

# Will the Border Water Quality Restoration and Protection Act of 2020 Be Enough to Flush the Tijuana River Valley Water Pollution Crisis Down the Drain?

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Fig. 1. Tijuana River Watershed.<sup>1</sup>

1. Tijuana River Watershed (illustration), in CAL. WATER BD., SEWAGE POLLUTION WITHIN THE TIJUANA RIVER WATERSHED (2020), [https://www.waterboards.ca.gov/sandiego/water\\_issues/programs/tijuana\\_river\\_valley\\_strategy/sewage\\_issue.html#:~:text=At%20times%2C%20sewage%20generated%20on%20the%20Mexico%20side,and%20visitors%20along%20both%20sides%20of%20the%20border](https://www.waterboards.ca.gov/sandiego/water_issues/programs/tijuana_river_valley_strategy/sewage_issue.html#:~:text=At%20times%2C%20sewage%20generated%20on%20the%20Mexico%20side,and%20visitors%20along%20both%20sides%20of%20the%20border) [https://perma.cc/B7DH-E34U].

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I. INTRODUCTION

The Tijuana River Watershed spans approximately 1,750 square miles along the California – Mexico border.<sup>2</sup> Approximately seventy-five percent of the watershed lies within Mexico’s border and encompasses the densely urbanized City of Tijuana, Mexico.<sup>3</sup> The watershed drains into the Tijuana River Valley and ultimately into the Pacific Ocean in the southernmost part of Imperial Beach, California.<sup>4</sup>

Over the past few decades, the Tijuana River Valley has dumped significant amounts of wastewater into the Pacific Ocean. This has caused concern by inhabitants along both sides of the border, but especially the citizens of Imperial Beach, California, who have been forced to close beach access for one-third of each year due to risk to human health.<sup>5</sup> The root cause of why neither country has assumed full ownership of this crisis seems to lie within the 1944 Treaty. The 1944 Treaty provides that both countries share the labor and cost of maintaining the Tijuana River system,<sup>6</sup> which has, in essence, created a “Tragedy of the Commons;”<sup>7</sup> resultantly, colossal amounts of wastewater continue to drain through Tijuana River Valley and into the Pacific Ocean. Meanwhile, politicians point fingers to forgo the use of tax dollars to rectify the issue.

However, there is a glimmer of hope for the citizens of both Imperial Beach, California, and Tijuana, Mexico. The recently promulgated United States-Mexico-Canada-Agreement (USMCA) provides \$300 million in funding to address the toxic sewage flowing across the border into San Diego County.<sup>8</sup> Whilst the \$300 million declaration made a good press

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2. CAL. WATER BD., SEWAGE POLLUTION WITHIN THE TIJUANA RIVER WATERSHED (2020), [https://www.waterboards.ca.gov/sandiego/water\\_issues/programs/tijuana\\_river\\_valley\\_strategy/sewage\\_issue.html#:~:text=At%20times%2C%20sewage%20generated%20on%20the%20Mexico%20side,and%20visitors%20along%20both%20sides%20of%20the%20border](https://www.waterboards.ca.gov/sandiego/water_issues/programs/tijuana_river_valley_strategy/sewage_issue.html#:~:text=At%20times%2C%20sewage%20generated%20on%20the%20Mexico%20side,and%20visitors%20along%20both%20sides%20of%20the%20border) [https://perma.cc/B7DH-E34U].

3. *Id.*

4. *Id.*

5. Border Water Quality Restoration and Protection Act of 2020, S. Res. 4352, 116th Cong. § 101(10) (2020).

6. Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

7. *See generally* MICHAEL MARCHETTI & PETER MOYLE, PROTECTING LIFE ON EARTH: AN INTRODUCTION TO THE SCIENCE OF CONSERVATION 130–132 (2010) (explaining the Tragedy of the Commons).

8. United States-Mexico-Canada Agreement Implementation Act § 821, 19 U.S.C. § 4731 (2020); M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RSCH. SERV., IF11391 USMCA: AMENDMENT AND KEY CHANGES 6 (2020).

release for California politicians,<sup>9</sup> little instruction is provided within the USMCA for effectuating the legislator's intent.<sup>10</sup> One solution to this problem may be the Border Water Quality Restoration and Protection Act of 2020 that was introduced by Senator Dianne Feinstein (D-CA) and cosponsored by Senator Kamala Harris (D-CA) on July 29, 2020.<sup>11</sup>

This Article reviews the complex and decades-long wastewater pollution crisis occurring in the Tijuana River Valley, its legislative history, and whether the Water Quality Restoration and Protection Act of 2020 would flush the Tijuana River Valley water pollution crisis down the drain in light of the promulgation of the USMCA.

## II. HISTORICAL OVERVIEW

### A. *The 1944 Treaty Between the United States of America and Mexico*

In the early twentieth century, both the United States and Mexico experienced steady population growth that led to the two countries forming their first water distribution agreements.<sup>12</sup> In time, those agreements expanded, paving the groundwork for the 1944 Treaty. The 1944 Treaty, among other things, was enacted to “delimit the rights of the two countries with respect to the waters of the . . . Tijuana Rivers . . . in order to obtain the most complete and satisfactory utilization [of the waters].”<sup>13</sup> To accomplish this goal, the 1944 Treaty gave oversight responsibility to the International Boundary and Water Commission (IBWC), who is responsible for reporting its findings to the two Governments.<sup>14</sup> Among the enumerated responsibilities, the IBWC is tasked with studying and reporting (1) “plans for storage and flood control to promote and develop domestic, irrigation and other feasible uses of the waters[;]” and (2) estimating costs “of the proposed works and the manner in which the construction of such works or the cost thereof should be divided between the two Governments.”<sup>15</sup>

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9. See, e.g., Juan Vargas, *Rep. Vargas Releases Statement on USMCA Passage Including Funding to Combat Cross-Border Pollution* (Dec. 19, 2019), <https://vargas.house.gov/media-center/press-releases/rep-vargas-releases-statement-on-usmca-passage-including-funding-to> [<https://perma.cc/5DYP-FE5C>] [hereinafter *The Funding Release*].

10. S. Res. 4352.

11. *Id.*

12. Allie Umoff, *An Analysis of the 1944 U.S.-Mexico Water Treaty: Its Past, Present, and Future*, 32 ENVIRONS ENVTL. L. & POL'Y J. 69, 72 (2008).

13. Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

14. *Id.* at 6.

15. *Id.* at 35.

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Although the 1944 Treaty gives broad oversight to the IBWC, it essentially gives the IBWC a bark without a bite because all IBWC recommendations remain subject to the two Governments' approval.<sup>16</sup> Nevertheless, succeeding the abovementioned stipulation, the 1944 Treaty says, "The two Governments agree to pay in equal shares the costs of joint operation and maintenance of the works involved, and each Government agrees to pay the cost of operation and maintenance of the works assigned to it for such purpose."<sup>17</sup> This latter provision seems to be the crux of the wastewater crisis—neither country wants to be responsible for the millions (possibly billions) of dollars needed to erect and maintain the wastewater treatment infrastructure necessary to control the wastewater runoff in the Tijuana River Valley.

*B. Domestic Water Law: The United States*

In addition to adherence to the 1944 Treaty, the United States has adopted domestic regulations that impact measures aimed at rectifying wastewater issues like those seen in the Tijuana River Valley wastewater crisis. The two main domestic regulations impacting the Tijuana River Valley wastewater crisis are (1) the Clean Water Act (CWA); and (2) the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>18</sup>

*1. The Clean Water Act*

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>19</sup> The CWA sought to accomplish this through detailing seven national goals, which included "that the discharge of pollutants into the navigable waters be eliminated by 1985."<sup>20</sup> Yet, the CWA left an exception granting the United States Environmental Protection Agency's (EPA) Administrator authority to issue permits through the National Pollutant Discharge Elimination System (NPDES), permitting the discharge of pollutants into navigable waters under limited conditions.<sup>21</sup> Accordingly, the CWA makes it unlawful to discharge any pollutant from a point source into navigable waters unless

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16. *See id.*

17. *Id.* at 36.

18. *See* 33 U.S.C. §§ 1251, 1365(b); *see also* 42 U.S.C. § 6901.

19. 33 U.S.C. § 1251(a).

20. *Id.* at § 1251(a)(1).

21. *See* 33 U.S.C. § 1342.

a permit is obtained through the EPA's NPDES.<sup>22</sup> To hold stakeholders accountable, the CWA permits citizen suits against the United States—or another governmental instrumentality or agency—for violating provisions of the CWA or a permit issued by the EPA's NPDES.<sup>23</sup>

In effect, the CWA places more stringent requirements to be met by the United States on future projects involving Tijuana River Valley. This further complicates the pervasive contamination that is the wastewater challenge. For example, in 1997, Minute 296 was proposed to split the costs of the construction, operation, and maintenance of the South Bay International Wastewater Treatment Plant (SBIWTP) between the United States and Mexico.<sup>24</sup> However, the SBIWTP, as originally designed, failed water quality permit standards required by the CWA.<sup>25</sup> The EPA and United States Section of the IBWC (hereinafter USIBWC) then recommended a completely mixed aerated pond system to supplement the SBIWTP; however, the recommendation was rejected by Congress because the supplemental system would place the SBIWTP's bottom-line over the \$239.4 million statutory cap allotted for the SBIWTP project.<sup>26</sup> This imposition of stricter regulation requirements under the CWA drove away what could have been the treatment of approximately ten billion annual gallons of wastewater flowing through the Tijuana River Valley.<sup>27</sup> Since the CWA is still sound law, any measures taken by the United States to resolve the wastewater in the Tijuana River Valley must also comply with the stricter requirements promulgated in the CWA.<sup>28</sup>

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22. *See id.*

23. *See id.* § 1365.

24. INTERNATIONAL BOUNDARY AND WATER COMMISSION (IBWC), DISTRIBUTION OF CONSTRUCTION, OPERATION AND MAINTENANCE COSTS FOR THE INTERNATIONAL WASTEWATER TREATMENT PLANT CONSTRUCTED UNDER THE AGREEMENTS IN COMMISSION MINUTE NO. 283 FOR THE SOLUTION OF THE BORDER SANITATION PROBLEM AT SAN DIEGO, CALIFORNIA/TIJUANA, BAJA CALIFORNIA, RESOLUTION 15, available at <https://www.ibwc.gov/Files/Minutes/Min296.pdf> [<https://perma.cc/QJX7-FQKH>] [hereinafter *Meeting Minutes on the Border Sanitation Problem*].

25. John M. Minan, *Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border*, 3 SAN DIEGO INT'L J. 51, 64-65 (2002); *see generally* 33 U.S.C. § 1251 et. seq.

26. Act of October 6, 1992, Pub. L. 102-389, 106 Stat. 1571, 1599 (1992); MINAN, *supra* note 25, at 65.

27. MINAN, *supra* note 25, at 65 (citing U.S. EPA & U.S. IWBC, Record of Decision for the International Boundary and Water Commission South Bay International Wastewater Treatment Plant: Long Term Treatment Options, Supplemental Environmental Impact Statement, at 2 (Dec. 8, 1999)).

28. *See* INT'L BOUNDARY AND WATER COMM'N UNITED STATES AND MEXICO, RECOMMENDATIONS FOR THE SOLUTION TO THE BORDER SANITATION PROBLEMS (Sept. 24, 1979), <https://www.ibwc.gov/Files/Minutes/Min261.pdf> [<https://perma.cc/285Z-9DGL>] (“[E]ach country in dealing with its sanitation problems has its own quality standards,

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2. *The Resource Conservation and Recovery Act*

The RCRA “is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.”<sup>29</sup> The RCRA establishes a national policy that “wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible.”<sup>30</sup>

The largest impact that the RCRA has on the Tijuana River Valley wastewater crisis is that the RCRA permits citizen suits against “any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”<sup>31</sup> Consequently, litigants have recently brought claims challenging the government’s failure to provide a safe wastewater treatment infrastructure along the United States-Mexico Border under the RCRA.<sup>32</sup>

Additionally, to conduct its directive, the RCRA gives the EPA oversight and control of solid waste from “cradle to grave.”<sup>33</sup> This is partially why the funding earmarked in the USMCA to address the wastewater infrastructure in the Tijuana River Valley was likely allocated to the EPA, rather than another government agency.<sup>34</sup> Granted the intricacies that government bureaucracy imposes on implementing solutions to complex issues, having one stakeholder responsible for project oversight may prove beneficial.

C. *Domestic Water Law: Mexico*

According to Mikael Wolfe, Assistant Professor of History at Sandford University, Mexico has very robust domestic water laws; yet Mexico does

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determined by the authorities responsible for safeguarding public health and well-being of its inhabitants . . .”).

29. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996); *see* 42 U.S.C. § 6901.

30. § 6902(b).

31. § 6972(a)(1)(B).

32. *See, e.g., Imperial Beach v. Int’l Boundary & Water Comm’n U.S. Section*, 337 F. Supp. 3d 916, 930–933 (S.D. Cal. 2018).

33. U.S. Env’t Prot. Agency, *Summary of the Resource Conservation and Recovery*, <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> [<https://perma.cc/6MF7-GFX7>].

34. *See The Funding Release*, *supra* note 9.

little to enforce those laws.<sup>35</sup> The three Mexican laws that have the greatest impact on the Tijuana River Valley wastewater crisis are (1) the Political Constitution of the United States of Mexico; (2) the General Law of Ecological Balance and Environmental Protection; and (3) the National Waters Law.

### *1. The Political Constitution of the United States of Mexico*

Article 27 of the Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United States of Mexico] (hereinafter the Mexican Constitution) broadly states that “all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars.”<sup>36</sup> In essence, Article 27 of the Mexican Constitution states that all water within Mexico is owned by the federal government, unless otherwise conveyed by the federal government.

### *2. The General Law of Ecological Balance and Environmental Protection*

Ley General del Equilibrio Ecológico y la Protección al Ambiente [The General Law of Ecological Balance and Environmental Protection] (hereinafter the Ecology Law) builds off Article 27 of the Mexican Constitution by establishing general criteria pertaining to water pollution prevention and control.<sup>37</sup> The relevant portion of the Ecology Law is Chapter III, which addresses the prevention and control of water and aquatic ecosystems pollution.<sup>38</sup>

Chapter III, Article 117, Subsection II of the Ecology Law states, “It is the responsibility of the State and society to avoid pollution in rivers,

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35. See Mikael Wolfe, *Mexico has Some of the Best Water Laws Around. So why are its Rivers so Contaminated?*, THE WASHINGTON POST (Apr. 26, 2018, at 3:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/26/mexico-has-some-of-the-best-water-laws-around-so-why-are-its-rivers-so-contaminated/> [https://perma.cc/TR4T-6AX3].

36. Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021 (Mex.), translated in M. Fernanda Gomez Aban, *Mexico's Constitution of 1917 with Amendments through 2015*, COMPARATIVE CONSTITUTIONS PROJECT (Aug. 26, 2021, 4:39 PM), [https://www.constituteproject.org/constitution/Mexico\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en) [https://perma.cc/J5LL-XSM5].

37. Ley General del Equilibrio Ecológico y la Protección al Ambiente [LGEP], Diario Oficial de la Federación [DOF] 28-01-1988, últimas reformas DOF 18-01-2021 (Mex.), translated in *General Law of Ecological Balance and Environmental Protection*, FEDERAL OFFICIAL GAZETTE (Jan. 28, 1988), <https://www.wipo.int/edocs/lexdocs/laws/en/mx/mx028en.pdf> [https://perma.cc/N63E-E7DF].

38. *Id.* art. 117.



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basins, oceans and other deposits and water currents, including subsoil waters.”<sup>39</sup> Subsection IV goes further by requiring urban wastewater to be treated before being discharged into a water source.<sup>40</sup> Pursuant to Article 119, the Natural Resources and Fisheries’ Secretariat of Environment is responsible for issuing “the Official Mexican Standards necessary to prevent and control pollution of national water . . . .”<sup>41</sup> The state and municipal governments are responsible for complying with the Official Mexican Standards established by the Secretariat.<sup>42</sup>

### 3. *The National Waters Law*

The National Waters Law (Ley de Aguas Nacionales) is a comprehensive piece of national legislation that supports the broader provisions set out by the Ecology Law.<sup>43</sup> Importantly, the National Waters Law establishes the National Water Commission (Comisión Nacional del Agua) (NWC), which oversees “water planning, permitting, management and enforcement issues.”<sup>44</sup> Like the United States EPA, the NWC reviews and issues permits to individual and legal entities seeking to discharge wastewater.<sup>45</sup> If the NWC discovers an individual or legal entity violating wastewater discharge standards, the NWC can seek legal remedies including, but not limited to, revocation of permits, sanctions, and mediation or arbitration.

### III. THE CHALLENGE

Upon examination of the legislative underpinnings of the Tijuana River Valley, one can easily see there is a robust body of law that, if properly adhered to, would most likely mitigate the Tijuana River Valley wastewater crisis. Instead, the issue has turned into a “Tragedy of the Commons.”<sup>46</sup>

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39. *Id.*

40. *Id.*

41. *Id.* art. 119.

42. *See id.*

43. *See* Commission for Environmental Cooperation, *Summary of Environmental Law in Mexico*, Summary of Environmental Law in North America, <https://moose.cec.org/moose/lawdatabase/mxdoc.cfm?varlan=english&topic=9> (last visited Sept. 1, 2021) [perma.cc/4HZW-85JK] [hereinafter *Commission for Environmental Cooperation*]; *See generally* Ley de Aguas Nacionales [LAN], Diario Oficial de la Federación [DOF] 01-12-1992, últimas reformas DOF 06-01-2020 (Mex.).

44. Commission for Environmental Cooperation at § 9.

45. *Id.* § 9.2.

46. *See* MARCHETTI & MOYLE, *supra* note 6.

Neither country fully assumes ownership nor takes the necessary initiative needed to remedy the adverse effects produced by the dilapidated wastewater treatment infrastructure along the United States-Mexico border. Evident from a reading of the 1944 Treaty and subsequent statutes, the issue ultimately boils down to neither country wanting to assume the full financial responsibility necessary to rectify the wastewater crisis.

*A. Projected Cost of Resolving the Tijuana River  
Valley Wastewater Crisis*

The estimated cost of resolving the Tijuana River Valley wastewater crisis varies. But the projected implementation costs—upwards of \$900 million—are steep.<sup>47</sup> Tack on the estimated operation costs of the proposed Tijuana River Valley projects, and the necessary funding required would likely exceed one billion dollars.<sup>48</sup>

Currently, only \$300 million has been set aside by the United States through the USMCA.<sup>49</sup> It is unclear whether the amount will be enough to even put a dent into the wastewater crisis, since Mexico has remained silent on offering any contribution. If Mexico matches the United States' contribution, then enough funding would be available to establish most of the necessary infrastructure to filter and divert the wastewater flowing through the Tijuana River Valley.<sup>50</sup> However, even then, more funding would likely be required from both nations to continually manage and operate the wastewater treatment projects.<sup>51</sup>

Without Mexico's support, the \$300 million set aside in the USMCA will likely require further funding to resolve the Tijuana River Valley wastewater crisis.

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47. See PROJECT CLEAN WATER, TIJUANA RIVER VALLEY NEEDS AND OPPORTUNITIES ASSESSMENT (NOA) REPORT 55-68 (Mar. 2020), <http://www.projectcleanwater.org/download/tijuana-river-valley-needs-and-opportunity-assessment-noa-report/> [https://perma.cc/2X37-Y69F].

48. See *id.*

49. See *The Funding Release*, *supra* note 9.

50. See PROJECT CLEAN WATER, *supra* note 47; see also Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

51. See PROJECT CLEAN WATER, *supra* note 47; see also Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

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*B. Pending Litigation*

Given the complexity and frustration of the Tijuana River Valley, several parties in the United States have recently brought suit against the USIBWC.<sup>52</sup> The claims brought by the parties allege that the USIBWC violated the CWA, NPDES permits, and/or the RCRA by allowing the discharge of pollutants to flow through the Tijuana River Valley, which contribute to a substantial endangerment of the environment and community health.<sup>53</sup>

In subsequent motions to dismiss, the Court has denied all motions to dismiss less several claims under the RCRA.<sup>54</sup> Therefore, the potential liability that the USIBWC may be subject to is greatly unknown; however, the USIBWC can momentarily breathe from what could become multimillion-dollar jury verdicts, since the three pending suits against the USIBWC in connection with the Tijuana River Valley wastewater crisis have been stayed following the announcement of the \$300 million allotment to address the transboundary pollution crisis.<sup>55</sup>

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52. See *City of Imperial Beach v. Int'l Boundary & Water Comm'n U.S. Section*, 337 F.Supp. 3d 916-33 (S.D. Cal. 2018); see also *Surfrider Found. v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv162 (JMA), 2018 WL 6504154, at \*1-5 (S.D. Cal. Dec. 11, 2018); see also *People v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv2050 (LL), 2019 WL 1572994, at \*1-5 (S.D. Cal. Apr. 11, 2019).

53. See *id.*; see also Second Amended Complaint at 1-4, *City of Imperial Beach v. Int'l Boundary & Water Comm'n U.S. Section*, No. 3:18-cv-00457-JM-JMA (S.D. Cal. Sept. 12, 2018) (“Defendants have utterly failed to fulfill their legal and moral mandates False Toxins and human bacterial and viral pathogens, including but not limited to, hepatitis, enteroviruses, and vibrio, have been and will continue to present in and around coastal beaches in the absence of abatement measures.”).

54. *City of Imperial Beach v. Int'l Boundary & Water Comm'n U.S. Section*, 356 F.Supp. 3d 1006, 1025 (S.D. Cal. 2018) (“Defendants’ motions to dismiss Plaintiffs’ RCRA claim under Rule 12(b)(1) are granted in part and denied in part. Plaintiffs’ allegations relating to the dispersal of waste by wind are dismissed as the court lacks jurisdiction over these allegations. . . . Defendants’ motions to dismiss Plaintiffs’ RCRA claim pursuant to Rule 12(b)(6) are granted in part and denied in part. Plaintiffs state a claim for violation of RCRA under Rule 12(b)(6), but only as to the allegations that Defendants’ temporary slowing and obstruction of wastewater changes the character of the waste flowing from Mexico and exacerbates environmental and human endangerment.”).

55. *City of Imperial Beach v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv457-JM-LL, 2020 WL 3604126, at \*1-3 (S.D. Cal. July 02, 2020); *Surfrider Found. v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv1621-JM-LL, 2020 WL 3604127, at \*1-3 (S.D. Cal. July 20, 2020); *California v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv2050-JM-LL, 2020 WL 3604128, at \*1-3 (S.D. Cal. July 02, 2020).

#### IV. THE UNITED-STATES-MEXICO-CANADA AGREEMENT'S IMPACT

In 2019, the United States, Mexico, and Canada replaced the North American Free Trade Agreement with the USMCA.<sup>56</sup> After the countries assented to the USMCA, follow-on negotiations continued resulting in several amendments to the newly brokered deal.<sup>57</sup> Pertinent here is an amendment that authorized grants under the U.S.-Mexico Border Water Infrastructure Program.<sup>58</sup> Although the amendment itself did not specify how much funding was to be provided to address the dilapidated wastewater treatment infrastructure supporting the Tijuana River Valley, California legislatures quickly released to the press that “\$300 million in funding will be distributed to the [U.S.-Mexico Border Water Infrastructure Program] over four years, directing the United States Environmental Protection Agency to prioritize wastewater infrastructure projects.”<sup>59</sup> Shortly thereafter, all parties involved in the above referenced cases jointly filed motions to stay their case, which was granted by the Court.<sup>60</sup>

Currently, the EPA has announced several short-term projects to “expeditiously increase treatment of Tijuana River flows by ten million gallons per day” through funds appropriated in the USMCA.<sup>61</sup> However, no other improvement projects have been announced. With government resources and political sentiment focused on the novel Coronavirus (COVID-19), the decades-long battle of solving the Tijuana River Valley wastewater crisis seems to find itself in a familiar situation: a stalemate.

#### V. THE BORDER WATER QUALITY RESTORATION AND PROTECTION ACT OF 2020

There may be a beacon of hope notwithstanding the stalemate in implementing a solution to the Tijuana River Valley wastewater crisis. On

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56. See United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

57. See M. ANGELES VILLARREAL & IAN F. FERGUSON, CONG. RESEARCH. SERV., IF11391, USMCA: AMENDMENT AND KEY CHANGES (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11391> [<https://perma.cc/2BU3-9A2T>].

58. *Id.* at 2.

59. *Id.*; *The Funding Release*, *supra* note 9.

60. *City of Imperial Beach v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv457-JM-LL, 2020 WL 3604126, at \*3 (S.D. Cal. July 02, 2020); *Surfrider Found. v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv1621-JM-LL, 2020 WL 3604127, at \*3 (S.D. Cal. July 20, 2020); *California v. Int'l Boundary & Water Comm'n U.S. Section*, No. 18cv2050-JM-LL, 2020 WL 3604128, at \*3 (S.D. Cal. July 02, 2020).

61. Press Release, ENV'T. PROT. AGENCY, EPA Announces Two Near-Term, Clean Water Projects in the Tijuana River (Sept. 02, 2020), <https://www.epa.gov/newsreleases/epa-announces-two-near-term-clean-water-projects-tijuana-river> [<https://perma.cc/B7NU-SRGN>].

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*Border Water Quality Restoration & Protection*

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July 29, 2020, Senator Dianne Feinstein (D-CA) introduced the Border Water Quality Restoration and Protection Act of 2020 (hereinafter the Act) to, among other things:

(1) establish a program to plan and implement water quality restoration and protection activities; (2) ensure the coordination of restoration and protection activities among Mexican, Federal, State, local, and regional entities and conservation partners relating to water quality and stormwater management in the Mexican Tijuana River watershed and the American Tijuana watershed; and (3) provide funding for water quality restoration and protection activities in the Mexican Tijuana River watershed and the American Tijuana River watershed.<sup>62</sup>

*A. Overview of the Border Water Quality Restoration and Protection Act of 2020*

To begin, the Act acknowledges that “the Tijuana River watershed is in the midst of an environmental crisis, as stormwater flows from the upper watershed, originating in Tijuana, Mexico, carrying pollutants such as bacteria, trash, and sediment that severely affect water quality” and that “significant additional investment from Federal, State, local, and Mexican resources is needed to improve the water quality of the Tijuana River watershed.”<sup>63</sup>

To remedy the crisis, the Act first seeks to establish the Tijuana River Public Health and Water Quality Restoration Program to consult and coordinate with intergovernmental organizations.<sup>64</sup> The Act places the EPA Administrator in charge of the Tijuana River Public Health and Water Quality Restoration Program, who shall then “develop a plan for the purpose of improving and protecting the water quality of the Tijuana River watershed.”<sup>65</sup> The plan will incorporate existing efforts to improve the Tijuana River Valley wastewater infrastructure, develop additional features needed to improve and protect the quality of wastewater flowing through the Tijuana River Valley, and identify potential sources of funding to cover the operation and maintenance of the Tijuana River Valley wastewater infrastructure—present and future.<sup>66</sup> The plan will be updated by the EPA Administrator “not later than one year after the date

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62. Border Water Quality Restoration & Prot. Act of 2020, S. 4352, 116th Cong. § 101(b) (2020).

63. S. 4352 § 101(a).

64. S. 4352 § 103.

65. S. 4352 § 104(a)(1).

66. S. 4352 § 104(a)(2).

of enactment of [the] Act . . . and every five years after the date on which [the] plan is issued.”<sup>67</sup> Furthermore, the Act grants the EPA Administrator the authority to issue grants and enter into agreements necessary to develop and maintain the Tijuana River Valley wastewater infrastructure.<sup>68</sup> Once grants are received, the USIBWC Commissioner “may construct, operate, and maintain any project carried out using funds made available to carry out [the plan].”<sup>69</sup>

As for funding, the Act does not give a concrete number to fixate on.<sup>70</sup> Instead, the Act separates funding into two categories: projects within the United States and projects wholly or partially within Mexico.<sup>71</sup> For projects within the United States, the Act is fairly liberal and allows the Secretary of State, acting through the Commissioner of the USIBWC, to “use available funds, including funds received under this Act, to construct, operate, and maintain the projects.”<sup>72</sup> For projects wholly or partially within Mexico, the Act places stricter requirements. A project located wholly or partially within Mexico shall be eligible for funding if the project is (1) identified under and consistent with the results of a United States-Mexico joint study and design of stormwater control and water quality projects; and (2) approved in accordance with the 1944 Treaty.<sup>73</sup>

In essence, the Act places the EPA Administrator at the helm of resolving the Tijuana River Valley wastewater crisis and frees up additional funding for projects within the United States. Yet, complications are still likely to arise when it comes to projects wholly or partially within Mexico, since those projects must be split equitably as prescribed in the 1944 Treaty.<sup>74</sup> Therefore, without contribution from Mexico, the Act will likely only provide a piecemeal solution to the Tijuana River Valley wastewater crisis.

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67. S. 4352 § 104(b).

68. S. 4352 § 105.

69. S. 4352 § 105(e).

70. *See generally* S. 4352.

71. S. 4352 § 401.

72. S. 4352 § 401(b).

73. S. 4352 § 401(d).

74. *See generally* Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

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*B. The Interplay of the Border Water Quality Restoration and Protection Act of 2020 and Applicable Law*

*1. The 1944 Treaty and the Border Water Quality Restoration and Protection Act of 2020*

As previously mentioned, the 1944 Treaty gave the Tijuana River Valley wastewater infrastructure oversight responsibility to the IBWC.<sup>75</sup> But under the 1944 Treaty, funding for IBWC-recommended projects still requires Congressional approval, and costs are to be equitably shared by the United States and Mexico.<sup>76</sup> This has caused a lack of ownership, resulting in both countries deflecting blame. Nevertheless, the Act seems to rectify some issues imposed by the 1944 Treaty.

First, the 1944 Treaty requires all recommendations proffered by the IBWC to be approved by Congress.<sup>77</sup> While the Act still preserves the importance and role of the IBWC, the Act appears to make it easier for the USIBWC to obtain funding by going through the Executive Branch.<sup>78</sup>

Second, the 1944 Treaty requires that the United States and Mexico equitably share all project costs along the Tijuana River Valley.<sup>79</sup> The Act preserves this aspect of the 1944 Treaty for projects “wholly or partially within Mexico.”<sup>80</sup> However, the Act departs from the 1944 Treaty when it comes to projects within the United States. Under the Act, the Secretary of State, through the Commissioner of the USIBWC, can unilaterally fund projects that (1) are on a water quality priority list developed by the EPA; (2) are within the United States; and (3) improve the water quality of the Tijuana River watershed.<sup>81</sup>

Third, the 1944 Treaty places the IBWC in charge of monitoring and reporting wastewater treatment in the Tijuana River Valley, but the Act subordinates the USIBWC to the EPA.<sup>82</sup> Reasonable minds could differ as to whether placing the EPA in charge of the Tijuana River Valley

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75. *Id.* at 5-6.

76. *Id.* at 53.

77. *Id.*

78. *See* Border Water Quality Restoration & Prot. Act of 2020, S. 4352, 116th Cong. (2020).

79. Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

80. S. 4352 § 401(d).

81. S. 4352 § 401(b).

82. *See* S. 4352; *see also* Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994.

wastewater crisis is optimal, but the measure will likely open resources that are unavailable under existing law. Furthermore, the USIBWC still plays an integral role under the Act by serving as an agency expert who “may study, design, construct, operate, and maintain projects to manage, improve, and protect the quality of wastewater, stormwater runoff, and other untreated flows in the Tijuana River watershed . . . .”<sup>83</sup>

## 2. *Other Regulations and the Border Water Quality Restoration and Protection Act of 2020*

In large part, the CWA, RCA, and other environmental regulations will have a minimal impact on the Act.<sup>84</sup> Nevertheless, the United States environmental regulations appear to have two impacts on the Act: (1) more interagency collaboration on certain projects in the Tijuana River Valley; and (2) stricter environmental requirements for projects within United States.

The Act acknowledges the necessity of the former by ensuring that the EPA Administrator consults with the heads of federal and state agencies, local government, nonprofit groups, the North American Development Bank, and other public agencies and organizations in developing the Tijuana River Public Health and Water Quality Restoration Program.<sup>85</sup> As for the latter, the Act does not alter any specific environmental regulations and requires the EPA Administrator to “coordinate the development of consistent Federal policies, strategies, projects, and priorities for addressing the public health and water quality restoration and protection of the Tijuana River.”<sup>86</sup> Furthermore, the Act requires any eligible project involving water discharge that will flow directly or indirectly into the United States to comply with “all relevant water quality standards of the country in which the project is located, including, for projects located in the United States, any applicable standards established under the Federal Water Pollution Control Act”<sup>87</sup> and for any eligible project to “comply with relevant State and local environmental and other laws (including regulations).”<sup>88</sup> Because the agencies that implement the directives prescribed by the Act also monitor and enforce many of the governing environmental regulations,<sup>89</sup>

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83. S. 4352 § 401(a).

84. *See* Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Mex.-U.S., art. 7, Nov. 14, 1944, U.S.T. 994; *see generally* *Meeting Minutes on the Border Sanitation Problem*, *supra* note 24.

85. S. Res. 4352 § 103.

86. *Id.*

87. S. 4352 § 301(a)(2)(A)(iii).

88. S. 4352 § 301(a)(2)(A)(v).

89. S. 4352 § 103(c).



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there is hope that little-to-no contention arises on projects approved through the Act.

*C. Will the Border Water Quality Restoration and Protection Act of 2020 Provide a Solution for the Cross-Border Riparian Residents?*

Whether or not the Border Water Quality Restoration and Protection Act of 2020 will provide a solution to the Tijuana River Valley wastewater crisis is largely unknown. The Act streamlines interagency coordination and opens up resources to the USIBWC that are otherwise unavailable. But the Act does little to address how much in funding will be provided to rectify the Tijuana River Valley wastewater treatment infrastructure. While the USMCA has earmarked \$300 million to “prioritize wastewater infrastructure projects,”<sup>90</sup> cost estimates have projected the need for three-to-four times the amount provided in the USMCA.<sup>91</sup> It is likely that neither nation has the appetite to provide the additional funding needed to resolve the Tijuana River Valley wastewater crisis since both nations have been economically crippled by COVID-19.<sup>92</sup> Congress has already injected roughly \$5.4 trillion into the United States economy through the Coronavirus Aid, Relief and Economic Security Act; the Consolidated Appropriations Act, 2021; and the American Rescue Plan Act of 2021.<sup>93</sup> Forgoing any pork barrel spending in subsequent bills, additional funding in excess of the \$300 million provided in the USMCA will likely remain nonexistent in the near-future. What does this mean for the cross-border riparian residents? Wastewater spillage in the Tijuana River Valley will most likely continue in the near future, and so will the environmental and life-threatening health problems that arise from the wastewater spillage.<sup>94</sup>

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90. *The Funding Release*, *supra* note 9.

91. *See* PROJECT CLEAN WATER, *supra* note 47.

92. *See* David M. Culter & Lawrence H. Summers, *The COVID-19 Pandemic and the \$16 Trillion Virus*, 324 J. AM. MED. ASS’N 1495, 1495 (2020) (“The total cost is estimated at more than [sixteen] trillion [dollars], or approximately [ninety percent] of the annual gross domestic product of the US.”).

93. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (providing \$2.2 trillion in economic relief); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2021) (providing \$2.3 trillion in economic relief); American Rescue Plan Act of 2021, Pub. L. No. 117-7 (2021) (providing \$1.9 trillion in economic relief).

94. *See, e.g.*, Lesley Stahl, *Raw Sewage Flowing into the Tijuana River Brings Toxic Sludge to California: Beaches are Being Polluted and Communities, including the*

## VI. RECENT LEGISLATIVE DEVELOPMENTS IN THE BORDER WATER QUALITY RESTORATION AND PROTECTION ACT OF 2020

Although the allocation of more funds to address the waste spillage in the Tijuana River Valley seems unlikely, California politicians continue to back legislation to rectify the environmental crisis. On March 3, 2021, Senator Dianne Feinstein (D-CA) and Senator Alex Padilla (D-CA) introduced an updated version of the Border Water Quality and Protection Act of 2020.<sup>95</sup> The updated Act is nearly identical to its predecessor and preserves the same means to obtain the same ends.<sup>96</sup> Currently, the Act is before the Committee on Environment and Public Works.<sup>97</sup>

Meanwhile, there is also support for the Border Water Quality Restoration and Protection Act in the House of Representatives.<sup>98</sup> On March 8, 2021, Representative Juan Vargas (CA-51) and five other United States congresspeople introduced a House Bill unironically titled the “Border Water Quality Restoration and Protection Act”, which is “a companion bill to Senator Feinstein and Padilla’s (D-CA) legislation introduced [on March 3, 2021].”<sup>99</sup> In a press release made by Representative Vargas, the congressman made it clear that, “[a]ddressing cross-border pollution in [the Tijuana River Valley] requires strong communication between agencies from both sides of the border” and that the bill makes the “EPA the lead agency to coordinate efforts between federal, state, local, and Mexican entities to properly allocate [] funding towards infrastructure and restoration programs to help address th[e] decades-long problem.”<sup>100</sup> Currently, the House Bill is before several subcommittees.

The dual-chamber support for the Border Water Quality Restoration and Protection Act is promising; however, only California politicians have

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*Navy SEALs and Border Patrol, are Getting Sick from the Waste*, CBS NEWS (Sept. 13, 2020), <https://www.cbsnews.com/news/raw-sewage-southern-california-coast-tijuana-mexico-60-minutes-2020-09-13/> [<https://perma.cc/RM7M-KG6Q>]; Greg Moran, *Border Patrol Agents Say Tijuana River Pollution is Making them Sick, and Officials want it Fixed*, L.A. TIMES (Mar. 6, 2018), <https://www.latimes.com/local/lanow/la-me-border-patrol-pollution-20180306-story.html> [<https://perma.cc/A28Q-3XWM>].

95. See Border Water Quality Restoration & Prot. Act, S 572, 117th Cong. (2021).

96. Compare Border Water Quality Restoration & Prot. Act of 2020, S. 4352, 116th Cong. (2020), with Border Water Quality Restoration & Prot. Act, S. 572, 117th Cong. (2021).

97. See S. Res. 572, 117th Cong. (2021) (sitting in the S. Env’t and Pub. Works Comm. since Mar. 3, 2021).

98. See Press Release, Juan Vargas, House of Rep., Reprs. Vargas, Peters, Ruiz, Levin, Jacobs, & Issa Introduce Border Water Quality Restoration & Prot. Act (Mar. 8, 2021), <https://vargas.house.gov/media-center/press-releases/reps-vargas-peters-ruiz-levin-jacobs-and-issa-introduce-border-water> [<https://perma.cc/48KD-3HMM>].

99. *Id.*

100. *Id.*

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supported both pieces of legislation. Thus, the California legislators have some work trying to sway their peers before the Act gains the necessary support needed to arrive at the President's desk. If the legislative support is nonexistent, then an alternative could lie within President Biden's proposed \$3.5 trillion infrastructure program, the Build Back Better Agenda, which includes upgrading wastewater infrastructure.<sup>101</sup> Since President Biden's Build Back Better Agenda negotiations are ongoing, this may be a golden opportunity to gain some, if not all, the necessary funding needed to rectify the wastewater spillage in the Tijuana River Valley.<sup>102</sup>

## VII. CONCLUSION

After reviewing the efficacy of the Border Water Quality Restoration and Protection Act of 2020, the proposed piece of legislation and its predecessors appear to help resolve the complex issue of the decades-long Tijuana River Valley wastewater crisis. Nonetheless, the Act alone will likely not be sufficient to flush the Tijuana River Valley wastewater crisis down the drain. Instead, more funding than that provided in the USMCA will be needed from both the United States and Mexico during a time both nations are facing a financial crisis induced by COVID-19. Therefore, it is unlikely that the Act will progress past the Senate Committee on Environment and Public Works,<sup>103</sup> which means the cross-border riparian residents will continue to be plagued by the adverse environmental and health effects induced by water pollution in the Tijuana River Valley. An

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101. THE WHITE HOUSE, THE BUILD BACK BETTER AGENDA, <https://www.whitehouse.gov/build-back-better/> [<https://perma.cc/UX2M-PZZ8>] (last visited Oct. 16, 2021) [hereinafter *The Build Back Better Agenda*]; THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN ANNOUNCES SUPPORT FOR THE BIPARTISAN INFRASTRUCTURE FRAMEWORK, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework/> [<https://perma.cc/TG2T-M3K6>] (June 24, 2021) [hereinafter *Fact Sheet*].

102. See generally, PROJECT CLEAN WATER, *supra* note 47.

103. See Border Water Quality Restoration and Protection Act of 2020, S. 4352, 116th Cong. (2020) (referred to the Committee on Environment and Public Works); Border Water Quality Restoration & Prot. Act, S. 572, 117th Cong. (2021) (referred to Committee on Environment and Public Works).

alternative may lie within the President Biden's Build Back Better Agenda,<sup>104</sup> but the Build Back Better Agenda is currently nothing more than a campaign promise.

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104. See *The Build Back Better Agenda*, *supra* note 101; see *Fact Sheet*, *supra* note 101.