metro Dist. Com’n* (D.Mass. Sept. 5, 1985) 1985 WL 9071, *11 (“Intend and good faith are irrelevant to the existence of violations of the Act, since NPDES enforcement actions are based on strict liability”). Thus, USIBWC is subject to enforcement for its effluent violations, regardless of the reason for the violations or good faith attempts to prevent or mitigate. That transboundary flows would directly enter the environment without USIBWC’s intervention does not excuse USIBWC from properly operating and maintaining the SBIWTP, nor from complying with the limits and requirements of the 2014 Permit.

Action Taken

None.

1.3. Comment

Additionally, while USIBWC does not dispute the Regional Board’s authority to issue CDO’s that are properly supported by findings and evidence—which is not the case here—possible efforts by the Regional Board to enforce the CDO are complicated by issues of Constitutional separation of powers, federal preemption, and sovereign immunity. See **Attachment A**. This is because, management of the flows to South Bay is a matter addressed in international agreements. Pursuant to those international agreements in force with Mexico, control of the volume of influent flow to the South Bay International Wastewater Treatment Plant (SBIWTP or Plant) is vested with Mexico and in practice control of the volume of wastewater sent to the plant is accomplished in conjunction with Mexico and not controlled solely in the United States. Further, when the USIBWC is acting on behalf of the United States in the settlement of disputes arising under international agreements

³ Attachment D, section V.G of the 2014 Permit requires USIBWC to provide advance notice to the San Diego Water Board or California State Water Resources Control Board of any planned changes in the permitted facility or activity that may result in noncompliance of the 2014 Permit.

⁴ In California, waste discharge requirements serve as NPDES permits.

with Mexico, it acts as the US component of the IBWC—a Public International Organization—and is “entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act [IOIA].” See Public Comment Letter 5-6.

Thus, USIBWC respectfully requests that the Regional Board rescind the Tentative CDO. USIBWC will work cooperatively with the Regional Board to address the concerns that lead to the issuance of the Tentative CDO and those raised by any public comments thereto. For example, USIBWC agrees to submit a Compliance Assurance Report to (1) assist the Regional Board in understanding the maintenance, repairs, and other deliverables at the Facilities and the steps taken or planned to address those repairs, and (2) assist the Regional Board in identifying the unrelated issues that have led to certain effluent limitation exceedances and the steps taken or planned to reduce, eliminate, and prevent reoccurrence. In the alternative, because the maintenance activities listed in Table 2 of the CDO are not reasonably related to the violations alleged in the Tentative CDO, USIBWC requests that the Tentative CDO be modified to omit the time schedule in Table 2. In its stead, the CDO can be modified to reflect the repair and maintenance work that the USIBWC is in the process of implementing and for which it has, prior to the Tentative CDO, secured funding. Some of the same work is reflected in Table 2.

Response

Regarding enforcement of 2014 Permit violations, please refer to Response to Comment No. 1.2. The San Diego Water Board disagrees that the management of influent flows into the treatment works is vested with Mexico and not controlled by USIBWC. USIBWC has a measure of control over influent flows into the treatment works. For an example of influent control measures, please refer to Response to Comment No. 1.2.

Moreover, at the San Diego Water Board hearing for the issuance of the first waste discharge requirements (WDR) for the SBIWTP, San Diego Water Board members were concerned about USIBWC’s ability to control flows coming into the SBIWTP. (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.) USIBWC assured the San Diego Water Board that flows coming into the SBIWTP would be controlled at the SBIWTP’s headworks: “[t]he control at the plant, the flows to the plant, will be controlled by the headworks of the plant. In other words, we can assure that the flows that arrive at that plant, we have control over that. So it’s not a matter of that plant having to receive everything that arrives at the headworks. We have the ability to control the flows into the plant.” (*Ibid.*, 25:7-13.) Furthermore, in response to questions about regulating flow into the SBIWTP, USIBWC stated “[t]here’s a junction box. That – it’s a junction box with pipes that go to their Pumping Plant No. 1 and pipes that come to the IWTP. And the headworks at the IWTP have gates on them, and then we regulate those flows coming into the plant with those gates.” (*Ibid.*, 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 to the San Diego Water Board 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's treatment works. USIBWC can take steps within its exclusive control to regulate the influent flow volume into the SBIWTP.

USIBWC's compliance with the 2014 Permit requirements is part of its day-to-day operations. The San Diego Water Board does not believe USIBWC is claiming Mexico is responsible for compliance with the WDR. USIBWC, not Mexico, is exclusively subject to enforcement for violations of the 2014 Permit. (See Letter of Understanding International Wastewater Treatment Plant, IBWC US Section, EPA Region 9, RWQCB SD (1995), p. 4.)

The San Diego Water Board disagrees that the Tentative CDO should be rescinded. The San Diego Water Board has made several attempts to work cooperatively with USIBWC; however, USIBWC consistently failed to respond to informational requests and Notices of Violations, and failed to notify the San Diego Water Board of infrastructure issues at SBIWTP that lead to the effluent exceedances. The 2014 Permit required USIBWC report this information. The Tentative CDO includes several findings which explain USIBWC's failure to comply with reporting requirements contained in the 2014 Permit. (Tentative CDO, ¶¶ 8-10.) The Tentative CDO is necessary to ensure USIBWC ceases, and ceases to threaten, violating its WDR.

The San Diego Water Board appreciates USIBWC's willingness to submit a Compliance Assurance Report to address the San Diego Water Board's and other commenters' concerns. USIBWC's commitment is memorialized in the Tentative CDO as part of the time schedule set by the San Diego Water Board.

The San Diego Water Board disagrees that the actions listed in Table 2 of the Tentative CDO are not reasonably related to the violations of the 2014 Permit. Based on information previously submitted to the San Diego Water Board, the San Diego Water Board understands that these actions are necessary to return the SBIWTP and its treatment works to proper operations and maintenance. The San Diego Water Board is concerned that the repair and maintenance activities referenced in USIBWC's comment letter may not be sufficient to ensure proper operations and maintenance of the SBIWTP and its treatment works. California Water Code (Water Code) section 13301 authorizes the San Diego Water Board to issue a Cease and Desist Order which directs USIBWC to comply in accordance with a time schedule set by the San Diego Water Board. The Tentative CDO includes a time schedule to ensure USIBWC will consistently comply with all applicable effluent limitations. (Tentative CDO, § 1, Table 2.)

If USIBWC had been more forthright and approached the San Diego Water Board about issues at the SBIWTP earlier, this Tentative CDO could have been avoided. However, that time has passed. The San Diego Water Board cannot ignore the

issues at the SBIWTP. The San Diego Water Board must now exercise its enforcement authority and consider this Tentative CDO.

Action Taken

None.

1.4. Comment

A. Limited Waiver of Sovereign Immunity

Section 313 of the CWA constitutes a general authorization on the part of Congress, that federal facilities and activities “resulting, or which may result, in the discharge or runoff of pollutants” be subject to all Federal, State, interstate, and local legal, administrative, and procedural requirements “respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.” 33 U.S.C. § 1323. Section 313 is limited, however, by section 511(a)(3), 33 U.S.C. § 1371(a)(3), which states that that the CWA “shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.” See *City of Imperial Beach v. Int’l Boundary & Water Comm’n, U.S. Section*, 356 F. Supp. 3d 1006, 1016 (S.D. Cal. 2018) (“Section 511(a)(3) unambiguously limits the partial waiver of sovereign immunity provided by § 505(a)(1).”); see also, Public Comment Letter 3-5. Additionally, section 313 is limited by section 308(c), 33 U.S.C. § 1318(c). Section 308(c) provides that, where the Administrator has approved a state program relating to monitoring, “such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (*except with respect to point sources owned or operated by the United States*). 33 U.S.C. § 1318(c) (emphasis added); see also Public Comment Letter 4. Additionally, the United States has not waived sovereign immunity from liability for civil fines imposed for violations of the CWA or under state laws respecting the control and abatement of water pollution. See 33 U.S.C. §§ 1323, 1371.

Response

USIBWC, as the owner and operator of a federal facility in the United States, is subject to state water pollution laws. Section 313, of the CWA, requires USIBWC to operate and maintain the SBIWTP in compliance with state water pollution laws. (33 U.S.C. § 1323, subd. (a).) As part of its day-to-day operations, USIBWC is subject to state water pollution laws, including the 2014 Permit. USIBWC, not Mexico, is exclusively subject to enforcement for violations of the 2014 Permit. (See Letter of Understanding International Wastewater Treatment Plant, IBWC US Section, EPA Region 9, RWQCB SD (1995), p. 4.)

If USIBWC violates the Tentative CDO, Water Code section 13308 authorizes the San Diego Water Board to issue a time schedule order and prescribe a civil penalty based on the amount reasonably necessary to achieve compliance in the time frame described. The amount of the penalty may not exceed ten thousand dollars (\$10,000) for each day in which the violation occurs and the civil penalties are not

intended to be punitive nor are they intended to redress past violations. USIBWC may be subject to such civil penalties where there is a threatened or continuing violation of the underlying CDO to ensure timely compliance with the requirements therein.

Section 308(c), of the CWA is not applicable to California, as California has not submitted, nor has USEPA approved, any inspection, monitoring, and entry procedures pursuant to section 308(c). However, USIBWC is subject to state requirements contained in the Water Code, including monitoring and reporting requirements pursuant to section 313 of the CWA.

In 1972, Congress amended the Federal Water Pollution Control Act of 1948. As amended in 1972, the law became commonly known as the Clean Water Act. The 1972 amendments added section 308 to the CWA. (Pub.L No. 92-500 (Oct. 18, 1972) 86 Stat. 816, 858-859.) In 1976, the United States Supreme Court held that federal facilities are required under the CWA to comply, to the same extent as non-federal facilities, with state requirements respecting control and abatement of water pollution, but federal facilities were not required to obtain a permit from a state with a federally approved permit program. (*Environmental Protection Agency v. California ex rel. State Water Resources Control Bd. (EPA v. California)* (1976) 426 U.S. 200.) Congress amended the CWA in 1977 in response to *EPA v. California*.

Specifically, Congress amended section 313(a), of the CWA to clarify that federal facilities must comply with the substantive and procedural requirements of state law regarding the control of water pollution, including obtaining state permits. (Pub.L No. 95-217 (Dec. 27, 1977) 91 Stat. 1566, 1598 [“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. The preceding sentence shall apply ... to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever”).])

In amending section 313 of the CWA, Congress waived sovereign immunity with respect to federal facility compliance with substantive and procedural state water pollution laws. The section 313 amendments also explicitly require federal facilities to comply with any state “recordkeeping or reporting requirement.” (33 U.S.C. § 1323, subd. (a); see also Letter of Understanding International Wastewater Treatment Plant, IBWC US Section, EPA Region 9, RWQCB SD (1995), p. 4.)

The Senate Report for the 1977 amendments specifically state that section 313 was intended to impose state monitoring requirements on federal facilities. (Senate Report (Environment and Public Works Committee) No. 95-370, at p. 67 [“section 313 is amended to specify that ... a Federal facility is subject to any ... State ... requirements respecting the control or abatement of water pollution, both substantive and procedural, to the same extent as any person is subject is subject to these requirements. This includes, but is not limited to ... reporting and

monitoring requirements”].) Monitoring and reporting requirements are generally considered procedural requirements.

Under the CWA, the USEPA administers the NPDES program in each state. If a state desires to implement its own NPDES program, the state may submit to USEPA “a full and complete description of the program it proposes to establish and administer *under State law*.” (33 U.S.C. § 1342, subd. (b), emphasis added.) When submitting its proposed NPDES program, the state must also submit a statement from its attorney general explaining that the laws of the state will provide adequate authority to carry out the described program. (*Id.*) USEPA is *required* to approve each submitted program, unless it determines that the state program is not at a minimum consistent with federal law. (*Id.*; see also *ibid.* at § 1342, subd. (c)(2).) Specifically, state programs must have adequate authority to inspect, monitor, enter, and require reports to at least the same extent as required by CWA section 308. (33 U.S.C. § 1342, subd. (b)(2)(B); see also, § 1318.) For states with approved NPDES programs, USEPA retains oversight authority. (*American Paper Institute, Inc. v. U.S. E.P.A.* (7th Cir. 1989) 890 F.2d 869, 871.)

In this way, the federal CWA and its implementing regulations operate as minimum requirements. (See *Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd.* (E.D. Va. 1978) 453 F.Supp. 122, 126.) Upon approval of the state program, USEPA suspends its issuance of NPDES permits. (33 U.S.C. § 1342, subd. (c)(1).) CWA section 402 does not delegate the federal program to states. (*State of Cal. v. U.S. Dept. of Navy* (9th Cir. 1988) 845 F.2d 222, 225, citing H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), reprinted in U.S. Code Cong. & Admin. News, pp. 4327, 4479.)

The CWA is a “carefully constructed ... legislative scheme that impose[s] major responsibility for control of water pollution on the states.” (*District of Columbia v. Schramm* (D.C. Cir. 1980) 631 F.2d 854, 860; *American Paper, supra*, 890 F.2d at pp. 873-74; see also 33 U.S.C. § 1251, subd. (b).) Under the CWA, an approved state NPDES program functions in lieu of and consistent with the federal program. (*State of Cal. v. U.S. Dept. of Navy, supra*, 845 F.2d at p. 225.)

“On May 14, 1973, California became the first State to be approved by [US]EPA to administer the NPDES permit program. On May 5, 1978, it also became the first State to receive [US]EPA approval to regulate discharges from federal facilities.” (45 Fed. Reg. 40664 (Oct. 3, 1989).) In 1989, USEPA also approved California’s NPDES Pretreatment Program, NPDES general permits, and revisions to the State’s existing NPDES permit regulations. (*Id.*) To seek the 1989 approvals, the State of California submitted a statement from its Attorney General which certified that the laws of the state provide adequate authority for the California State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards to carry out a state NPDES program that is, at a minimum, consistent with federal law. (Attorney General’s Statement for the State National Pollutant Discharge Elimination System Program and State Pretreatment Program Administered by the California State Water Resources Control Board and the

California Regional Water Quality Control Boards (May 1987) (Attorney General's Statement), pp. 1, 7, 12-13 ["the Clean Water Act requirements incorporated into Chapter 5.5 of the Porter Cologne Act serve as minimum requirements; additional requirements may be imposed to the extent authorized by other provisions of the Porter-Cologne Act. The Clean Water Act expressly provides that states may adopt and enforce their own standards and requirements, so long as they are not less stringent than the requirements of the Clean Water Act. Clean Water Act section 510; 33 U.S.C. § 1370."].)

Regarding inspection and monitoring authority, the Attorney General's Statement stated that "[w]aste discharge requirements must incorporate inspection, monitoring, and entry requirements where required under the Clean Water Act. [Water Code] § 13377." (Attorney General's Statement, at p. 8; see also pp. 60-61.) Further, "waste discharge requirements may establish more stringent requirements than those required or authorized by the Clean Water Act." (Attorney General's Statement, p. 13.)

Since the Water Code provides equivalent authority to issue water pollution permits as federal law, USEPA was required to approved California's NPDES program pursuant to section 402(b). (See 33 U.S.C. § 1342, subd. (b); see also Memorandum of Agreement between the U.S. Environmental Protection Agency and the California State Water Resources Control Board (1989), p. 1 ["The State Board has been authorized by [USEPA], pursuant to Section 402 of the [CWA], to administer the [NPDES] program in California since 1973."].) California law, under the Water Code, therefore operates in lieu of USEPA's permitting authority. California waste discharge requirements are issued pursuant to state law, consistent with federal law. The clear waiver of sovereign immunity in Section 313 therefore applies to the state's program and subjects federal facilities to the Water Code.

USIBWC, as the owner and operator of a federal facility, is therefore subject to Water Code requirements, administrative authority, and processes and sanctions respecting the control and abatement of water pollution. (33 U.S.C. § 1323, subd. (a); *State of Cal. v. U.S. Dept. of Navy*, *supra*, 845 F.2d at p. 224; see also Senate Report (Environment and Public Works Committee) No. 95-370, at p. 67.) This includes monitoring and reporting requirements pursuant to Water Code sections 13267 and 13383.

The provisions of section 308(c) "cannot be read to weaken or render ineffective" the clear authority granted to states through waiver of sovereign immunity in section 313(a). (Memorandum from the Assistant Administrator for Enforcement and General Counsel, USPEA, to Regional Administrators and Directors of the Approved NPDES Programs (undated), at p. 5, fn. 3, at <https://www3.epa.gov/npdes/pubs/owm521.pdf> [as of April 7, 2021].) To interpret these two statutory provisions otherwise would create unnecessary internal conflict within the CWA. (See, e.g., *Boise Cascade Corp. v. USEPA* (9th Cir. 1991) 942

F.2d 1427, 1432; *Avila v. Spokane Sch. Distr.* 81 (9th Cir. 2017) 852 F.3d 936, 942-94.)

The San Diego Water Board is authorized by Water Code section 13301 to issue a cease and desist order to USIBWC for violations of the 2014 Permit and threatened violations of the 2021 Permit.

Action Taken

None.

1.5. Comment

B. CDO Authority

In issuing the CDO, the Regional Board purports to exercise its authority under California Water Code § 13301. When a regional board finds that a discharge of waste is taking place or threatens to take place in violation of the requirements prescribed by order of the regional [sic], the regional board may issue a cease and desist order. Cal. Water Code § 13301. Decisions and orders of the Regional Board are reviewable by administrative appeal to the State Water Board, and then by petition for administrative mandamus in the superior court. Code Civ. Proc. § 1094.5; Cal. Water Code §§ 13320, 13330. Review of an administrative order extends, among other issues, to whether there was any prejudicial abuse of discretion. Code Civ. Proc, § 1094.5. “Abuse of discretion” is defined to include instances in which the administrative agency “has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.* § 1094.5(b).

Response

Comment noted. Regarding compliance with state laws, please refer to Response to Comment No. 1.4.

Action Taken

None.

1.6. Comment

A. The International Boundary and Water Commission

As discussed in the Public Comment Letter, the International Boundary and Water Commission (IBWC)’s mission is to provide binational solutions to issues that arise during the application of U.S.-Mexico treaties regarding, among other things, water quality and flood control in the border region, including constructing and operating bi-national wastewater treatment plants, as directed by Congress. The 1944 *Treaty Between the United States of America and Mexico Respecting Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande* (“1944 Treaty”), Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994, established the key organizational components of IBWC and its two sections—USIBWC and the Comisión Internacional de Límites y Aguas (“CILA” or the “Mexican Section”).

These sections act on behalf of their respective government in the “exercise of the rights and obligations,” and the “settlement of all disputes” arising under the 1944 Treaty. 1944 Treaty, art. 2.

The IBWC was designated as a Public International Organization by Executive Order 12467. See 49 Fed. Reg. 8,229 (March 2, 1984) when acting on matters that are not in the exclusive control or sole discretion of the United States Commissioner. This designation does not extend to the USIBWC when it is acting on matters “within its *exclusive* control, supervision or jurisdiction, or within the *sole* discretion of the United States Commissioner, *pursuant to* international agreements in force with the United Mexican States, statute or other authority.” *Id.* (emphasis added). Thus, the USIBWC acts as both a federal government agency *and* as a Public International Organization.

When acting as a federal agency, USIBWC is subject to the limited waiver of sovereign immunity in section 313 of the CWA. Conversely, when acting as the US component of the IBWC—a Public International Organization—USIBWC is not subject to the limited waiver of sovereign immunity in section 313 of the CWA and is “entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act [IOIA].” *Id.* See **Attachment A**, pgs. 5-6 for more detailed discussion of the USIBWC’s foreign affairs powers, privileges, exemptions and immunities.

As stated in the Public Comment Letter, the 1944 Treaty establishes the jurisdiction, structure, and functions of IBWC and the, IBWC has negotiated a series of minutes related to border sanitation issues. After approval by the United States Department of State and the Mexican Ministry of Foreign Relations, these minutes have become executive agreements binding on the two countries. 1944 Treaty, arts. 2, 25.

Response

Comment noted. To the extent USIBWC references and incorporates portions of its comment letter to the 2021 Permit, the San Diego Water Board also incorporates and references its Response to Comment Report for the 2021 Permit addressing the same topics.

Action Taken

None.

1.7. Comment

B. The South Bay International Wastewater Treatment Plant (SBIWTP or Plant)

The IBWC has executed several minutes with regard to the San Diego-Tijuana sanitation issues. Because Minutes are approved by the U.S. Department of State before they become binding on the U.S. Government, each minute details the participation by the U.S. Government through the USIBWC in the bi-national agreement.

In 1965, pursuant to Minute 222 between the United States and Mexico, the City of Tijuana, Mexico's sewer system was connected to the City of San Diego sewer system, to be used in the event of "a serious accident" to the Tijuana Sewer System in order to protect U.S. land against surface flows of Tijuana sewage. Minute 222, Joint Report, p. 1. The "emergency connection" facilities included: a sewer line in Mexico from Pumping Plant No. 1 (PB1) to the international boundary, an extension of that line in the United States for approximately .8 miles to a connection with the City of San Diego sewer system, and a measuring device for the sewer line extension. In conformance with Minute 222 (1965), the United States developed interception devices in some canyon tributaries to the Tijuana River which would intercept some flows from Mexico in the canyons and return them to the City of Tijuana's disposal system. In emergency circumstances when PB1 was inoperable, the U.S. intercepting system would convey those intercepted flows to the City of San Diego's plant for discharge at Point Loma. Minute 283, p. 2, #3.

In 1985, the United States and Mexico recognized that untreated sanitary wastewater from the City of Tijuana moving through natural drainage courses and the Tijuana River and into the United States and also the northward ocean currents that would carry Mexican wastewater north onto U.S. beaches, were problematic. See Minute 270, pp.1-2. To address this problem, Mexico implemented substantial upgrades to its municipal sewer system, including upgrades to PB1 and the conveyance facilities near the border, that were intended to collect and convey "all the wastewater from the Tijuana River basin" to a treatment plant in southwest Tijuana, San Antonio de Los Buenos (SAB Minute 270, *Description of the First Stage Treatment and Disposal Facilities Project for the Solution of the Tijuana Border Sanitation Problem* at p.2). Specifically, the upgraded Mexican collection system was to collect flows from the northwest and northeast part of Tijuana (near the international border) and convey them to a new treatment facility along the coast. Mexico eventually planned that as a second phase of their treatment works, they would construct a treatment facility near the confluence of the Alamar Arroyo and the Tijuana River (the Rio El Alamar treatment facility) to handle flows from northeast Tijuana to [sic] instead of conveying them to the coast. See *Id.* at p. 2. The effluent from the coastal facility was to be used partially for irrigation water in Mexico. Minute 270 at p. 3.

By 1990, the City of San Diego was planning to upgrade its wastewater system. The United States contemplated that one of the City of San Diego's treatment plants could be located in the Tijuana River Valley. Minute 283, p. 3. At the same time, Mexico notified the U.S. that it had secured the financing and was ready to begin constructing the second phase of their treatment works that was contemplated under Minute 270: the Rio El Alamar treatment facility in Mexico. The U.S. proposed instead that Mexico use its money to construct a bi-national treatment plant in the United States that would treat the flows from Mexico that had been intended to be treated at the Rio El Alamar treatment plant. *Id.* That is, the U.S. proposed that a bi-national treatment plant would be built in the U.S. in lieu of the Rio El Alamar treatment plant in Mexico. Mexico agreed to the U.S. proposal.

Minute 283 was executed in 1990 and approved the construction of this bi-national South Bay International Wastewater Treatment Plant (SBIWTP) in lieu of the Rio El Alamar treatment plant to address the untreated sewage that flowed into the United States in the Tijuana River and its tributaries. The Minute provided, in part: (1) that a secondary treatment plant (SBIWTP) would be constructed in the U.S. to treat 25 million gallons per day (mgd) of wastewater from Mexico; (2) that a pipeline would be built in the U.S. to convey the treated wastewater to the ocean; (3) that Mexico would construct collection works in Mexico necessary to convey wastewater to the SBIWTP; (4) that Mexico would require industries in Mexico to provide pre-treatment of wastewaters that discharge into the Tijuana collection system for conveyance to the SBIWTP; and (5) that Mexico would assure that there were no discharges of treated or untreated wastewaters into the Tijuana River that crosses the international boundary and that, in the event of such flows, that Mexico would take measures to immediately stop such flows.

In accordance with Minute 283, Mexico agreed to construct, operate, and maintain in Mexico: (1) a gravity sewer trunkline from PB1 to the international boundary and (2) collection works for the flows (that would have been treated at the Rio El Alamar treatment plant) for conveyance to the SBIWTP. Mexico also agreed: (1) to participate in the construction costs of the bi-national treatment plant in the United States (SBIWTP); (2) to fund the construction of all the works in Mexico necessary to collect and convey to the U.S. the flows that would have been treated at Rio El Alamar; and (3) to operate and maintain the works in Mexico at Mexico's sole expense. The operation and maintenance responsibility of the collection and conveyance works in Mexico "shall be charged to Mexico." Minute 283, p. 5, #3.

The United States and Mexico jointly designed the international secondary treatment plant with a capacity of 25mgd. *Id.* at #4. Minute 283 contemplated that the "final design . . . [and] division of work to be carried out by each country" would be established by subsequent minutes. *Id.* at p.6, #8. Mexico also agreed to dispose of all the sludge generated at the SBIWTP at Mexico's sole expense. *Id.* at p. 7, #10. It was agreed that Mexico would assure no additional flows of treated or untreated wastewater into the United States in the Tijuana River. *Id.* at p. 8, #16. Construction of SBIWTP began in 1995.

Minutes 296 and 298 were signed in 1997 and specifically govern the division of labor between the two countries and the distribution of construction, operation, and maintenance costs for the SBIWTP, including issues related to asset management and assessing plant capacity. For example, in Minute 296, the IBWC determined Mexico's payment rate for treatment of Mexican wastewater at SBIWTP. Of note, Minute 296 contemplated that Mexico could send *more than* 25 mgd to the United States for treatment and that the payment rate for flows in excess of 25 mgd would be different than the payment rate for the first 25 mgd. Minute 296, p. 5, #6. Minute 296 also considered that in the event that Mexico required use of the emergency connection to the City of San Diego's system, Mexico's cooperation would be

necessary to handle the flows in excess of the capacity of that emergency connection. Minute 296, p. 7, # 12.

While SBIWTP was under construction, in 1997, the Border Environment Cooperation Commission (BECC) helped fund upgrades to Tijuana's sewer system, including: a new pump station (PB1B) adjacent to PB1, thereafter referred to as PB1A, and collectively known as PB1A/1B; an upgrade to SAB; new conveyance lines from PB1B into Mexico; and a new pipeline connection from the U.S. boundary to the SBIWTP, which would include a control valve and associated isolation structure, Junction Box 1 (JB1) *to facilitate maintenance*. Minute 298, p. 2, #2 (emphasis added). Once the system constructed in Mexico with the BECC money was completed, Mexico was charged with the operation and maintenance of the system with the understanding that once the ocean outfall in the United States from the SBIWTP to the Pacific Ocean (SBOO) was operational, the wastewater conveyed to the SBIWTP would be limited to an average of 25 mgd. Minute 298, p. 6, # 4, #6; p. 8, VII.1. The Governments agreed that the Government of Mexico would operate and maintain the pumping and conveyance systems. Minute 298, pp8-9, #6.

In accordance with these Minutes, the SBIWTP receives primarily domestic and industrial wastewater from the City of Tijuana's municipal collection system. The City of Tijuana also operates five wastewater treatment plants in Mexico to treat its remaining sewage, though these plants are not always fully operational. The SBIWTP was upgraded with secondary treatment facilities in 2010. The advanced primary treatment design capacity has a peak hydraulic capacity of 100 mgd, a peak design flow rate of 75 mgd, and an average design flow rate of 25 mgd. The secondary treatment design capacity is 25 mgd with a peaking factor of approximately 2. If flow from the primary treatment units to the secondary treatment units exceeds 49.85 mgd, primary effluent flows exceeding 49.85 mgd bypass the polymer addition and activated sludge processes and discharge directly to the South Bay Ocean Outfall (SBOO). The reported annual average daily discharge flow between 2016 and 2019 ranges between 22.36 mgd and 24.57 mgd.⁵

Sewage from the City of Tijuana is conveyed in a 72-inch diameter line called the Tijuana Interceptor, to Tijuana's Pumping Plant PB1A and PB1B3. See **Attachment B**, Flow Schematic. Pump Station CILA (PB CILA) also conveys River flow to the Tijuana Interceptor line. The Interceptor line connects with a concrete box in Mexico, similar to a manhole, that taps into the flow of the Interceptor and allows it to flow through a 72" pipe to Junction Box 1 (JB1) in the United States. Typically, 25 mgd of sewage is conveyed to JB1 and then into the SBIWTP. Pump Station 1B also includes a 42-inch force main and a conveyance canal with an operational

⁵ The SBIWTP's facilities include five canyon collector boxes located along the border in five of six cross-border canyons. During normal operations, small amounts or "low-flows" of urban runoff and wastewater from Mexico are captured and diverted by canyon collector boxes and conveyed to the SBIWTP through underground pipelines. As part of Minute 283, IBWC also built a diversion infrastructure just south of the border, operated by Mexican entities, to capture low-volume, dry-weather flows in the Tijuana River.

capacity of 36 mgd to send flow to the SAB. While the valve/slucice gate at JB1 is able to control flow when fully operational, USIBWC cannot, in its sole discretion, control the flow of the wastewater into the treatment Plant. The design of the Plant, and international agreements in effect with Mexico, require that USIBWC work with Mexico through CILA to address excess flows. See **Attachment B**, Flow Schematic. If the USIBWC would attempt to control the volume of flow to the SBIWTP solely in the U.S. without concurrent Mexican action, not only would this violate the international agreements that allow Mexico to potentially send more than 25 mgd to the plant, but it may cause flows to back up in the Mexican system potentially resulting in flows escaping the Mexican conveyance and collection system.

As reflected in the Minutes that resulted in the construction and operation of the collection and treatment system, the SBIWTP was intended to treat flows that would have been treated by Mexico at the Rio El Alamar treatment facility in Mexico. The Minutes contemplate that Mexico may send more than 25 mgd to the plant but that the JB1 was built and intended to be operated to control flows only for maintenance purposes. 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. This was the intended outcome of these agreements, as the SBIWTP was built in lieu of Mexico constructing a treatment plant in Mexico.

Response

Comment noted. Regarding the control of influent flow into the SBIWTP and its treatment works, please refer to Response to Comment No. 1.3.

Action Taken

None.

1.8. Comment

C. USMCA and Transboundary Flows from Mexico

Despite massive U.S. investment in the City of Tijuana's collection system, that system has aged, and its population has grown since the mid-1990s. During rainstorms or wet weather in Tijuana and when pipelines or pumps break, water flows to the Tijuana River and canyons and mixes with unknown amounts of urban runoff, treated effluent from the Tijuana River, and wastewater in Mexico before flowing into the United States. During dry weather, the runoff is largely groundwater and some untreated discharge from illegal connections (dry-weather flows); during storms, this runoff mixes with large amounts of rainfall (wet-weather flows). Thus, transboundary flows that cross the U.S.-Mexico international border can transport pollutants generated in Mexico that impact downstream surface waters in the United States. Paragraph 16 of Minute 283 states, "[t]he Government of Mexico will

assure that there are no discharges of treated or untreated domestic or industrial wastewaters into waters of the Tijuana River that cross the international boundary, and that in the event of a breakdown in collection or other detention facilities designed to prevent such discharges, the Government of Mexico will take special measures to immediately stop such discharges and make repairs. Should Mexico request it through the Commission, the United States Section will attempt to assist with equipment and other resources in the containment of such discharges and temporary repairs under the supervision of the Commission.”

In the decades since construction of the SBIWTP, the communities along the border have experienced exponential growth in populations and development that has resulted in ongoing transboundary flows of raw sewage, trash, and sediment, exacerbated by aging and deteriorating infrastructure. In the last two decades, the local Mexican utility that operates and manages Tijuana’s sewage infrastructure has invested in expanding the city’s wastewater collection infrastructure to address direct dischargers or inadequate disposal practices in Mexico. However, overall, the Mexican system has not kept pace with the region’s rapid growth, nor has the existing infrastructure in Mexico received sufficient maintenance. Poor conditions of critical wastewater infrastructure in Mexico still results in a percentage of Tijuana’s wastewater entering the Tijuana River or Pacific Ocean without treatment.

On September 4, 2018, the Regional Board filed a complaint in United States District Court, Southern District of California against USIBWC alleging that discharges from the Plant’s canyon collectors caused by inadequate operations and/or maintenance constitute violations of section 301 of the CWA, and discharges from the Plaintiff’s canyon collectors and pump stations, along with numerous other permit violations constitute violations of section 402 of the CWA. The Regional Board’s action is related to two other citizen actions alleging similar violations of the CWA. The USIBWC disputes these allegations. In relevant part, USIBWC disputes that transboundary flows, not captured by the SBIWTP, are discharges within the meaning of the CWA or properly subject to the Regional Board’s authority in issuing NPDES permitting requirements for the Plant. Additionally, the Regional Board is attempting to unlawfully regulate transboundary flows through monitoring and reporting requirements included in Tentative Order R9-2021-0001. USIBWC disputes the Regional Board’s purported jurisdiction and legal justification for including such provisions in Tentative Order R9-2021-0001.

In 2019, the United States renegotiated the North American Free Trade Agreement, replacing it with the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020. The USMCA allocates to the EPA \$300 million “for architectural, engineering, planning, design, construction and related activities in connection with the construction of high priority wastewater facilities in the area of the United States-Mexico Border, after consultation with the appropriate border commission.” The USMCA implementing legislation Section 821 directs EPA to “carry out the planning design, construction, and operation and maintenance of high priority treatment works” in a portion of the Tijuana River watershed in the United

States “to treat wastewater (including stormwater), nonpoint sources of pollution, and related matters resulting from international transboundary water flows originating in Mexico.” EPA launched a process to study the technical and environmental feasibility of potential new projects aimed at preventing or mitigating transboundary wastewater flows in the Tijuana River Valley. EPA’s implementation of the USMCA will entail substantial federal investments in new pollution control infrastructure. Thus, the USMCA will streamline, and could render unnecessary, further litigation. The Parties therefore agreed to seek a stay of the litigation while EPA’s USMCA implementation process proceeds. The stay arrangement also provided for implementation of interim measures to address transboundary wastewater flows in the Tijuana River Valley.

In 2020, USIBWC was approached by EPA and the Regional Board to consider developing a short-term project to address low volume transboundary flows from Mexico in the Tijuana River. See **Attachment C**, USMCA Inter-agency Consultation Group Meeting, July 29, 2020 and **Attachment D**, Interagency Coordination Group Membership (Principal and Delegate). The purpose of the short-term project was to divert low-volume flows from the Tijuana River to the SBIWTP to alleviate additional transboundary flows into the Tijuana River and Pacific Ocean and their detrimental impacts. It was further contemplated that the project would be designed in such a way that it would only operate during the dry-weather season, when flows in the Tijuana River are much lower and consist largely of untreated sewage and effluent from Mexican treatment plants. This short-term project would have required the construction of a diversion project in the Tijuana River consisting of an earthen weir/berm to stretch across of the River into an open 50-meter x 3-meter-deep trench. From there a diesel pump, using flexible tubing, would divert the River flow into the junction box prior to the headworks (known as JB2) of the SBIWTP for treatment. See **Attachment E**, USMCA Tijuana River Watershed Eligible Public Entities Coordinating Group (EPECG) Virtual Meeting November 19, 2020, pgs. 4-7. The intention of the plan was to push the SBIWTP to its maximum capacity by diverting an additional 10 mgd of flow from the Tijuana River to the Plant for treatment, up to a total of 35 mgd.

Although this proposal was not in accordance with either the Plant’s design or the operating capacity of the Plant under NPDES Permit No. CA0108928, USIBWC was open to a pilot period to determine what, if any, detrimental impact to the Plant may occur from accepting additional flow for treatment.⁶ USIBWC sought from the Regional Board assurances that it would be provided regulatory protection from potential violations that may occur from the treatment of additional flow at the Plant. See **Attachment F**, PowerPoint “Time Schedule Order for Short-Term Diversions by the California Regional Water Quality Board, San Diego Region.”

⁶ In Minute 283 states “both Government reserve the right to return for reuse in their respective territories part or all of the international treatment plant effluent corresponding to each country’s sewage inflows.” Minute 283 p. 7, #12.

The short-term project proposed by EPA and the Regional Board never came to fruition because the limits of the Plant's treatment capacity were tested when the Plant began receiving much higher flows from Mexico's collection system. The USIBWC was informed after many requests for information, that Mexico was experiencing difficulties with pump stations PB1A and PB1B, that Mexico was experiencing difficulty with electrical power at these pumps, and that multiple sections of the conveyance lines to the SAB had collapsed and were undergoing repairs. Due to this confluence of multiple system component's breaking down all at once, Mexico was unable to decrease the flow coming to the SBIWTP. From approximately August 2020 through January 2021, flows in excess of 25 mgd were sent to the Plant. These excess flows were treated to secondary standards before being discharged through the South Bay Ocean Outfall.

Pursuant to international agreements, USIBWC did in fact make continued requests of CILA to have CESPT divert the excess flow to the Mexican treatment plants. Unfortunately, those requests went unheeded. The Plant continued treating flows in excess of 30 mgd, with peaking flows in excess of 40mgd. USIBWC was itself unable to control the volume of flow coming into the plant through JB1. As previously described, JB1 contains two valves/slucice gates, that can control the volume of the flow coming into the plant for maintenance purposes. However, the 72" valve had been broken and removed in approximately 2017; the 96" valve had been operating until approximately June 2020 – just two months before the problems causing the high-volume flows from Mexico began. Due to difficulties with the valve, it was decided that the valve would be left partially open such that approximately 35mgd could be sent to the Plant. If the valve had been closed so as to limit flows to 25 mgd, as suggested by the CDO, the untreated sewage flow would likely have backed up in Mexico's system which, at the time had multiple inoperable components, and the flows would likely have ended up in the canyons or the River. While transboundary flows through the River channel were greatly reduced during this period, the Plant began to experience effluent exceedances in November 2020. Thus, the Plant demonstrated that it was unable to handle sustained flows in excess of its designed capacity while complying with the NPDES Permit.

On January 8, 2021, then Commissioner of the USIBWC Jayne Harkins met with Executive Director of the Regional Board Dave Gibson, along with legal and technical staff from both organizations, concerning the flows from Mexico into the SBIWTP and the technical and operational impacts at the Plant. USIBWC discussed with the Regional Board corrective actions taken or planned to address the additional flows from Mexico and the technical and operational impacts at the Plant. During that meeting, Mr. Gibson promoted cooperation and communication as a manner in which the Regional Board could provide to USIBWC compliance assistance with the existing NPDES permit and citizen enforcement protection for likely exceedances. Instead, the Regional Board released for public comment the Tentative CDO without any advance cooperation or communication. USIBWC has repeatedly requested that Regional Board work cooperatively with it in achieving

regulatory objectives in the face of environmental, constitutional, and international complexities that are presented by USIBWC's operation of the Plant. USIBWC is disappointed that the Regional Board has elected enforcement action, which frustrates these objectives and adds to the existing complexities.

Response

The San Diego Water Board disagrees that the regulation of transboundary flows are not within the San Diego Water Board's jurisdiction. Regarding compliance with state laws, please refer to Response to Comment No. 1.4. Moreover, transboundary flows which bypass the canyon collector systems can constitute the discharge of a pollutant pursuant to the CWA and the discharge of waste pursuant to the Water Code.

For instance, the resuspension of pollutants in sediments from dry-weather spills into navigable waters can constitute discharges of a pollutant. (*Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1285 ["even if the material discharged...originally comes from the streambed itself, [the] resuspension [of the material in the waters] may be interpreted to be an addition of a pollutant under the [Clean Water] Act."]; see also *Borden Ranch Partnership v. U.S. Army Corps of Engineers* (9th Cir. 2001) 261 F.3d 810, 814-815, *aff'd* 537 U.S. 99 (2002); *United States v. Deaton* (4th Cir.2000) 209 F.3d 331, 335-336.) The canyon collector systems' detention basins are regularly filled with sediment, trash, and other pollutants. To the extent USIBWC does not clear the accumulated sediment, trash, or other pollutants, successive transboundary flows will resuspend the pollutants, adding them to the flow, and cause the discharge of pollutants through the canyon collector systems.

As another example, flows through the canyon collector systems may constitute discharges of waste pursuant to the Water Code. The Water Code defines waste as "sewage and any and all other waste substances, liquid, solid, gaseous or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature prior to, and for purposes of, disposal." (Wat. Code, § 13050, subd. (d).) Under the Water Code, waste is more than just sewage and includes constituents or materials that are harmful to water quality or beneficial uses when discharged. (*Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region* (2021) 61 Cal.App.5th 1, 463, *petn. for review pending*, *petn. filed* March 29, 2021; *Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163, 169 ["concentrated silt or sediment associated with human habitation and harmful to the aquatic environment is 'waste'"].) The canyon collector systems' detention basins may collect and accumulate sediment, pollution, and other harmful substances. Subsequent flows may re-suspend such sediment, pollution, or other harmful substances to be discharged through the canyon collector systems. Thus, Canyon Collector Transboundary Flows may constitute waste under the Water Code.

While the Water Code does not define the term “discharge,” courts typically apply the common sense meaning of “discharge.” Dictionary definitions of “discharge” include “to allow (a liquid, gas, or other substance) to flow out from where it has been confined,” “to give outlet or vent to,” and “to emit.” (*Sweeney, supra*, 61 Cal.App.5th 1, 464—465.) As stated in the Fact Sheet, transboundary flows may “overflow[]” or “bypass[]” the canyon collector systems. (Fact Sheet, § 2.1, F-7.) Transboundary flows which overflow or bypass the canyon collector systems fall within the common sense meaning of discharge and thus constitute discharges under the Water Code. Therefore, Canyon Collector Transboundary Flows may be discharges of waste under the Water Code. The Water Code authorizes the San Diego Water Board to issue a cease and desist order for violations and threatened violations of waste discharge requirements issued by the San Diego Water Board. (See Wat. Code, § 13301.)

The San Diego Water Board disagrees that flows in excess of 25 mgd have been treated to secondary treatment standards from approximately August 2020 through January 2021. As noted in the Tentative CDO and based on USIBWC’s self-monitoring reports, the treatment process has been insufficient to meet secondary treatment standards, see 40 CFR § 133.102, resulting in a number of exceedances of the secondary treatment standards. (See Tentative Order, ¶ 7, pp. 3-5.) While the SBIWTP may have been able to effectively treat to secondary treatment standards from August 2020 to October 2020, the secondary treatment processes were eventually overwhelmed by the increased amount of solids, as evident by the total suspended solids, settleable solids, turbidity, and carbonaceous biochemical oxygen demand exceedances from November 2020 to January 2021. Based on the most recent monitoring report submitted by USIBWC, the exceedances have continued in February 2021.

USIBWC’s comment also noted that San Diego Water Board Executive Officer, David Gibson, promoted cooperation and communication and USIBWC is disappointed that the San Diego Water Board instead is considering the Tentative CDO. The Tentative CDO is being considered because of USIBWC’s lack of cooperation and communication. USIBWC fails to timely report transboundary flows, fails to notify the San Diego Water Board of infrastructure issues that can affect the SBIWTP operation, fails to respond to San Diego Water Board’s informational requests, and fails to respond to Notices of Violations. The San Diego Water Board has received no formal request from USIBWC for the San Diego Water Board to work cooperatively with it in achieving regulatory compliance.

The San Diego Water Board is frustrated by USIBWC's lack of cooperation and the repeated pattern of withholding of information reasonably related to the SBIWTP and compliance with its WDR. USIBWC did not inform the San Diego Water Board of the broken sluice gates. Instead, the San Diego Water Board discovered the issue when inspecting a transboundary flow at Stewart's Drain. The San Diego Water Board has issued several Notices of Violations which request information, all but one have gone unanswered. USIBWC also failed to respond to San Diego Water Board's emails requesting information and status updates. Accordingly, the San Diego Water Board is not confident that USIBWC will voluntarily, nor timely, return to compliance with its NPDES permit absent a companion enforcement order. The San Diego Water Board is considering the exercise its enforcement authority to obtain compliance with applicable effluent limitations forthwith and protect water quality and beneficial uses.

Regarding the temporary river diversion, please refer to Response to Comment No. 1.2.

Action Taken

None.

1.9. Comment

D. Alleged Threatened Violation of Reporting Requirements

The 2014 Permit expired on July 31, 2018 but remains in effect until such time it is superseded by a new NPDES permit. On February 23, 2021, the Regional Board released for public review and comment Tentative Order No. R9-2021-0001. On March 25, 2021, USIBWC submitted timely comments challenging as unlawful certain provisions of Tentative Order No. R9-2021-0001. A public hearing on Tentative Order No. R9-2021-0001 is scheduled for May 12, 2021. Nevertheless, the Tentative CDO assumes without due consideration of the legal and practical challenges raised by USIBWC in its public comments and without affording USIBWC the opportunity to be heard, that Tentative Order No. R9-2021-0001 will be adopted without modification.

USIBWC's Public Comment Letter raises serious questions of law and challenges the inclusion of certain provisions in Tentative Order No. R9-2021-0001. Yet, the Tentative CDO relies on the same authorities questioned by USIBWC in the Public Comment Letter and does so without allowing USIBWC the opportunity to exhaust its administrative challenges to those provisions. Specifically, USIBWC disputes the Regional Board's authority under state law and the CWA to impose on the USIBWC any monitoring and reporting requirements for transboundary flows that are not first captured by the Plant's facilities. *See., e.g., Attachment A* Public Comment Letter, pp. 21-25; 31. Yet, the Tentative CDO relies on those same provisions as justification for alleging threatened violations of a future permit. (See CDO pg. 7, #11; pg. 8, #19; pg. 11, #7). It is arbitrary and capricious, and a violation of due process, for the Regional Board to issue a CDO based on requirements being administratively challenged in the Tentative NPDES Permit. This denies USIBWC

due process. To the extent that the USIBWC has challenged Tentative Order No. R9-2021-0001 as unlawful and without a legal basis, issuance of the CDO is equally unlawful and without a legal basis.

In the CDO, the Regional Board relies on characterizing transboundary flows as waste discharges (CDO pp, 9-11). The USIBWC incorporates by reference the provisions of the Objection Letter with regard to characterizing uncaptured transboundary flows as “discharges” or “waste discharges.” In the CDO, the Regional Board requires that the USIBWC construct sluice gates on JB1 to enable USIBWC to cut-off flow from Mexico and limit the Mexican flows to SBIWTP (CDO p. 10). As explained above, the procedures for how the United States and Mexico manage the volume of wastewater flows to the SBIWTP, and the division of operational responsibility between the two countries, is provided for in the Minutes corresponding to the SBIWTP and the collection and conveyance system in Mexico. As articulated in Minute 283 and 298, the volume of flows sent to the plant for treatment are to be managed by Mexico through its operation of the collection and conveyance system, while the valves at JB1 are intended to manage flow volume for maintenance purposes. The Minutes contemplate that Mexico may have need to convey more than 25 mgd to SBIWTP. For these reasons and because the SBIWTP was built in lieu of a treatment facility in Mexico, the U.S. cannot “cut Mexico off” from use of SBIWTP using the JB1 valves for non-maintenance purposes. As previously mentioned, to do so when Mexico’s facilities are inoperable would have resulted in high-volume flows of completely untreated wastewater into the Tijuana River or into the canyons.

Moreover, the Regional Board’s CDO is requiring the SBIWTP to limit the untreated wastewater entering the plant to 25 mgd, but as noted above, the Regional Board and EPA sought for USIBWC to treat extra flows above 25 mgd of untreated wastewater at SBIWTP as a pilot project. That wastewater was to be diverted to the plant from the Tijuana River. The Regional Board’s request in the Temporary CDO to restrict the flows to the plant to a maximum of 25 MGD at all times eliminates the very scenario sought by the EPA and the Regional Board in late 2020 - the scenario where extra flows are diverted to the SBIWTP in an effort to prevent untreated wastewater from entering the United States, in either in the Tijuana River or in the canyons. The Regional Board’s express request of USIBWC was based on their belief that affording *some* treatment of extra flows from the Tijuana River was better than leaving them completely untreated which would pose more of a risk or “hazard to the human environment.” The USIBWC notes this contradiction in the Regional Board’s previous request to USIBWC and its Tentative CDO.

Also, because the above-mentioned Minutes address how flows to SBIWTP are managed, this issue is preempted under the doctrine of federal issue preclusion and is a matter of foreign relations that is not subject to state regulation; is an issue addressed by an public international organization; is an issue addressed by existing international agreements; and the State’s attempt to regulate this matter is an impermissible interference with treaty implementation. As such, the United States

has not waived its immunity from the Clean Water Act with respect to limiting the volumes sent by Mexico to South Bay. Stated simply, the State cannot direct the USIBWC to cut Mexico off from use of the South Bay facilities.

Response

USIBWC alleges that it will not be afforded an opportunity to be heard prior to the adoption of the 2021 Permit. The San Diego Water Board provided an administrative draft of the 2021 Permit to USIBWC on January 8, 2021. The San Diego Water Board released the 2021 Permit for public comment and provided notice of the public hearing on February 25, 2021. The public comment period ended on March 25, 2021. USIBWC submitted timely comments on March 25, 2021. The San Diego Water Board has provided sufficient due process prior to the adoption of the 2021 Permit by giving notice of the public hearing and providing USIBWC an opportunity to be heard on the 2021 Permit. The San Diego Water Board is not required to provide an additional, written public comment period for the 2021 Permit. USIBWC may provide oral comments on any revisions to the 2021 Permit at the public hearing. Therefore, USIBWC will have an additional opportunity to be heard on the 2021 Permit.

Regarding compliance with state laws, please refer to Response to Comment No. 1.4.

USIBWC's comment refers to an "Objection Letter." However, the comment does not define "Objection Letter." For purposes of this Response to Comment Report, the San Diego Water Board assumes that the "Objection Letter" is USIBWC's comment letter to the 2021 Permit. To the extent USIBWC references and incorporates portions of its comment letter to the 2021 Permit, the San Diego Water Board also incorporates and references its Response to Comment Report for the 2021 Permit addressing the same topics.

The San Diego Water Board is confused by two statements in USIBWC's comment. First, USIBWC's comment states that the Tentative CDO "requires that the USIBWC construct sluice gates on JB1 to enable USIBWC to cut-off flow from Mexico and limit the Mexican flows to SBIWTP." Second, USIBWC's comment states that the Tentative CDO requires the influent flows into the SBIWTP be limited to 25 mgd.

The Tentative CDO does not require USIBWC to "cut-off flow from Mexico and limit the Mexican flow to SBIWTP" nor limit influent flows to 25 mgd. Those words do not appear in the Tentative CDO. Table 2 of the Tentative CDO establishes a time schedule for USIBWC to achieve various actions, including repair of the sluice gate at Junction Box 1 and to achieve consistent compliance with applicable effluent limitations, by January 3, 2022. (Tentative CDO, p. 10.) Since USIBWC has allowed the SBIWTP and treatment works to fall into a state of disrepair, the San Diego Water Board feels it is necessary for it to establish a time schedule of repair and maintenance actions to obtain timely, consistent compliance with applicable effluent limitations.

The Tentative CDO also orders USIBWC to comply with applicable effluent limitations, transboundary flow reporting requirements, violation reporting requirements, and 5-day reporting requirements forthwith. (Tentative Order, §§ 2-5, p. 11.) These provisions do not require USIBWC to cut-off or limit flows into the SBIWTP or limit influent flows.

USIBWC's comment oddly, inappropriately, and unnecessarily assumes there is only one method to comply with its effluent limitations—cut-off or limit flows from Mexico. That is simply not true. USIBWC may implement any number of best management practices or other actions to achieve its effluent limits. For an example of influent control measures, please refer to Response to Comment No. 1.2. The San Diego Water Board does not typically prescribe the method of compliance. (See Wat. Code, § 13360, subd. (a).) Thus, USIBWC may choose the appropriate course of action that fulfills the Tentative CDO.

USIBWC's comment attempts to highlight a discrepancy between the previously discussed temporary river diversion and this Tentative CDO. Regarding the temporary river diversion, please refer to Response to Comment No. 1.2. USIBWC never committed to the temporary river diversion. Thus, the San Diego Water Board did not issue any enforcement order to provide regulatory assurance for the additional flow that would be treated by the SBIWTP.

Previously, USIBWC would not commit to the temporary river diversion with an enforcement order to provide regulatory assurances and protection. Now, USIBWC is attempting to claim the same regulatory assurances and protection without an enforcement order. USIBWC cannot have the best of both worlds. If USIBWC wants regulatory assurances and protection, it needs to propose a course of action to the San Diego Water Board. The San Diego Water Board will consider the appropriate regulatory tool based on USIBWC's proposal. Regarding strict liability for permit violations, please refer to Response to Comment No. 1.2.

Regarding discharge, please refer to Response to Comment No. 1.8.

Action Taken

None.

1.10. Comment

E. Compliance Ordered by the Regional Board

USIBWC is willing to submit a Compliance Assurance Report that identifies all shortcomings, inadequacies, and maintenance issues with regard to control measures that need to be addressed to attain consistent compliance with the effluent limitations contained in the 2021 Permit. As previously stated, prior to the Tentative CDO, the USIBWC identified funds for repair of system components listed in the Tentative CDO's Table 2. It has already approved the submitted proposal for one item and will be receiving proposals for two additional items before the end of April 2021. Accordingly, the Compliance Assurance Report shall also include a

schedule for retaining appropriate contractors and designing, installing, and putting into operation the new or modified control measures.

However, the Regional Board is ordering the USIBWC to comply with specific repairs by specific dates in 2021 and 2022. Here, the Regional Board is directing a federal agency with regard to its use of federally appropriated funds. This may violate basic tenets of appropriations law and the Anti-Deficiency Act.

First, 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. The Appropriations Clause allows Congress to direct and control expenditures of federal funds from the U.S. Treasury. See U.S. Const., art. I, § 9, cl. 7. The “necessary expense doctrine” as a rule of construction for federal appropriations statutes governs the many situations where general statutory text leaves open whether a specific proposed expenditure is a legally authorized purpose for which appropriated funds may be expended. *U.S. Dep’t. of Navy v. FLRA*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (citing *Ass’n of Civilian Technicians, P.R. Army Chapter v. FLRA*, 370 F.3d 1214, 1221-22 (D.C. Cir. 2004)). Under the necessary expense doctrine, whether an expenditure is reasonably necessary to accomplish the agency’s mission is a matter of agency’s discretion. *Id.* See also *Dep’t of the Air Force--Purchase of Decals for Installation on Public Utility Water Tower*, B-301367, 2003 WL 22416499, at *2 (Comp. Gen. Oct. 23, 2003) (noting that necessary expense doctrine is, in the first instance, “a matter of agency discretion,” and commander’s use of funds lie within his discretion); see also *Matter of: Customs Service*, 1997 WL 56937, at *2 (Comp. Gen. July 6, 2006) (The “necessary expense” doctrine reflects a respect for an agency’s legitimate exercise of discretion to determine how best to accomplish the objects of its appropriation, and is a rule of reason and of deference.). That is, an agency has discretion to determine how it spends its appropriations so long as the expenditure is within the purpose of the appropriation as set-forth by Congress. The Regional Board here is attempting to control the discretionary spending decisions of a federal agency and effectively eliminate the Agency’s discretion with regard to how to spend its appropriated funds. This precedent would give open the door to state control over a federal Agency’s budget and spending decisions. Ceding such control to a State entity is unacceptable under federal appropriations principles. While the Regional Board may require compliance with its permit, it cannot require specific expenditures or direct an Agency with regard to how to achieve that compliance.

Second, the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342, requires that no agency commit to any expenditure before it receives an appropriation for that expenditure. The USIBWC is provided funding for its operations and activities in an annual appropriation by Congress. The amount appropriated to USIBWC is based on a budget submitted to the President two years in advance. For the appropriation for 2021, USIBWC submitted a budget to the Administration in 2019. The USIBWC is not authorized to expenditures that were not authorized by Congress and submitted in advance by USIBWC. For example, “replacement of a belt press” may cost more

than what was included in USIBWC's budget for maintenance and operation of the Plant. Agreement to expend a large amount of money when USIBWC has not budgeted that amount, requested that amount from Congress, or received it from Congress may violate the Anti-Deficiency Act. Therefore, for the 2021 Plant upgrades, USIBWC cannot comply with the CDO.

Also, the CDO requires that the Agency commit to expenditures in 2022. For expenditures ordered by the CDO for 2022, as required by the Antideficiency Act, federal agencies are prohibited from making financial commitments for which it has no appropriation. All funding in future years are subject to the availability of appropriated funds and the budget priorities of each agency, as they have provided these priorities to Congress. The Regional Board is prohibited from obligating USIBWC or requiring it to expend appropriations or to enter into any other financial obligations that would be inconsistent USIBWC's authorities and budget priorities.

Response

The San Diego Water Board appreciates USIBWC's willingness to submit a Compliance Assurance Report that identifies all shortcomings, inadequacies, and maintenance issues with regard to control measures that need to be addressed to attain consistent compliance with applicable effluent limitations. The San Diego Water Board agrees that the Compliance Assurance Report should also include a schedule for retaining appropriate contracts and designing, installing, and putting into operation new or modified control measures. USIBWC's commitment is memorialized in the Tentative CDO as part of the time schedule set by the San Diego Water Board. Regarding compliance with state laws, please refer to Response to Comment No. 1.4.

USIBWC also commented that the time schedule is not achievable due to budgetary constraints and appropriations limitations. The San Diego Water Board requested USIBWC provide a schedule for repairs for 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. 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.

Lastly, compliance with its WDR 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 transparency on the repair schedule and federal appropriations as a shield to avoid compliance with its WDR 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. This Tentative CDO furthers that mission by ordering consistent compliance with USIBWC’s WDR and the repair, operation, and maintenance of the SBIWTP and treatment works. The costs of compliance with the Tentative CDO are reasonable given the need for proper operations and maintenance of the SBIWTP and consistent compliance with applicable permit requirements for the protection of water quality and beneficial uses. How USIBWC chooses to use its funds to comply with the Tentative CDO remains vested in its discretion. The San Diego Water Board encourages USIBWC to consider prioritizing any end-of-year budget surplusages to these much needed repair and maintenance issues. Regarding the method of compliance, please refer to Response to Comment No. 1.9. Regarding civil penalties for compliance assurance, please refer to Response to Comment No. 1.4.

Action Taken

Table 2 of the Tentative CDO has been revised as follows:

Task	Deadline
Submit a Compliance Assurance Report that identifies all shortcomings, inadequacies, and maintenance issues with regard to control measures that need to be addressed to attain consistent compliance with the effluent limitations contained in the 2021 Permit. The report shall also include a schedule for retaining appropriate contractors and designing, installing, and putting into operation the new or modified control measures <u>and estimated project costs</u> .	June 30, 2021

2. Viviane Marquez-Waller

2.1. Comment

As part of the requirements for the CDO, I would like to see a significant investment in an on-call as-needed contractor. This process is often used with agencies like the IBWC that know that they consistently need maintenance, repairs and parts. It is unconscionable that an important repair like the sluice gates in Box 1 is delayed for months as work is put to bid and contracts signed. It should go without saying that IBWC should have on-site available inventory of parts for routine and anticipated replacements and repairs.

Response

Comment Noted. The San Diego Water Board agrees that USIBWC should have appropriate personnel and spare parts available for maintenance issues. The 2021

Permit includes provisions for USIWBC to develop an Asset Management Plan and the Tentative CDO requires USIBWC to comply with the 2021 Permit.

Action Taken

None.

2.2. Comment

It is time to consider the best approach without consideration of Mexico's infrastructure. The last 2 years have proven unequivocally, Mexico's infrastructure cannot be relied upon and fails on a consistent basis. We need a diversion system and a pump station on the U.S. side of the border to send effluent to IBWC when CILA and/or the Mexican diversion system is not working properly.

Response

Comment Noted. The San Diego Water Board agrees that appropriate agencies should consider approaches to be implemented on the U.S. side of the international border to address border sewage issues. However, this comment is outside the scope of the Tentative CDO.

Action Taken

None.

2.3. Comment

In the CDO, the RWQCB identifies numerous violations during a very short period of time (November 2020 through January 2021) for Finding 7 and 2 months for Finding 8). The many violations listed in Findings 7-10 are during a year with one of the region's lowest reported rainfall in decades (San Diego County received less than 4 inches of rain during the time period the violations took place).

During only this short period of time, the IBWC reported: 46 violations of effluent discharge limitations (Section 7 a., b., and c., averaging one every other day!) and 10 violations of canyon collectors flow reports (Section 8), (including single day flows of 325,000, 314,000 and 141,000 gallons) totaling almost a million gallons of transboundary flow at Stewarts Drain in November and December 2020 alone. We understand the IBWC has been plagued with change in personnel, however, this federal agency is clearly not providing reporting or corrective actions as required. Their non-compliance is further exasperated by their flagrant repeated non-responsiveness to RWQCB letters and requests for information.

Response

Comment Noted. The Tentative CDO requires USIBWC to comply with all reporting requirements in the 2021 Permit.

Action Taken

None.

2.4. Comment

IBWC should be required to clean up transborder trash; it is insufficient and non-productive to require only assessment and monitoring without effective removal of trash.

Response

Comment Noted. The collection of trash is outside the scope of the Tentative CDO.

Action Taken

None.

2.5. Comment

IBWC should be required to have a vacuum truck on-site to remediate smaller flows and stagnant ponded wastewater from canyons and the river on a regular basis and be treated at the Treatment Plant.

Response

Comment Noted. The 2021 Permit includes provisions for USIBWC to contain and clean up transboundary flows that bypass the canyon collector systems, if the transboundary flow was within the canyon collector system capacity. The San Diego Water Board also requests USIBWC apply these same provisions to other transboundary flows at other areas. The 2021 Permit regulates the SBIWTP and flows in the main channel of the Tijuana River are not part of the SBIWTP.

Action Taken

None.

2.6. Comment

Yogurt Canyon should become part of the IBWC's responsibility as the transborder sewage in that canyon is already sufficient to 'be collected by a vacuum truck'.

Response

Comment Noted. Requiring USIBWC to control flows in Yogurt Canyon is outside the scope of the Tentative CDO. The 2021 Permit regulates the SBIWTP and associated facilities. USIBWC does not currently have a canyon collector system or infrastructure at Yogurt Canyon. While the San Diego Water Board does not have authority to require USIBWC to contain and clean up transboundary flows at Yogurt Canyon, the 2021 permit requests that USIBWC report, contain and clean up these flows.

Action Taken

None.

2.7. Comment

IBWC should not receive their 2021 permit until they have adequately addressed all items in Table 2. I also believe Table 2 should include a clause that adds: 'provide and repair any and all additional items or issues as needed, to be in compliance with their 2021 Tentative Permit'.

The seriousness and number of violations addressed in this CDO, show a flagrant disregard of the responsibility the IBWC has in protecting our region's health and environment. Seeing these violations on paper may obfuscate the on-the-ground reality, that our largely minority south bay region is affected by the air pollution IBWC's (and Mexico's) negligence has created, the water pollution IBWC's (and Mexico's) negligence has created and the land pollution the IBWC's (and Mexico's) massive sewage flows have created. In addition, the IBWC's (and Mexico's) negligence has resulted in our underserved communities being denied use of their City, County, State and Federal parks, lands and ocean in the Tijuana River Valley due to closure and pollution for several years, including during the pandemic, when access was even more critical.

I request that the RWQCB has the CDO review and adoption prior to the Permit renewal (International Boundary and Water Commission Tentative Order No. R9-2021-0001 National Pollutant Discharge Elimination System Program Permit renewal), so that the excessive violations can be part of the renewal approval or denial consideration(s).

I would also like the Board to consider denying the permit until violations cease or at the very least renew the permit for a shorter period of time, to see how the IBWC performs in the coming months. In fact, I believe it would be unethical for IBWC to receive or accept a permit with conditions they know they cannot meet for 6 months or more.

Because the IBWC Treatment Facilities is the only sewage treatment plant existing in the world that treats exclusively sewage from a foreign country, it may be time to consider bringing grievances to the Federal, State Department level. The State Department may be better equipped than the IBWC to negotiate with Mexico to fix their side of the problem.

Response

Comment Noted. USIBWC is currently enrolled in the 2014 Permit. The 2014 Permit expired on July 31, 2019, but remains in effect until such time as it is superseded by a new reissued permit. The 2021 Permit provides many improvements over the 2014 Permit; therefore, the San Diego Water Board staff recommend adoption of the 2021 Permit. The Tentative CDO requires USIBWC comply with the then adopted 2021 Permit forthwith.

Action Taken

None.