Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border

John H. Minan

Follow this and additional works at: https://digital.sandiego.edu/ilj

Part of the International Law Commons, Law of the Sea Commons, Natural Resources Law Commons, and the Water Law Commons

Recommended Citation
John H. Minan, Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border, 3 San Diego Int’l L.J. 51 (2002)
Available at: https://digital.sandiego.edu/ilj/vol3/iss1/3

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego International Law Journal by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border

JOHN H. MINAN*

I. INTRODUCTION .......................................................................................... 52
II. THE CHALLENGE .................................................................................... 55
III. THE INTERNATIONAL BOUNDARY AND WATER COMMISSION (IBWC) ........................................ 58
IV. A BRIEF HISTORICAL OVERVIEW .................................................. 59
V. THE MODERN ERA .................................................................................. 61
   A. Treaty Developments .......................................................................... 61
      1. Minute 270 .................................................................................. 61
      2. Minute 283 .................................................................................. 62
      3. Minute 296 .................................................................................. 64
   B. The Bajagua Project ............................................................................ 66
   C. The Tijuana River Valley Estuary and Beach Cleanup Act of 2000 ........................................................................ 69
      1. An Overview .................................................................................. 69
      3. Enforcement in the Event of Default: California Regulatory Remedies ......................................................... 74
   D. People of the State of California v. The International Boundary and Water Commission, United States Section ........................................................................ 75
VI. CONCLUSION .......................................................................................... 80

* John H. Minan is a Professor of Law at the University of San Diego. He also is Chairman of the San Diego Regional Water Quality Control Board. The views expressed in this article are his own, and do not necessarily represent those of the Board or the state of California.
I. INTRODUCTION

Southern California has been under siege from the flow of treated and partially treated sewage from the Tijuana region in Mexico since the mid-1930s. Although the wastewater management situation has improved in recent years, new challenges have emerged that threaten further progress.

Today, the Tijuana region generates about fifty million gallons per day (mgd) of sewage. Of the fifty mgd, the South Bay International Wastewater Treatment Plant (SBIWTP), which is operated by the United States Section of the International Boundary and Water Commission (USIBWC), treats approximately twenty-five mgd under an international

---

2. See infra text accompanying footnote 21.
agreement with Mexico.\textsuperscript{4}

Following the treatment by the SBIWTP, the effluent is then discharged about three miles offshore into the waters of the United States through the South Bay Ocean Outfall (SBOO). The remaining twenty-five mgd of wastewater not treated by the SBIWTP is discharged directly into Mexican waters from the Mexican treatment plant at San Antonio de los Buenos.

The Tijuana River, which flows in a northwest direction from Mexico into the United States, empties into the Pacific Ocean through an estuary about two miles north of the border. The river is the natural water course for the Tijuana watershed. The watershed encompasses some 1700 square miles, with about twenty-five percent of it being in California.\textsuperscript{5} The Mexican portion of the watershed flows through Tijuana, which is one of the fastest growing cities in Mexico, whereas the portion in California is not highly developed.\textsuperscript{6} Urban runoff, stormwater, and planned and unplanned sewage discharges into the Tijuana River from the Tijuana watershed have a direct impact in the United States as well as in Mexico.

For approximately five miles before it enters the United States, the Tijuana River has been channelized in a concrete structure. The natural banks of the river are defined by this channel. This concrete channel continues for a mile or so after crossing the border. This aspect of the river is significant because the natural absorptive capacity of the river bottom and banks has been lost. Thus, the channelized portion of the river acts as an effective transporter of pollution from the surrounding Tijuana watershed.

The Tijuana estuary, which lies at the mouth of the river, is one of the most important tidal wetlands along the Southern California coast.\textsuperscript{7}
Unseasonable, dry-weather wastewater flows from the Tijuana watershed that reach the estuary cause significant harm. The harm is acerbated by wet-weather flows which effectively flush the pollution in the river system into the estuary. These flows upset the delicate balance of the estuary’s ecosystem.⁸

Although the river valley and estuary are obviously affected by such wastewater discharges, the surrounding community is also broadly impacted. The coastal shore areas and adjacent ocean waters from Rosarito Beach, Mexico and northward through San Diego, California also are affected, both by the uncontrolled discharges and the planned discharges from the SBIWTP. In addition, the shore areas and coastal waters in Mexico, and to a lesser extent the United States, are impacted by the discharges from the Mexican treatment plant at San Antonio de los Buenos.

The purpose of this article is to examine recent developments in the long-standing struggle by the United States and Mexico to cope with managing cross-border wastewater. Two notable legal developments have occurred recently that are fundamental to understanding the situation today. One is legislative, and the other is judicial. Neither has received scholarly comment.

The first is the enactment of Tijuana River Valley Estuary and Beach Cleanup Act, which was signed into United States’ law in 2000. It signified a significant change in policy by Congress. Prior to the enactment of the Cleanup Act, the international agreement contained in Minute 283 specified that both the primary and the secondary wastewater treatment required by the federal Clean Water Act was to be done in the United States. However, the Cleanup Act authorized the Secretary of State to negotiate and execute an agreement providing for secondary treatment to be done in Mexico.

The second development occurred on the judicial front. It resulted from the failure of the United States to comply with federal and California water quality permit standards contained in the International Wastewater Treatment Plant’s NPDES permit. This permit contains effluent limitations for total suspended solids (TSS) and chemical and

---

⁸ Mexico is currently in the process of developing wastewater reclamation projects adjacent to the Tijuana River. As discussed later in the article, these projects have the potential of adversely affecting the estuary. See infra note 20 and accompanying text.
biological oxygen demand (CBOD5) consistent with "secondary treatment," as required by the Clean Water Act. It also includes effluent limitations for acute and chronic toxicity and ammonia in order to implement California water quality standards, including requirements based on standards contained in the California Ocean Plan and San Diego Basin Plan.

In early 2001, California filed suit against the United States for failing to meet its permit obligations. This action was considered necessary because the doctrine of federal sovereign immunity limited California's other options to effectively deal with the situation. The suit was filed in federal district court over the continuing operation of SBIWTP in violation of the secondary treatment requirements imposed by federal and state law. In the litigation, California has not taken a position on where the secondary treatment should occur, only that it should occur as promptly and under a court-supervised schedule of implementation.

Taken together, these developments are certain to provide a strong impetus to breaking the current logjam of political inaction. Until this happens, the United States will continue to operate the SBIWTP in violation of its obligations under international agreement with Mexico as well as under federal and state law.

II. THE CHALLENGE

The inability to properly manage the flow of cross-border water pollution affects a wide array of public interests on both sides of the border. General water quality in the region is degraded. Toxic pollutants, water-borne bacterial and viral pathogens contained in the sewage threaten the health and safety of the public. Property values...
are diminished, ecosystems are damaged, and the tourist industry is adversely impacted. Thus, effectively regulating cross-border wastewater presents an important international challenge.

Cross-border water pollution in the San Diego-Tijuana border region is driven by various forces. Some of the physical considerations are unalterable. A cursory glance at a map at the beginning of this article reveals that the Tijuana River flows northward from Mexico into the United States before finding its way to the Pacific Ocean. The river naturally flows northward because Mexico is at a higher elevation than the United States. In addition, the terminus of two major urban canyons, Smuggler Gulch (Canon del Matadero) and Goat Canyon, drain the surrounding watershed directly into United States territory.

Another natural feature is the northward littoral near-shore current during various times of the year, principally during the winter and spring. Water pollution entering the ocean from the Tijuana River flows northward along the coast of Southern California. In addition, Tijuana wastewater is discharged directly into the ocean from the Mexican treatment plant at San Antonio de los Buenos. This effluent plume is trapped in the near-shore area of the coastal waters, where it also flows northward during the winter and spring. As a result of topography and current flow, significant amounts of water pollution flow naturally from Mexico into the United States or its coastal waters.

The Tijuana River has been heavily polluted for years, but the water pollution problems from wastewater grew significantly worse during the 1980s and 1990s as people migrated in increasing numbers to the Tijuana area in search of work. The generation of cross-border water pollution is directly linked to the population growth in the Tijuana region. At least in part, population growth has been stimulated by the “free-trade” economic opportunities provided by the North American Free Trade Agreement (NAFTA) and maquiladora plants.


Demographic projections predict a continuing increase in population, so the problems with managing Mexican wastewater will continue to press decision-makers for effective solutions in the years ahead.

An expanding population and growing economy in the Tijuana region predictably mean that more wastewater will be generated. Unfortunately, the Tijuana sewage control facilities, both wastewater collection and treatment, are already inadequate. The system is overburdened and struggling to keep pace with the demands placed on it.

The inability of Mexico to successfully treat, control and dispose of this sewage is compounded by a shortage of financial resources, an inadequate infrastructure and a lack of technical expertise. Notwithstanding these constraints, several initiatives are currently underway to address wastewater issues in Mexico. One is the preparation of a Master Plan for Potable Water and Wastewater Services for Tijuana and Playas de Rosarito (Master Plan). The Master Plan project is being financially supported by the U.S. Environmental Protection Agency (EPA), North American Development Bank (NADBank), and the Comisión Estatal de Servicios Públicos de Tijuana (CESPT). Another project intended to


15. Suzanne M. Michel, Defining Hydrocommons Governance Along the Border of the Californias: A Case Study of Transbasin Diversions and Water Quality in the Tijuana-San Diego Metropolitan Region, 40 Nat. Res. J. 931, 949 (2000). Although the generation of more wastewater is likely, this result is not inevitable, at least in the short-term. Between 1987 and 1997, for example, the Southern California Metropolitan Water District claims to have met the demand from a 2.8 million increase in population through conservation. Id. Water recycling also tends to dampen the generation of excess wastewater.

16. In June 2001, for example, the San Diego Regional Water Quality Control Board adopted a resolution requesting $697,000 from the State Water Resources Control Board to provide technical assistance to the State of Baja for the implementation of industrial wastewater pretreatment programs in the cities of Tijuana and Tecate. California Regional Water Quality Control Board, Region 9 San Diego, Adopted Orders, Resolutions and Decisions, Resolution 2001-177 (June 2001), available at http://www.swrcb.ca.gov/~rwqcb9/Orders/orders.html (last visited May 11, 2002).


18. Id. CESPT is the State Water Utility Commission responsible for providing
reduce sewage overflows and spills, including those into the Tijuana River, is the Tijuana Sewer Rehabilitation Project (Rehabilitation Project). Work on the Rehabilitation Project in coordination with the Master Plan is planned to commence in 2002. The funding for the project is to be provided by the same agencies supporting the development of the Master Plan.19

In addition to these projects, Mexico is also in the process of developing wastewater reclamation projects connected with new development in the eastern part of Tijuana. CESPT has obtained financing from the Japanese government to construct four wastewater reclamation plants, two20 of which are in the vicinity of the Rodriguez reservoir and adjacent to the upper reaches of the Tijuana River. The two reclamation projects adjacent to the Tijuana River have the potential to adversely impact the Tijuana estuary. To the extent that the water market is unable to use the full extent of the reclaimed water, the excess would be a new source of discharge to the Tijuana River, which would affect the volume of water reaching the estuary. An increase in the water volume from these plants has the potential of disrupting the ecosystem balance of the estuary. This concern about new discharges to the Tijuana River is a management issue that must be addressed by the United States in its border dealings with Mexico.

III. THE INTERNATIONAL BOUNDARY AND WATER COMMISSION (IBWC)

The International Boundary and Water Commission (IBWC) is a bi-national commission consisting of a United States Section and Mexican Section.21 The United States Section is organized under the Department of State, and the Mexican Section, Comision Internacional de Limites y
Aguas (CILA), is organized under the Ministry of Foreign Relations of Mexico. The Commission is charged with dealing with water problems along the border.\textsuperscript{22} IBWC international activities are conducted through “Minutes,” which typically are short documents having the force of law when the governments of both countries provide written notification of approval through their respective sections of the IBWC.\textsuperscript{23} The Minutes define a joint United States-Mexican project or program and then set out strategies for achieving an agreed goal or project in contractual terms or in terms of a resolution expressed in a Memorandum of Understanding (“MOU”). As discussed more fully below, Minutes 270, 283 and 296 provide the basic legal framework to cross-border cooperative efforts in this region for wastewater.

\section*{IV. A BRIEF HISTORICAL OVERVIEW}

Cross-border sewage in the Tijuana River Valley has been a problem for close to seventy years. In 1928, Tijuana had a community septic tank system serving approximately 500 people. By the mid-1930s, the community’s population had surged to 5,000, with no concurrent increase in its sewage treatment capacity, with resulting contamination discharges into the Tijuana River.\textsuperscript{24} In 1935, a new septic tank system

\begin{itemize}
  \item \textsuperscript{22} In addition, the Border Environmental Cooperation Commission (BECC) and the North American Development Bank (NADBank) operate under a side agreement to NAFTA. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, T.I.A.S. No. 12516 [hereinafter Charter]. Other organizations also are involved with environmental problems along the border. BECC’s mission is to identify, support, evaluate and certify affordable environmental infrastructure projects and to improve the quality of life for the people in the U.S.-Mexico border region. \textit{Id.} at Ch. I, art. 1. It is governed by a ten-member binational Board of Directors (five from each country), and is assisted by an eighteen-member binational Advisory Council (nine from each country). \textit{Id.} at Ch. I, arts. 1, 3, & 5. NADBank is a bilaterally-funded, international organization, in which Mexico and the United States participate as equal partners. \textit{Id.} at Ch. II, art. VI at §§ 2-3.
  \item \textsuperscript{23} International Boundary and Water Commission (IWBC), 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 [hereinafter Treaty Minutes will be cited as: IWBC, \textit{supra} note 23, Minute ###, Recommendation ##], \textit{available} at http://www.ibwc.state.gov/FORAFFAI/MINUTES/minindex.HTM \textit{last visited May 11, 2002}. \textsuperscript{24} E. Meyer, California Regional Water Quality Control Board, San Diego Region: Staff Report, \textit{History of Sewage Facilities Serving the City of Tijuana Baja},
was built to accommodate the wastewater of Tijuana’s expanding population. The system was quickly overloaded causing untreated sewage, once again, to contaminate agricultural lands and ground water in the Tijuana River basin.\textsuperscript{25}

In 1938, with funding from the United States, an International Outfall system was constructed on the U.S. side of the border to carry wastewater from Tijuana and from various federal buildings in the San Ysidro area. Trunk sewer lines within Mexico were funded by the Northern Territory of Baja. The San Diego County operated the outfall system, with operation and maintenance costs being shared by the County and the Northern Territory of Baja.\textsuperscript{26} However, management and control problems continued.

To more comprehensively address border-related water issues, on February 3, 1944, the United States and Mexico entered into the Treaty Between the United States of American and Mexico Respecting the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande.\textsuperscript{27} In Article 3 of the treaty, beneficial use preferences were identified in connection with the joint use of international waters.\textsuperscript{28} The beneficial use of water was subject to an important caveat: “All of the foregoing [beneficial] uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two governments, which hereby agree to give preferential attention to the solution of all border sanitation problems.”\textsuperscript{29} This provision is significant because it elevates the importance of finding cooperative solutions to the problem of cross-border water pollution. It also is important because it provides the basis for imposing mandatory legal obligations on the United States and Mexico, pursuant to subsequent international agreements, such as Minutes.

By 1948, Tijuana continued to face population growth. Its more than 50,000 citizens were generating sewage effluent in excess of 2.5 mgd.\textsuperscript{30} Given the inadequate size of the collection and treatment system, the result was predictable. Tijuana began discharging essentially untreated sewage into the outfall. While the effluent problem was evident, official action to address the continuing problem did not occur until 1953. In December 1953, the San Diego Regional Water Pollution Control Board

\textit{Mexico}, at 1 (1983) [hereinafter Staff Report] (on file with author).

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.} at 2.

\textsuperscript{27} 1944 Water Treaty, \textit{supra} note 21, art. III.

\textsuperscript{28} \textit{Id.} The first paragraph of this article identifies “domestic and municipal uses” as the first preference. \textit{Id.}.

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} Staff Report, \textit{supra} note 24, at 3.
adopted Resolution 53-5, declaring that the outfall was creating a pollution problem. The resolution also asked the governor of California to address the issue. However, long-term solutions were not forthcoming.\textsuperscript{31}

In 1958, the Regional Board requested that the Governor ask the U.S. Department of State for immediate emergency action. The State Department response was largely bureaucratic. It advised that the Mexican Ministry of Hydraulic Resources was studying the possibility of confining the effluent to the Mexican side of the border, and that technical assistance from the U.S. Public Health Service was available to the region.\textsuperscript{32}

A more encouraging step occurred in 1958 with the San Diego Metropolitan Sewage Master Plan that included an interceptor connection for conveying sewage from Tijuana to the metropolitan system for processing. Shortly thereafter, the political winds of progress shifted when Mexico informed the United States Commissioner of the IBWC that it intended to treat most or all of its wastewater in Tijuana. While Mexico remained interested in the possibility of using the San Diego metropolitan system for standby purposes, it was not interested in discharging all of its effluent into the San Diego metropolitan system.\textsuperscript{33}

V. THE MODERN ERA

A. Treaty Developments

The modern era for dealing with wastewater in the San Diego-Tijuana border region began in the 1980s. It started with the adoption of Minute 270, which provides the structural framework for analyzing contemporary wastewater events in the San Diego-Tijuana border region.

1. Minute 270

In 1985, Mexico promised to undertake specific action to address the wastewater problem. In Minute 270, it agreed to upgrade its wastewater management operations, at least within the framework of the Inter-American Development Bank (IDB), in order to address the effects of raw sewage spills into the Tijuana River. Among other planned construction projects, Mexico agreed to build two sewage treatment plants.

\textsuperscript{31} Staff Report, \textit{supra} note 24, at 5.
\textsuperscript{32} Staff Report, \textit{supra} note 24, at 6.
\textsuperscript{33} Staff Report, \textit{supra} note 24, at 10
The first plant, the San Antonio de los Buenos Sewage Treatment Plant, was completed and began operating in 1987. It is located approximately five miles south of the border on the Baja coast at Punta de los Buenos. Today, the plant receives about twenty-five mgd of sewage from Tijuana. Approximately seventeen mgd is treated before being discharged. The rest, about eight mgd, bypasses the plant and therefore receives no treatment. Both the treated and the untreated effluent, are discharged onto the beach through the Los Buenos Creek before entering the Pacific Ocean. The second treatment plant, Rio El Alamar, was to be located at the confluence of the Tijuana and Alamar Rivers in the Tijuana River Valley. It was never built because Minute 283 rendered it unnecessary.

2. Minute 283

In 1987, Congress authorized the construction of an international wastewater treatment facility in San Diego, California to provide for treatment of municipal sewage and industrial waste from Mexico, including Tijuana. The international treatment plant was envisioned as satisfying Mexico’s commitment to build the Rio El Alamar plant under Minute 270. Conceptually, Congress appeared to finally settle, at least as a matter of policy, where treatment would occur. It would be in the United States.

Progress on the international front was slow. In July 1990, three years after Congress acted, the United States and Mexico agreed to Minute 283, entitled “A Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California.” For the first time, an international framework to the collection, treatment and disposal of some of Tijuana’s sewage began to emerge.

The United States committed to building a bi-national wastewater treatment plant in California to treat Mexican sewage. The United States, acting through the IBWC, agreed to provide primary and secondary treatment for twenty-five mgd of the dry-weather sewage flow at the International Wastewater Treatment Plant (IWTP). This new agreement clearly was not a comprehensive solution because it did not address wet-weather stormwater flows, the inadequacy of the San Antonio plant, or the need for more capacity beyond the agreed upon twenty-five mgd. Nevertheless, it was a step in the right direction.

The costs of construction, operation and maintenance\textsuperscript{35} were to be shared between the two countries.\textsuperscript{36} The cost to Mexico was limited to the projected cost of the planned but never built, Rio El Alamar treatment plant.\textsuperscript{37} Pursuant to Minute 283, Mexico agreed to construct a collection system to convey the sewage to the Mexican side of the border in the proximity of the international treatment plant and to dispose of the sludge resulting from the plant’s treatment of Tijuana’s wastewater in Mexico.\textsuperscript{38}

In order to assure “efficient treatment,” Mexico also agreed to “require all industries to provide appropriate pre-treatment of wastewaters that those industries may discharge into the Tijuana sewage collection system which would in turn discharge into the international sewage treatment plant.”\textsuperscript{39} To date, Mexico has taken steps toward realizing this objective.\textsuperscript{40} In some measure, progress may be limited due to the fact that “efficiency” is not connected to the usual standards for primary treatment, such as BOD or TSS removals, of industrial waste. In the context of advanced primary treatment, this “efficient treatment” requirement has minimal practical effect on controlling the industrial effluent coming into the IWTP.

One aspect of Minute 283 that is apt to become increasingly important is the provision dealing with reclamation and reuse of wastewater. With respect to continuing entitlement to the wastewater, it states: “[B]oth Governments reserve the right to return for reuse in their respective territories part or all of the international treatment plant effluent

\begin{itemize}
  \item \textsuperscript{35} IBWC, supra note 23, at Minute 296, Recommendation 2 (setting the operation and maintenance costs at $0.034 per cubic meter for up to the 25 mgd, with adjustments “as needed.”). This amount was based on the cost that Mexico would have expended in 1997 in the operation and maintenance of the proposed Rio Alamar plant. \textit{id.}
  \item \textsuperscript{36} IBWC, supra note 23, at Minute 283, Recommendation 3.
  \item \textsuperscript{37} \textit{id.} at Recommendation 7. The amount of Mexico’s contribution was set at $16.8 million. IBWC, \textit{supra} note 23, at Minute 296, Recommendation 1.
  \item \textsuperscript{38} IBWC, \textit{supra} note 23, at Minute 283, Recommendation 10.
  \item \textsuperscript{39} \textit{id.} at Recommendation 12.
  \item \textsuperscript{40} Progress is being made. In the year 2000, 190 industries were inspected by the Baja California Department of Ecology. Out of the 190 industries inspected, 49 were cited and fined for discharging waste into the sewer collection system outside the Mexican norms or standards. Out of the 49 industries cited and fined, 6 were shut down until they could provide adequate pretreatment of their wastes before discharging to the sewer collection system. Statement of Adolfo Report of Gonzalez, Director General, Dirección General de Ecología, at the San Diego/Tijuana Pretreatment Meeting, Planta de Tratamiento San Antonio de Los Buenos (October 22, 2001) (on file with author).
\end{itemize}
corresponding to each country's sewage inflows. This provision gives Mexico a future source of supply for water recycling.

The USIBWC was charged with the responsibility of operating the international treatment plant, now known as the SBIWTP. The facility is located in the United States on seventy-five acres of land near the border. To implement Minute 283, Congress authorized funds for the development of both primary and secondary treatment at the SBIWTP, in addition to funds for the development of the federal government's share of the South Bay Ocean Outfall (SBOO). It set a statutory cap on funds for the SBIWTP, both for primary and secondary treatment and disposal, at $239.4 million. As discussed below, this funding cap would play an important role in subsequent developments.

3. Minute 296

Minute 296 was signed by the representatives to the IBWC on April 16, 1997. It recommended the specific distribution of costs for the construction, operation and maintenance of the SBIWTP. Equally important, Minute 296 proposed building the SBIWTP in two phases. As of this writing, the implementation of the second phase module has not yet occurred, and this failure is the reason for the lawsuit by California against the IBWC discussed below.

The first phase module, which was designed to meet "advanced primary standards," was intended to achieve "some treatment" of Mexican wastewater as quickly as possible. This phase one module was intended to expedite treatment of up to twenty-five mgd of untreated sewage from Tijuana, which otherwise would have continued to pollute the Tijuana River and Estuary along with the adjacent coastal waters. The second phase was intended to implement "secondary" treatment standards.

The first module opened in 1998 as an advanced primary plant discharging through an emergency connection to the City of San Diego's Point Loma treatment facility. In early 1999, the SBIWTP plant began discharging Mexican wastewater through the SBOO. Since then, the plant has discharged approximately twenty-five mgd of sewage from Mexico, which is the equivalent of close to ten billion gallons of effluent per year.

41. IBWC, supra note 23, at Minute 283, Recommendation 11.
44. See infra text accompanying Part V. D.
The legal problem with the discharge from the first phase module is straightforward. It violates the water quality permit standards required by the Clean Water Act (CWA) and Porter-Cologne Act. As previously mentioned, the failure is not just a technical quibble. The effluent discharged through the SBOO into waters of the United States consistently fails acute and chronic toxicity tests.

Implementation of the second phase module was delayed by an ongoing debate about the type of pollution control system that would be selected to meet secondary treatment standards. The EPA and USIBWC considered various options during the National Environmental Policy Act (NEPA) review process mandated by federal law. A completely mixed aerated (CMA) pond system or the activated sludge system were the two competing options that were identified as most likely to be used to achieve secondary treatment.

In 1999, the EPA and USIBWC signed a Record of Decision recommending the CMA pond-based system, which was to be located on land adjacent to the SBIWTP. The recommendation was based on environmental and cost-effectiveness considerations. The EPA project manager estimated that design of the phase two project would take eight

46. Cal. Water Code §§ 13000-14958 (2002). California participates in the NPDES program pursuant to §§ 13160-13169, 13200-13260. Id. Chapter 5.5 of the Porter-Cologne Act, beginning with section 13370, provides the statutory basis for the requirement of consistency between state and federal water quality control programs and for regional boards to issue waste discharge requirements to implement National Pollutant Discharge Elimination System (NPDES) regulations. See Cal. Water Code §§ 13370-13389.

47. Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2001), two EISs were prepared. The first is dated February 1994, consists of two volumes, and identifies the U.S. EPA and IBWC (U.S. Section) as the lead agencies. It recommended a secondary activated sludge wastewater treatment facility. The second is dated March 1999, and is identified as the “Final Supplemental EIS.” Pursuant to this supplemental process, the lead agencies selected the CMA Pond System as the preferred alternative. Copies of these reports are available at http://www.epa.gov/region09/water/iwtp/.

48. Final SEIS, supra note 45, at 4. The CMA pond system is a wastewater treatment technology consisting of parallel trains of ponds working in sequence. The working components are Anaerobic Digester Pits (ADP), Completely Mixed Aerated (CMA) Ponds, and Partially Mixed Aerated Ponds. They operate using settling and completely mixed activated treatment processes. As proposed, the primary effluent, after settling, is transferred from the ADP to the CMA ponds. Wastewater in the CMA pond is continuously aerated by diffusers using a fine bubble aeration system at the bottom of the pond to optimize air transfer and oxidation before being transferred to the Partially Mixed Aerated Ponds. Id. at 1-4.

49. Final SEIS, supra note 45.
to ten months and would cost about eight million dollars. It was also estimated that construction would take an additional two years and cost about forty-four million dollars.\textsuperscript{50}

The recommendation proved to be politically unpalatable. The stranglehold on moving forward with the recommendation was the funding of the CMA pond-based system. Congressional action was needed for additional funding because completion of the secondary treatment project would exceed the $239.4 million cap set by Congress.

\textit{B. The Bajagua Project}

Considered, but rejected in the environmental Record of Decision, was the Bajagua project, a privately funded facility owned by Agua Clara, LLC. It would be located in Tijuana, Mexico. It was proposed as an alternative to doing secondary treatment at the SBIWTP. Rather than discharging the effluent through the SBOO, the SBIWTP would send the advanced primary effluent to the Bajagua pond-based system in Mexico. The effluent would receive secondary treatment there.

This approach would “avoid” the capital cost incurred with building the facility in the United States. As part of this proposal, the Bajagua project would enter into a fee-for-services contract with the USIBWC that would allow the “avoided” capital cost to be recovered on an annual basis through the contract.\textsuperscript{51} Thus, the so-called “avoided” capital cost would be annualized through the fee-for-services agreement.

The total actual cost associated with doing the treatment using Bajagua would be greater for several reasons. First, additional cost would be incurred in pumping the advanced primary uphill from the SBIWTP to the Bajagua facility. Second, additional cost would be incurred in building the pipelines to convey the effluent to and from the Bajagua facility, to the extent it is discharged from the SBOO. Finally, because Bajagua would treat a greater amount of wastewater, fifty mgd instead of twenty-five mgd, the treatment costs would be larger.

On the other hand, several advantages to the Bajagua proposal can be identified. The effluent treated by Bajagua could be used for water recycling purposes in Mexico or returned to the SBIWTP for discharge through the SBOO in the event it could not be used locally. To the extent that the Bajagua treated wastewater could be recycled and distributed in Tijuana, the recycled water would become available to free

\textsuperscript{50} Leslie Wolf Branscomb, \textit{Sewage Treatment Project is Far from a Done Deal}, S.D. Union Trib., December 9, 1999, at B1, B6, available at 1999 WL 29196752. However, the $44 million included certain non-treatment costs, such as the construction of an administration building and library.

\textsuperscript{51} 22 U.S.C. § 277d-44(c)(2)(E) & (I) (2001). Section (E) referring to “contract term of 20 years” and Section (I) referring to “annual amount payable.”
up potable water supplies for other uses, or as the raw material for the production of potable water. In addition, the recycled water would tend to reduce the cost of importing water from outside the region and would provide a cushion against periods of water shortage. Of course, the expanded use of recycled water would require a distribution system connected to the end-users, which does not currently exist.

Another advantage lies in the expandable capacity of the Bajagua project. The project is planned to treat fifty mgd, with the ability to add additional capacity at a later date. In contrast, the SBIWTP has limited land capacity using a pond-based system to expand beyond its current twenty-five mgd capacity, although some expansion might be accomplished with a smaller amount of dedicated land using an activated sludge system. As the need for expanded plant capacity arises in the future, Bajagua offers a more promising means of meeting this additional capacity.

Finally, one can argue that making the wastewater available for beneficial use in Tijuana is consistent with Mexico’s legal entitlement, as well as with sound public policy. This argument is based on the view that the wastewater is a potentially valuable asset owned by Mexico. In addition, the goal of international cooperation supports the view that the United States should assist Mexico with meeting its water needs by making this potentially valuable resource productive, rather than simply discharging it as waste through the SBOO.

Notwithstanding these arguable advantages, the Supplemental Environmental Impact Statement prepared by the EPA and USIBWC, rejected the Bajagua proposal in both the Draft and Final SEIS as “infeasible.” A variety of objections to the project were stated. It was argued that the Bajagua proposal could not achieve the goal of providing secondary treatment in an expeditious manner, whereas the environmental review of doing secondary treatment in the United States was completed and was consistent with Minute 283. Additionally, the need for a lengthy Mexican review process and the need to enact authorizing legislation by the United States, because Minute 283 requires the secondary treatment facilities be located in the United States, worked

---

52. This advantage is not unique to the Bajagua project. In fact, any facility in Tijuana producing recycled water, pursuant to the terms of Minute 283, would carry the same benefit. IBWC, supra note 23, at Minute 283.

53. Final SEIS, supra note 45, at 5.
against the timely completion of the project. Also, the uncertainty associated with Mexico’s support of the project also was stated as a concern that might hinder moving forward quickly with the project.

Another reason was the absence of enforceable legal mechanisms to ensure that the effluent returned to the SBIWTP would meet the required secondary standards. Other related legal concerns included ensuring ongoing operation in the event of Agua Clara’s bankruptcy, and determining whether the SBIWTP or Agua Clara would be the permittee.

A final reason for opposing the Bajagua proposal was based on statutory obstacles found in United States law. The project, it was argued, would be subject to the federal Competition in Contracting Act (CICA), which requires a full and open competition in soliciting offers and awarding government contracts. Since the Bajagua project was the only one put forward in Mexico, the application of the CICA arguably might constrain going forward with the project. While this concern is legitimate as a general matter, the CICA does not contain a blanket prohibition. The use of noncompetitive procedures is permitted by the CICA under certain circumstances.

One exception to competitive procedures specified under the act exists when the services, in this case the provision of secondary treatment, are

---

54. Id.

55. Id. Mexico has sent mixed signals on the issue. “On December 1, 1999, the Mexican IBWC Commissioner, Arturo Herrera Solis, reiterated the Mexican position that secondary treatment in Mexico is not a viable alternative at this time (emphasis added).” Final SEIS, supra note 45, at 15. In contrast, a letter from the mayor of Tijuana, Mexico was read into the record during the debate in the House of Representatives on the Cleanup Act. It described the Bajagua project as representative of the “kind of entrepreneurial solution” needed to provide secondary treatment, and the “type of private sector solution” that could be extolled as a model. 146 Cong. Rec. H7470-03, 7473. A recent statement by the Commissioner of the USIBWC casts doubt on Mexico’s support: “Even if negotiations could proceed, there is much doubt about whether Mexico would accept the specific terms dictated by the estuary bill (Cleanup Act).” Carlos M. Ramirez, Mexican sewage issue needs to be addressed, even if only partially, S.D. Union Trib., November 9, 2001, at B9. In addition, the terms of reference for contracting consulting services for the preparation of the Tijuana Master Plan do not include a firm commitment to the Bajagua project. They provide: “Alternatives for wastewater treatment infrastructure shall be developed with and without the Bajagua Project as a planning assumption.” Terms of Reference for the Contracting of Consulting Services, Master Plan for Potable Water and Wastewater Services for Tijuana and Playas de Rosarito, B.C., at 15 (August 2001) (emphasis added) (on file with author).

56. Final SEIS, supra note 45, at 3 & 10.

57. 41 U.S.C. § 253 (1997). The Competition in Contract Act generally requires federal agencies to acquire goods and services through an open competitive process. Id. at § 253(f). Because the project does not involve the expenditure of Mexican public funds, no comparable Mexican competitive procedures would be triggered.

58. 41 U.S.C. § 253(c). This section provides various exceptions to the use of competitive procedures that might have been considered applicable to the Bajagua project.
available from “only one responsible source” to meet the needs of the executive agency.59 Another exception exists when an “unusual and compelling urgency” exists.60 A third possible exception exists when the head of the executive agency determines that it is necessary to the public interest and Congress is notified.61 Thus, the CICA, while perhaps an obstacle, is not an absolute bar to the Bajagua.

The SEIS identified other potential statutory difficulties under United States law. These include the provisions of the Anti-Deficiency Act62 and Budget Enforcement Act.63 Although these laws also raise legitimate concerns, they also do not amount to insurmountable obstacles. Congress has the ability to eliminate them as serious legal barriers, which it may have done with the enactment of the Tijuana River Valley Estuary and Beach Cleanup Act of 2000.

C. The Tijuana River Valley Estuary and Beach Cleanup Act of 2000

1. An Overview

The Final Supplemental EIS “preferred alternative” to build a CMA pond system at the SBIWTP in order to achieve secondary treatment ran into stiff political opposition. This opposition was prompted by community concerns about the potential odors associated with the proposed pond system and by the fact that the limited size of the twenty-five mgd system would inevitably mean future expansion. An impasse developed. The IBWC needed additional funding to implement the pond system in the United States because of the $239.4 million spending cap. It needed at least $35 million in additional appropriations from Congress to complete the “preferred alternative.” Due to local congressional opposition, Congress refused to move forward on making the additional appropriations needed to allow the secondary treatment project to be completed in the United States as proposed.

Instead, Congress mapped a new political strategy to the secondary

59. 41 U.S.C. § 253(c)(1).
60. 41 U.S.C. § 253(c)(2).
61. 41 U.S.C. § 253(c)(7).
62. 31 U.S.C. § 1341 (2002). The Anti-Deficiency Act generally prevents a federal agency from entering into a contract for the future payment of money in advance of, or in excess of, an existing budget authorization. Id.
treatment issue by enacting the Tijuana River Valley Estuary and Beach Cleanup Act of 2000. Congress abandoned the "preferred alternative" advanced by the EPA and USIBWC, in favor of secondary treatment at a "Mexican facility." As defined in the Cleanup Act, the term "Mexican facility" refers generally to a proposed public-private wastewater treatment facility. It does not expressly identify or otherwise mention Bajagua. Notwithstanding the fact that the Bajagua project is not specifically named in the legislation, Bajagua appears to be the only public-private project proposed in Mexico. Thus, at least at this time, it is effectively the principal alternative for secondary treatment in Mexico.

The Cleanup Act identifies Mexico as the location of the secondary treatment facility. Because it conflicts with the understanding that secondary treatment would take place in the United States, the Secretary of State was "requested" by the law to negotiate and execute either a new Treaty Minute or an amendment to Treaty Minute 283, in order to allow for secondary treatment of fifty mgd of sewage in Mexico. In an effort to promote prompt action, Congress asked the Secretary of State to "give the highest priority" to the Treaty Minute issue, so that implementation could be accomplished as "soon as possible." As of November 2001, no diplomatic progress has been made in achieving this result, and if experience is a reliable guide, the negotiation process may take years.

While Congress' preference to do the treatment in Mexico is clearly stated, the Cleanup Act does not commit irrevocably to this end result. The law states that secondary treatment will be in Mexico "if such treatment is not provided at a facility in the United States." Consequently, if an agreement with Mexico does not occur, secondary treatment in the United States would be necessary to comply with federal and state law.

Another provision of the Cleanup Act is notable. Section 804 requires the EPA to prepare a comprehensive plan assessing "secondary treatment needs," necessary "upgrades in the sewage collection system" in Tijuana, and "recommendations for preferred options" for additional treatment

64. 22 U.S.C. § 277d-43.
65. 22 U.S.C. § 277d-43(6). Although the Bajagua project is not mentioned in the Cleanup Act, the House Report contains a description of the project. H.R. Rep. No. 106-842, at 4-5 (2000). Following the discussion of various options to meet secondary treatment, the following statement is included: "[t]here is no final decision on how best to provide secondary treatment needs of the San Diego and Mexico border area." Id. See also 146 Cong. Rec. H7470-03, 7473 (daily ed. Sept. 12, 2000).
66. 22 U.S.C. § 277d-43(4). The term "secondary treatment" has the same meaning as used in the CWA and implementing regulations.
70. 22 U.S.C. § 277d-44(b)(2).
capacity in the Tijuana River area.\textsuperscript{71} This plan is due within two years of the enactment of the Cleanup Act. This requirement and the caveat "if such treatment is not provided at a facility in the United States" will become increasingly significant as California's lawsuit against the federal government on the operation of the SBIWTP presses forward and time passes with little tangible action occurring on the diplomatic front.

Notwithstanding some uncertainty as to whether secondary treatment will occur in Mexico, a careful examination of the Cleanup Act is warranted. The Act authorizes the Commission\textsuperscript{72} to enter into a twenty-year\textsuperscript{73} "fee-for-services" contract with the owner of a Mexican facility\textsuperscript{74} to carry out secondary treatment and to make payments under the contract. The contract payments, to be made by the USIBWC would incorporate the costs of developing, financing, constructing, operating and maintaining the treatment facility in Mexico.\textsuperscript{75} While the costs for the entire term of the contract were difficult to assess, the Committee on Transportation and Infrastructure estimated the cost to the United States at approximately $203 million in outlays for the fiscal years 2001-2005.\textsuperscript{76}

The law states that the contract "may" be entered into "notwithstanding any provision of Federal procurement law,"\textsuperscript{77} which may be an attempt to deal with the concern that the federal Competition in Contracting Act (CICA) limits awarding the contract to a sole source, such as Bajagua. While an argument might be advanced that the reference in the Cleanup Act to "may enter" is ambiguous, Congress' broad intent seems clearly evidenced by the direction to the Secretary of State to negotiate a new or amended Treaty Minute.\textsuperscript{78} The language in the law, wherein the Commission is "authorized and directed to provide" secondary treatment in Mexico, also lends credibility to the view that Congress' intent is clearly expressed.\textsuperscript{79}

\begin{itemize}
\item \textsuperscript{71} 22 U.S.C. § 277d-44(b)(3).
\item \textsuperscript{72} The term "Commission" is defined as the "United States section" of the IBWC. 22 U.S.C. § 277d-43(2).
\item \textsuperscript{73} 22 U.S.C. § 277d-44(c)(2)(E).
\item \textsuperscript{74} The term "Mexican facility" is defined as a "proposed public-private wastewater treatment facility" within Mexico. 22 U.S.C. § 277d-43(6).
\item \textsuperscript{75} 22 U.S.C. § 277d-44(c)(2)(I).
\item \textsuperscript{76} H.R. Rep. No. 106-842, at 9 (2000).
\item \textsuperscript{77} 22 U.S.C. § 277d-43(c)(1).
\item \textsuperscript{78} 22 U.S.C. § 277d-45(a).
\item \textsuperscript{79} 22 U.S.C. § 277d-44(a)(1).
\end{itemize}
But these references in the Cleanup Act may not be specific enough to overcome the presumption against sole source treatment. The CICA authorizes non-competitive procedures only when "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source...." Section 253(i) presents a serious obstacle to attempting to avoid the use of the competitive procedures found in the CICA. The Cleanup Act does not refer either to subsection 253(i)(2)(A) or to subsection 253(i)(2)(C), as required by law. Additionally, the Cleanup Act does not refer to or identify any sole source of secondary treatment services to contract with the SBIWTP. The general statutory language, "notwithstanding any provision of Federal procurement law," is not likely to nullify the specific requirements of the CICA. The more likely result is that the "notwithstanding" language does not create an exception to the CICA's competition requirements. Therefore, any fee-for-services contract with the USIBWC is likely to be subject to CICA requirements.

The Cleanup Act refers to the use of competitive procedures. It requires the Mexican facility to use competitive procedures consistent with federal procurement law. In fact, the contract between the Commission and the Mexican facility is required to have a provision wherein the owner of the Mexican facility will use competitive procedures, which are consistent with the CICA, in the "procurement of property or services for the engineering, construction and operation and maintenance of the Mexican facility." Furthermore, to ensure compliance occurs, "contractors" are subject to review and approval by the Commission. Thus, oversight of the selection process is provided.

80. 41 U.S.C. § 253(c)(5).
81. 41 U.S.C. § 253 provides as follows:
   (i) Merit-based award of contracts
       (1) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.
       (2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—
           (A) specifically refers to this subsection;
           (B) specifically identifies the particular non-Federal Government entity involved; and
           (C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

The Cleanup Act authorizes a “public-private” wastewater treatment plant in Mexico. In the event that the Mexican facility is unable to provide the necessary level of secondary treatment or is otherwise in material breach of its obligations, the enforcement provisions of the contract need to be evaluated.

The Cleanup Act refers to several provisions dealing with breach that must be in the contract between the USIBWC and the Mexican facility. The contract is required to provide “for the transfer of ownership of the Mexican facility to the United States, without a cancellation fee,” if the owner of the Mexican facility fails to perform the obligations of the owner under the contract. In order to apply this provision, the ownership interest subject to transfer must be identified with specificity. Is it the land occupied by the facility, including the pond-based system, or is it the personal assets of the facility, or the contract right to operate the facility, or some other “ownership” interest?

Unfortunately, the act is not clear on this point. Thus, prudence dictates that the contract provide this necessary level of detail. However, one principle seems clear, it is impractical for the United States to make a claim to an ownership interest in land that is part of sovereign Mexico territory pursuant to this default provision. Thus, this interpretation of the “ownership” interest is not likely to be practical.

In working through the possible application of the “transfer of ownership” default provision, it is useful to begin by identifying the goal of the United States in the event of default. Simply stated, it is to insure compliance with “secondary treatment” standards. This objective may be adequately protected by being able to control the operation of the Mexican facility without necessarily having title to it. In other words, this interest of assuring compliance may be sufficiently protected by allowing the United States, or its assignee to step into the shoes of Bajagua for purposes of operating the facility.

Whether this option will be politically and practically acceptable to both countries is uncertain. Notwithstanding the uncertainty, the ability

---

84. 22 U.S.C. § 277d-44(c)(2)(J). This section, which applies in the event of Commission default, contains a “cancellation fee” payable by the United States. Id. The fee is that amount sufficient to repay construction debt and other amounts that remain unamortized due to the early termination of the contract. Id.
of the United States to take over the ownership interest of Bajagua in the event of default can arguably be secured through its assets. Bajagua is organized and will operate under the law of California. This means that its assets would be subject to the jurisdiction of the courts in the United States.

The Bajagua leasehold or contract to operate the facility will be subject to what might be considered a "sublease" or independent contract. Recall that the procurement of engineering, construction, and operation and maintenance of the Mexican facility is subject to competitive procedures,\footnote{22 U.S.C. § 277d-44(c)(2)(L).} which means that the operation and maintenance of the facility will be subcontracted. Thus, the procurement contract or sublease would be one of the assets subject to the transfer provision in the event of default.

Obvious concerns exist, however. If a problem exists with the provision of secondary treatment, it will be because the sublessee or subcontractor has failed to meet its obligations. If Bajagua is unable to secure compliance from the sublessee or contractor, the United States is not likely to be any more successful. Thus, the contract remedy identified in the Cleanup Act may provide little practical relief.

An additional complication to the administration of the default provision exists. The Bajagua contract term is twenty years.\footnote{22 U.S.C. § 277d-44(c)(2)(E).} At the end of the twenty-year period, the Mexican facility is not subject to the contract regardless of whether default has occurred during the contract term. Thus, if the United States steps into the shoes of Bajagua to cure any contract breaches during the initial twenty-year contract, the slate is wiped clean. Thus, it would appear that the party holding the rights at the expiration of the twenty-year period would then be the beneficiary of added improvements made during the term by the United States. Therefore, although the Cleanup Act does not require that this potential windfall matter be addressed, it should be covered in the fee-for-services contract.

3. Enforcement in the Event of Default: California Regulatory Remedies

The remedies available under the Cleanup Act are supplementary to the remedies available under the CWA and Porter-Cologne.\footnote{Final SEIS, supra note 45.} There is no indication that Congress intended that the contract remedies outlined above were intended to be exclusive in nature. Moreover, the administrative and judicial remedies available to California as an independent sovereign state arguably could not be eliminated by Congress.

\footnotesize{\begin{itemize}
\item 86. 22 U.S.C. § 277d-44(c)(2)(L).
\item 87. 22 U.S.C. § 277d-44(c)(2)(E).
\item 88. Final SEIS, supra note 45.
\end{itemize}}
The contract provisions outlined in the Cleanup Act may not be satisfactory to state regulators should the San Diego Regional Water Quality Control Board (Regional Board) consider Agua Clara to be the NPDES permittee. California is not likely to be interested in the “transfer of ownership” protection, available in the event of default. The Regional Board, which acts on behalf of California, is apt to want compliance with the discharge requirements based on federal and state law, and not the opportunity to pursue breach of contract remedies. Therefore, the Regional Board predictably, will look to the federal permittee, which is USIBWC, should a regulatory compliance problem exist with the operation of Bajagua.

As previously mentioned, care must be exercised in evaluating Congress’ commitment to do secondary treatment in Mexico. The need for caution was highlighted when the Commissioner of the U.S. Section announced on November 9, 2001 that the IBWC was “no closer today to implementing the Mexican treatment project than we were a year ago.” He went on to say:

> Without the green light from the administration to negotiate with Mexico and without funding to implement the project, it became clear to the commission that the proposal to build the project in Mexico was stalled indefinitely (emphasis added). Rather than waste another year chasing a project that has little support in Washington, the commission is committed to proceeding as quickly as possible to complete secondary treatment. That is why the decision was made to pursue funding to build an activated sludge secondary treatment plant as originally planned in the United States.89

As previously mentioned, this activated sludge option was one of the options analyzed in the NEPA process. At this point, a decided difference of opinion seems to exist between the executive and legislative branches on moving forward with secondary treatment in Mexico. The strength of Congress’ commitment to the Cleanup Act, as well as its influence with the Bush Administration, undoubtedly will be tested in the near future.

**D. People of the State of California v. The International Boundary and Water Commission, United States Section**

During the early 1990s, steady progress was being made toward making the international wastewater treatment plant a reality. A draft
EIS was issued for comment in 1991, and the two volume Final EIS was issued in 1994. In 1996, the IBWC submitted an application to the Regional Board for an NPDES permit for the discharge of treated wastewater from the SBIWTP. The application was for the discharge of twenty-five mgd of secondary effluent. In late 1996, the Regional Board, issued an NPDES permit, Order Number 96-50, which authorized the discharge of secondary treated effluent through the SBOO.90

The Regional Board recognized that it would not be possible for the SBIWTP to immediately comply with the required secondary treatment standard. Thus, it simultaneously adopted Cease and Desist Order Number (CDO) 96-52.91 The CDO set a time schedule for compliance. After being given two extensions of time by the Regional Board through addenda to the CDO, the IBWC finally was directed to complete the secondary treatment facilities, and to begin discharging the secondary treated effluent through the SBOO by December 31, 2000. The CDO also set interim standards for the discharge of “advanced primary” treated effluent to the ocean during the period before secondary treatment was available.

As the December 2000 deadline contained in the CDO drew near, two facts became apparent. First, the IBWC would not be able to comply with the time schedule for secondary treatment contained in Order 96-52. The second fact that became apparent was that the IBWC also would be in continuing violation of Order 96-50 (requiring secondary treatment for discharging advanced primary from the first phase of the SBIWTP.)

The reasons for the delay in meeting the deadline are complicated.

---

90. Cal. Regional Water Quality Control Board, Order No. 96-50, NPDES No. CA0108928, Waste Discharge Requirements for the International Boundary and Water Commission U.S. Section: International Wastewater Treatment Plant Discharge to the Pacific Ocean Through the South Bay Ocean Outfall San Diego County (November 14, 1996), available at http://www.swrcb.ca.gov/-rwqcb9/Programs/Special_Programs/IWTP/IWTP_NPDES/SBIWTP_NPDES_Permit_WDR_14Nov96.doc. In addition to imposing secondary treatment requirements, the NPDES permit imposed additional effluent limitations and receiving water standards pursuant to California law under the Ocean Plan and Basin Plan for the San Diego area. Id.


When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action . . . .
Part of the delay is attributable to litigation against the IBWC by environmental organizations over its decision to meet secondary treatment by using an activated sludge technology which was the preferred alternative identified in the 1994 EIS. This litigation was settled when the IBWC agreed to do an SEIS to study the feasibility of using treatment ponds to accomplish secondary treatment. The litigation extended the environmental review process. Another reason is that members of San Diego’s congressional delegation insisted that the Bajagua project be analyzed as a possible way of achieving secondary treatment. This pressure resulted in a delay in adopting the Record of Decision for the final SEIS, thus violating the date set in Addendum 2 to the CDO.\(^2\)

As a result of these continuing delays and failures, in August 1999, the Regional Board forwarded the case to the California Office of the Attorney General for litigation. Acting on behalf of the Regional Board, the Attorney General filed a “Notice of Intent to Sue” as required by the CWA.\(^3\) In February 2001, California then filed suit against the USIBWC in the U.S. District Court for the Southern District of California,\(^4\) under the citizen suit provision of the federal Clean Water Act\(^5\) and on the basis of federal question jurisdiction.\(^6\) Unless there is a settlement, a trial is expected sometime in mid-2002.

The suit was necessary because despite reassurances that compliance would be forthcoming, it had not been achieved nor had meaningful progress been made toward achieving compliance. Proposed solutions recommended in the final SEIS were not funded, Congress refused to adjust the $239.4 million statutory cap, and negotiations with Mexico to adopt a treaty Minute pursuant to the Cleanup Act authorizing a privately funded secondary treatment plant in Mexico had not produced

---

\(^2\) Cal. Regional Water Quality Control Board San Diego Region, Addendum No. 2 to Cease and Desist Order No. 96-52, International Boundary and Water Commission U.S. Section, International Wastewater Treatment Plant South Bay Ocean Outfall San Diego County (1996), available at http://www.swrcb.ca.gov/-rwqcb9/Programs/Special_Programs/IWTP/IWTP_CDO/SBIWTP_CDO_Add-2_14Oct98.doc. Addendum 2, which was adopted by the Regional Board in October 1998, directed the IBWC to submit to the Regional Board 1) an adopted environmental Record of Decision pursuant to NEPA for the secondary treatment plant by May 1, 1999 and 2) a definitive time schedule for compliance. Addendum 2 also required compliance with acute toxicity discharge specifications by May 16, 2000. Id.

\(^3\) 33 U.S.C. § 1365(b).


\(^5\) 33 U.S.C. § 1365(a).

tangible results. At the time the suit was filed, the Regional Board could not predict with any confidence when the IBWC would meet its legal obligations. Compliance seemed, at a minimum, several years away. In the interim, the federal government was violating federal and state law on a daily basis without legal consequence. Admittedly, the USIBWC was, and continues to be, in a difficult situation. Congress refused to appropriate the monies to complete the secondary treatment facilities in the United States, refused to approve funds to implement the Mexican treatment plant,97 and the IBWC claimed to have no authorization to negotiate the agreement contained in the Cleanup Act.98 In short, the federal machinery was deadlocked.

But, the public is, unfortunately, all too familiar with this refrain. CWA violations by federal facilities are a familiar occurrence. At the national level, reports exist that federal facilities historically fail to comply with the CWA twice as frequently as private industry.99 At the regional level, the Regional Board reports that federal facilities constitute close to seventy-five percent of NPDES permit violations in its’ region.100 In the reporting period 2000-01, the Regional Board identifies thirty-three sewer collection agencies in its region. Of these thirty-three agencies, federal-military facilities rank in the top four of spills per one hundred miles.101 The record of federal facilities leaves much to be desired.

The suit alleges that IBWC was in violation of the CDO, as well as state and federal law. It asks for three things. First, the lawsuit requests a judicial declaration that the operation of the plant below the required secondary standards violates the Clean Water Act, the California Porter-Cologne Act,102 and the IBWC’s Waste Discharge Permit103 issued by the Regional Board. Second, it asks for a judicially imposed time-schedule to ensure completion of the plant’s legal water quality obligations. Finally, it asked for “coercive penalties” against the IBWC, should the federal

---

97. Ramirez, supra note 54.
98. Id.
100. California Water Quality Control Board, Region 9 San Diego, Sanitary Sewage Overflow (SSO) Spill Data (2000), available at http://www.swrcb.ca.gov/rwqcb9/Programs/SSO/SSOSpillData/Sewer990.xls. For the reporting period (July 1, 1999 through July 7, 2000) there were 1608 reported NPDES violations in the San Diego Region. Of those, approximately 75% were attributable to two federal facilities, the International Wastewater Treatment Plant and five units at Camp Pendleton. This report is also on file at the San Diego Regional Water Quality Control Board.
101. Id.
103. IWBC, supra note 23, at Minute 283.
Recent Developments
SAN DIEGO INT’L L.J.

government fail to meet any court-imposed schedule for compliance.

The failure by the Regional Board to take action to protect the interests of California would carry serious adverse consequences. Inaction would convey the appearance that the Regional Board, which is the state agency charged with enforcing the Clean Water Act, Porter-Cologne Act, and IBWC’s waste discharge permit, sanctions the continuing violations of law as “acceptable” or as “business as usual.” It is neither. In a broader sense, the failure of the Regional Board to act would have the potential of undermining confidence in the regulatory process designed to protect the public.

In addition, the lawsuit was necessary because the doctrine of federal sovereign immunity limited California’s other options. The role of federal sovereign immunity under the CWA was examined by the Supreme Court in the controlling case of United States Department of Energy v. Ohio. The case sets the legal parameters to understanding California’s claim to “coercive penalties” in the IBWC litigation.

In Department of Energy, the Supreme Court considered whether Congress had waived federal sovereign immunity for past violations of the CWA. Fundamental to the court’s interpretation of the CWA’s federal facilities provision is the argument that the term “sanctions” requires one to distinguish between “punitive fines” and “coercive fines.”

104. Id.

105. 503 U.S. 607 (1992). Ohio sued the Department of Energy and others for improperly disposing hazardous waste from its uranium-processing plant in Fernald, Ohio. The Department of Energy moved to dismiss. The District Court denied the motion and found that Clean Water Act (CWA) and Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2796, as amended 42 U.S.C. §§ 6901-6992, waived federal sovereign immunity from punitive fines. On appeal, the Sixth Circuit affirmed the CWA waiver, but found that sovereign immunity had not been waived under RCRA. The Supreme Court held that United States’ sovereign immunity from liability for civil fines imposed by states for past violations under both the CWA and RCRA, had not been waived by Congress. Id. at 615-29.

106. 33 U.S.C. § 1323(a) (2001). This section provides that each department, agency, or instrumentality of the . . . Federal Government . . . 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 in the same manner . . . as any nongovernmental entity . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction (emphasis added), whether enforced in Federal, State, or local courts or in any other manner . . . The United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. Id.
Based on this distinction, which parenthetically is a distinction not expressly mentioned in the CWA, the court reasoned that Congress had waived sovereign immunity with respect to "coercive sanctions," but not "punitive sanctions." The Court cited *Latrobe Steel Co. v. United Steelworkers of America, Local 1537* for the view that coercive sanctions . . . look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order or by assuring that a potentially contumacious party adheres to an injunction by setting forth in advance the penalties the court will impose if the party deviates from the path of obedience. 108

The Court reasoned that the federal facilities' language "speaks of sanctions in the context of enforcing 'process' as distinct from substantive requirements," and thus justified the inference that Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines. 109

Although this restrictive interpretation of the waiver of sovereign immunity under the CWA was criticized by the dissent in *Department of Energy* as "analytic gymnastics" in defiance of the words actually used by Congress, 110 the distinction drawn by the majority is the basis for the demand of "coercive penalties" against the IBWC in the USIBWC litigation. While punitive fines for past violations of the CWA may not be possible under the *Department of Energy* rationale, forward-looking penalties are authorized by the Supreme Court's in *Department of Energy*.

**VI. CONCLUSION**

The Tijuana River Valley Estuary and Beach Cleanup Act of 2000 expressed Congress' intent that twenty-five mgd of Tijuana's wastewater be treated to secondary levels at a Mexican facility. This action reversed ten years of policy specifying that the secondary treatment would be done at the SBIWTP in the United States, pursuant to Minute 283. To date, little tangible progress on the diplomatic front has occurred to implement this federal law.

*People of the State of California v. International Boundary and Water Commission, United States Section* 111 is California's response to the failure of the federal government to meet its obligations under federal and state law. Litigation was necessary because the doctrine of sovereign immunity presents a significant obstacle to securing compliance from

107. 545 F.2d 1336, 1344 (1976).
109. *Id.*
110. *Id.* at 630 (White, J., concurring in part and dissenting in part).
the federal government of its obligations under the CWA and state law. California’s demand in the litigation for “coercive penalties,” based on the Supreme Court decision in *Department of Energy v. Ohio*, may provide an important catalyst to breaking the political logjam at the federal level. Unfortunately, the reality is that it is apt to be years before the sewage effluent coming from Mexico is treated to the secondary standard mandated by state and federal law.

In the interim, several operative principles should guide decision makers as progress is made toward achieving the mandated water quality standards. First, as much effluent coming from Mexico as possible should be treated. In addition, it should be treated to the highest level of treatment possible before being discharged. The option of “no treatment,” by ceasing the discharge from the SBIWTP in order to avoid coercive penalties under the CWA, should be firmly rejected. The “no treatment” option is inconsistent with the principles contained in the international agreements between the United States and Mexico. Moreover, it would be bad public policy.

Second, to the maximum extent practicable, the discharge should be through the SBOO, rather than into the Tijuana River. The South Bay Reclamation Plant, owned by the City of San Diego and in the proximity of the SBIWTP, is potentially available in early 2002 to assist in securing partial compliance. It has fifteen mgd of secondary treatment capacity, and perhaps more, that might be used by the IBWC in meeting its obligations pending a permanent solution. Using the South Bay Reclamation Plant as part of the solution obviously would require the cooperation of the City of San Diego.

The remaining ten mgd of non-complying effluent could be physically dealt with by returning it to Mexico for disposition, sending it to the San Diego Point Loma Wastewater Treatment Plant using the “emergency connection,” or allowing it to be discharged through the SBOO in violation of the law. Unfortunately, shortcomings exist with each option.

The “return-to-sender” option would result in greater harm to the public and environment than continuing to discharge the advanced primary through the SBOO. If the effluent is returned to Mexico, in all likelihood, it would be discharged from the Mexican treatment plant at San Antonio de los Buenos without any primary or secondary treatment. This option would also implicate possible legal challenges. The “return-
to-sender” policy would appear to conflict with Minute 283\textsuperscript{112} and its underlying policy. In short, this option would upset Mexico more than the lack of secondary treatment, and threaten the agreed to structure for dealing with cross-border wastewater.

Using San Diego’s Point Loma Wastewater Treatment Plant is also problematic. It would potentially create CWA problems for San Diego. In addition, the “emergency connection” was never intended for the type of long-term use that would be necessary, pending the implementation of the secondary treatment solution; so there are likely to be technical concerns with using this option. Consequently, using the “emergency connection” as part of an interim solution is likely to give the federal and state regulatory agencies significant pause.

Continuing to discharge the ten mgd of non-complying effluent through the SBOO obviously conflicts with federal and state law. With no certain time schedule for compliance in sight, this option is also problematic. Even with an agreed to time schedule, this option is not optimal.

A final operative principle can be stated. A greater political effort should be made to implement the Cleanup Act, so that secondary treatment occurs as quickly as possible. To date, little tangible effort has been made in this regard and further delay is unwarranted. It is simply unacceptable for the federal government to fail to resolve this longstanding cross-border wastewater crisis.

\footnote{\textsuperscript{112} IBWC, \textit{supra} note 23, at Minute 283, Recommendation 6. It provides: “Construction, operation and maintenance in the United States at United States expense, of a deep ocean outfall with . . . a capacity to discharge into the Pacific Ocean at least 25 mgd (1100 lps) of treated sewage from the international plant.”}