May 12, 2021
Item No. 4
Supporting Document No. 9

California Regional Water Quality Control Board
San Diego Region

Response to Comments Report

Tentative Order No. R9-2021-0001

NPDES No. CA0108928

Waste Discharge Requirements
for the United States Section of the International Boundary and Water Commission
South Bay International Wastewater Treatment Plant Discharge to the Pacific Ocean
through the South Bay Ocean Outfall

May 12, 2021

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STATE OF CALIFORNIA

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San Diego Region

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INTRODUCTION

This report contains the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) responses to written comments received on Tentative Order No. R9-2021-0001, NPDES No. CA0108928, *Waste Discharge Requirements for the United States Section of the International Boundary and Water Commission South Bay International Wastewater Treatment Plant Discharge to the Pacific Ocean through the South Bay Ocean Outfall* (Tentative Order).

The San Diego Water Board provided public notice of the release of the Tentative Order on February 23, 2021 and provided a period of 30 days for public review and comment on the Tentative Order. The public comment period ended on March 25, 2021.

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Comments and Responses

The summarized written comments and San Diego Water Board responses are set forth below. The responses include a description of any actions taken to revise the Tentative Order in response to the comment. Proposed revisions to the Tentative Order are in red-underline for added text and ~~red strikeout~~ for deleted text. Sections referred to in the responses refer to sections in the revised Tentative Order unless otherwise specified.

COMMENTS AND RESPONSES

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

1.1. Comment

I. Constitutional, Statutory, and Regulatory Background

A. The Clean Water Act, Generally

Under the Clean Water Act (CWA), it is unlawful to discharge pollutants into the waters of the United States except in compliance with certain sections of the Act, including CWA section 402. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. Section 402 of the CWA created a wastewater discharge permitting system, known as the National Pollutant Discharge Elimination System (NPDES). Under the requirements of the NPDES program, a point source may be authorized to discharge pollutants into waters of the United States by obtaining a permit. The NPDES permitting program transforms the general regulatory standards established under the CWA into enforceable requirements for individual dischargers. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

"Section 402(b) authorizes each State to establish 'its own permit program for discharges into navigable waters within its jurisdiction.'" *Id*. at 102 (quoting 33 U.S.C. § 1342(b)). In California, the controlling law is the Porter–Cologne Water Quality Control Act (Porter–Cologne Act or California Water Code). Operating within this federal-state framework, wastewater discharge requirements (WDR) established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Chapter 5.5 of the California Water Code was enacted to allow the State of California to administer the NPDES permits program. Cal. Water Code § 13370.5. While other provisions of the Porter–Cologne Act may apply to a NPDES permit, when implementing the NPDES permit program, the provisions of Chapter 5.5 "shall prevail over other provisions . . . to the extent of any inconsistency." Cal. Water Code § 13372(a). Except that a regional board may impose "effluent standards or limitations" that are more stringent than federal law requires. 33 U.S.C. § 1370; Cal. Water Code § 13377. Specifically, Chapter 5.5 adopts certain definitions that "shall have the same meaning" as in the CWA—"navigable waters," "administrator," "pollutants," "biological monitoring," "discharge," and "point sources." Cal. Water Code § 13373.

The CWA provides "jurisdiction to regulate and control only actual discharges—not potential discharges." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005). Under the CWA, "discharge" means "(A) *any addition* of any pollutant to navigable waters *from any point source*," or "(B) *any addition* of any pollutant to the waters of the contiguous zone or the ocean *from any point source* other than a vessel or other floating craft." 33 U.S.C. § 1362(12), (16) (emphasis added). "Navigable waters" means "the waters of the United States, including the

territorial seas." And "Waters of the United States" (WOTUS) is defined by regulation at 40 C.F.R. § 120.2.

The release of pollutants from a point source to a navigable water is a "discharge" under the CWA only if it entails the "addition" of pollutants to a navigable water. "Under a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 82 (2013). Thus, the mere "flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA" and is not subject to 33 U.S.C. § 1311's broad prohibition on the discharge of any pollutant. *Id.* at 83; *accord S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–10 (2004); *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933, 937–38 (9th Cir. 2015).

The release of pollutants to a navigable water is "from any point source" only when there is "a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476, (2020). Determining whether the release of pollutants from a point source to a location other than a navigable water is the "functional equivalent" of a direct point source discharge into navigable waters entails a fact-intensive inquiry. *Id.* at 1476–77.

Response

Comment Noted.

Action Taken

None.

1. 2. Comment

I. Constitutional, Statutory, and Regulatory Background

B. The CWA's partial waiver of sovereign immunity for federal facilities

Section 313 of the CWA constitutes a general authorization on the part of Congress, that federal facilities and activities "resulting, or which may result, in the discharge or runoff of pollutants" be subject to all Federal, State, interstate, and local legal, administrative, and procedural requirements "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323.

Section 313 is limited, however, by section 511(a)(3), 33 U.S.C. § 1371(a)(3), which states that that the CWA "shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States." *See City of Imperial Beach v. Int'l Boundary & Water Comm'n, U.S. Section*, 356 F. Supp. 3d 1006, 1016 (S.D. Cal. 2018) ("Section 511(a)(3) unambiguously limits the partial waiver of sovereign immunity provided by § 505(a)(1)."). So "[while there is no question

that Section 313 constitutes a partial waiver of sovereign immunity, there is also no question that Section 511 provides sovereign immunity protection for [USIBWC] when compliance with the Clean Water Act" would affect or impair a treaty's provisions.[1] *North Dakota v. U.S. Army Corps. Of Engr's*, 270 F. Supp. 2d 1115, 1123 (D.N.D. 2003); *see also in re Operation of Missouri River Sys. Litig.*, 418 F.3d 915, 917 (8th Cir. 2005) (holding that the partial waiver of sovereign immunity in CWA Section 313, 33 U.S.C. § 1323, is "limited by" Section 511(a)).[2]

Significantly, the limitation in Section 511(a)(3) is consistent with the delegation of authority under the U.S. Constitution, which vests the President with the exclusive authority to enter treaties and conduct foreign affairs.[3] U.S. Const. art. II, § 2; *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 650 (9th Cir. 1993) (refusing to compel the executive branch to enter treaty negotiations because it would violate the separation of powers doctrine). Section 511(a)(3) is also consistent with U.S. Supreme Court precedent affirming that a state's regulatory authority under the CWA extends only to conduct and water sources within the state's borders. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) ("Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.").

Additionally, section 313 is limited by section 308(c), 33 U.S.C. § 1318(c). Section 308(c) provides that, where the Administrator has approved a state program relating to monitoring, "such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources

[1] There is no reason to assume that Congress intended the CWA to impair or affect the bargain-for rights and obligations in international agreements that were not ratified pursuant to Article II, Clause 2, Section 2. The word "treaty" in CWA Section 511(a)(3) therefore includes Minutes that are approved by the United States and Mexico. *See Weinberger v. Rossi*, 456 U.S. 25, 26–34 (1982) (construing the word "treaty" to mean "an agreement concluded by sovereigns, regardless of the manner in which the agreement is brought into force").

[2] It is immaterial that *North Dakota* and *in re Operation of Missouri River System Litigation* concerned the partial waiver of sovereign immunity in CWA Section 313, and that *City of Imperial Beach* concerned the partial waiver at Section 505. Section 511 applies to the CWA at large and so restricts the waivers in Section 313 and 505 in equal measure. *See City of Imperial Beach*, 356 F. Supp. 3d at 1016.

[3] Article I, Section 10, Clause 1 of the Constitution also specifically prohibits states from intruding into the field of foreign affairs. *See also United States v. Hooker*, 607 F.2d 286, 289 (9th Cir. 1979) ("And the states of the United States have no power to conduct the international relations of the United States.").

located in such State (*except with respect to point sources owned or operated by the United States*). 33 U.S.C. § 1318(c) (emphasis added). Thus, section 308(c) of the CWA provides sovereign immunity protection for USIBWC from the State's jurisdiction to enforce the administrative and procedural requirements of the Porter–Cologne Act for inspection, monitoring, and entry. S*ee United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (explaining that where there are "plausible" readings of a statute that do not result in a waiver of sovereign immunity, a court cannot find the "unequivocal expression" of congressional intent necessary to waive that immunity).

Response

Comment Noted.

Action Taken

None.

1.3. Comment

I. Constitutional, Statutory, and Regulatory Background

C. Constitutional Preemption Doctrines

Under the Supremacy Clause, federal law and treaties are presumed to be the "supreme Law of the Land" notwithstanding any state law to the contrary. U.S. Const. art. VI, cl. 2. Under the doctrine of conflict preemption, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy. *Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher I)*, 592 F.3d 954, 961 (9th Cir. 2010) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) (stating that treaties are accorded the same preemptive effect as federal law). "[T]he likelihood that state legislation will produce something more than incidental effect in conflict with the National Government's express foreign policy would require preemption of the state law." *Garamendi*, 539 U.S. at 398; *see also Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher II)*, 754 F.3d 712, 719-20 (9th Cir. 2014).

State law may also be preempted by the federal government's foreign affairs power. Foreign affairs field preemption occurs if a state violates the Constitution "by establishing its own foreign policy." *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2003) (internal citation and quotation marks omitted). The relevant inquiry is whether the state law "(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012); *see also Von Saher I*, 592 F.3d at 964. A state action with more than "some incidental or indirect effect in foreign countries" is considered to infringe on foreign affairs. *Zschernig v. Miller*, 389 U.S. 429, 434, 441 (1968) (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

Response

Comment Noted.

Action Taken

None.

1.4. Comment

II. Factual Background

A. The International Boundary and Water Commission

The International Boundary and Water Commission (IBWC)'s mission is to provide binational solutions to issues that arise during the application of U.S.-Mexico treaties regarding, among other things, water quality and flood control in the border region, including constructing and operating wastewater treatment plants, as directed by Congress. The U.S. and Mexican governments established IBWC (then the International Boundary Commission) in 1889, initially to resolve boundary-related differences arising along the border. Various agreements between the United States and Mexico added water distribution and flood management in the transboundary rivers to IBWC's responsibilities. The 1944 *Treaty Between the United States of America and Mexico Respecting Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande* ("1944 Treaty"), Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994, established the key organizational components of IBWC and its two sections—USIBWC and the Comisión Internacional de Límites y Aguas ("CILA" or the "Mexican Section"). These sections act on behalf of their respective government in the "exercise of the rights and obligations," and the "settlement of all disputes" arising under the 1944 Treaty. 1944 Treaty, art. 2.

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

When acting as a federal agency, USIBWC is subject to the limited waiver of sovereign immunity in section 313 of the CWA. Conversely, when acting as the US component of the IBWC—a Public International Organization—USIBWC is not subject to the limited waiver of sovereign immunity in section 313 of the CWA and is "entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act [IOIA]." *Id*. International organizations "enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," § 288a(b), their property and

assets are immune from search and their archives are inviolable, § 288a(c), and treatment of their official communications are entitled to the same privileges, exemptions, and immunities accorded to foreign governments, § 288a(d). *See also* Restatement (Third) of Foreign Relations Law § 468 (stating that the immunities governing official correspondence and communications accorded to international organizations are comparable to those immunities enjoyed by diplomatic missions); § 466 ("The premises, archives, documents, and communications of an accredited diplomatic mission or consular post are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use."). The immunities from suit and judicial process enjoyed by foreign governments, made applicable to international organizations by the IOIA, are codified in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1604. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019).

The 1944 Treaty establishes the jurisdiction, structure, and functions of IBWC. Specifically, IBWC is authorized to jointly study, investigate, and develop solutions to transboundary problems related to water and the international boundary. IBWC is also authorized to settle differences between the two countries with respect to the interpretation or application of the treaty. Under Article 3 of the treaty, the joint use of international waters is "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." Under this article, and the articles authorizing joint investigations and solutions, IBWC has negotiated a series of minutes related to border sanitation issues, one of which dealt with the issue broadly and others of which dealt with specific geographic locations. After approval by the United States Department of State and the Mexican Ministry of Foreign Relations, these minutes have become binding executive agreements. 1944 Treaty, arts. 2, 25. For example, in 1979, IBWC signed Minute 261 which provides that for each border sanitation problem, IBWC shall prepare a minute that would identify the problem, the course of action for resolution, and a specific time schedule for implementation.

Response

Comment Noted.

Action Taken

None.

1.5. Comment

II. Factual Background

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

Minute 283 approved the construction of the SBIWTP. In the decades before the plant was built in 1997, untreated sewage flowed into the United States in the

Tijuana River and its tributaries. The river transported raw sewage to the Pacific coast at Imperial Beach, California, creating a nuisance and public health risk in the United States. To address the problem, IBWC signed Minute 283 in 1990, which provided the framework agreed to by both the U.S. and Mexican Governments to address the uncontrolled wastewater flows from Mexico into the United States. The agreement provided, in part: (1) that a secondary treatment plant (SBIWTP) would be constructed in the U.S. to treat 25 million gallons per day (MGD) of wastewater from Mexico; (2) that a pipeline would be built in the U.S. to convey the treated wastewater to the ocean; (3) that Mexico would construct collection works in Mexico necessary to convey wastewater to the SBIWTP; (4) that Mexico would require industries in Mexico to provide pre-treatment of wastewaters that discharge into the Tijuana collection system for conveyance to the SBIWTP; and (5) that Mexico would assure that there were no discharges of treated or untreated wastewaters into the Tijuana River that cross the international boundary and that, in the event of such flows, that Mexico would take measures to immediately stop such flows. Paragraph 14 of Minute 283 also states that, for jointly financed works, such as the SBIWTP, the construction and operation and maintenance of the works is under the supervision of the IBWC, United States and Mexico Sections. Minute 296 specifically governs the distribution of construction, operation, and maintenance costs for the SBIWTP, including issues related to asset management and assessing plant capacity.

Construction of the SBIWTP began in 1994. In 1997, the South Bay plant opened with discharge through an emergency connection to the City of San Diego's wastewater treatment facility. By 1999, the SBIWTP was providing advanced primary treatment for 25 million gallons of sewage coming from Mexico daily and discharging treated wastewater offshore in the Pacific Ocean through the South Bay Ocean Outfall.

The plant was upgraded with secondary treatment facilities in 2010. It is designed to treat up to 25 MGD of Tijuana's sewage, with the ability to treat up to 50 million gallons per day for a short period of time. The City of Tijuana also operates five wastewater treatment plants in Mexico to treat its remaining sewage, though these plants are not always fully operational. The SBIWTP's facilities include five canyon collector boxes located along the border in five of six cross-border canyons. During normal operations, small amounts or "low-flows" of urban runoff and wastewater from Mexico are captured and diverted by canyon collector boxes and conveyed to the SBIWTP through underground pipelines. As part of Minute 283, IBWC also built a diversion infrastructure just south of the border, operated by Mexican entities, to capture low-volume, dry-weather flows in the Tijuana River. The SBIWTP is not design [sic] to, nor does it, capture, divert, or treat high volume flows, such as those that result from wet weather, pipe breaks, or pump failures.

The SBIWTP treats 25 MGD of raw sewage that would otherwise flow into the United States. Nonetheless, in the decades since construction of the SBIWTP,

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

Response

Comment Noted.

Action Taken

None.

1.6. Comment

II. Factual Background

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

1. Publicly Owned Treatment Works (POTWs) and Non-Municipal Sources

As expressly recognized in Minute 296, because the SBIWTP "is located in the United States and will discharge to the coastal waters in the United States, the ocean discharge must meet quality standards established in the United States, under a permit granted to the United States Section of the IBWC." Thus, the SBIWTP is subject to the requirements of California's NPDES permit program, consistent with the partial waiver of sovereign immunity in the CWA. NPDES permittees can be broadly classified as municipal (publicly owned treatment works [POTWs] and related discharges) and non-municipal facilities. Within those broad categories, there might also be specific types of activities that are subject to unique programmatic requirements in the NPDES regulations.

The federal regulations at 40 C.F.R. § 403.3 define a POTW as a treatment works (as defined in CWA section 212) that is owned by a state or municipality (as defined in CWA section 502(4)). That definition "includes sewers, pipes, and other conveyances only if they convey wastewater to a POTW." 40 C.F.R. § 403.3(q). "[POTW] also means the municipality... which has the jurisdiction over the Indirect Discharges to and the discharges from such a treatment works." *Id.*

Federally owned treatment works, which are not owned by a state or municipality, are not considered POTWs. Thus, generally, federal facilities fall into the broader category of non-municipal facilities. Here, the SBIWTP treats wastewater of similar quality to POTWs and includes similar treatment processes

as POTWs. However, pursuant to international agreements in force with Mexico, USIBWC does not have operational control or jurisdiction over the sewage collection system for the city of Tijuana or indirect discharges to the treatment works. Specifically, Paragraph 14 of Minute 283 states that "[t]he construction of jointly financed works in the territory of each county, shall in no way confer jurisdiction to one country over the territory of the other." Additionally, Paragraph 12 of Minute 283 states that "[t]he Government of Mexico, in accordance with laws in force in that country," must require the appropriate pretreatment of wastewater for discharges into the Tijuana sewage collection system that in turn discharges into the SBIWTP.

Response

Comment Noted.

Action Taken

None.

1.7. Comment

II. Factual Background

C. Transboundary Flows

The Tijuana Basin diversion system consists of the Mexican-operated Pump Station CILA and the SBIWTP's canyon collector boxes. This system captures dry-weather flows for diversion and treatment at the SBIWTP or diversion to a wastewater treatment plant in Mexico. However, it is not designed to capture high flows, such as those that result from wet weather, pipe breaks, or pump failures. Neither Pump Station CILA nor the five canyon collector boxes operate during high-flow conditions, both to avoid damaging the SBIWTP and the diversion system itself.

Wet weather flows can be massive. For example, a storm which results in 2 inches of rainfall throughout the 1,750 square mile Tijuana River watershed would equal roughly 60 billion gallons of water (without accounting for hydrologic losses such as evaporation, infiltration and storage that would reduce this volume). A study conducted by Arcadis in 2019 reports that the volume of transboundary flows from the Tijuana River can reach levels of up to 9 billion gallons per day due to storm events. This makes it unrealistic to capture and eliminate all transboundary flows. To further illustrate this point, videos of flows during wet weather at Stewart's Drain, Goat Canyon, and Smuggler's Gulch are included as Attachment 2 to this letter.

During rainstorms or wet weather in Tijuana and when pipelines or pumps break, water flows to the Tijuana River and canyons and mixes with unknown amounts of urban runoff, treated effluent from the Tijuana River, and wastewater in Mexico before flowing into the United States. During dry weather, the runoff is largely groundwater and some untreated discharge from illegal connections (dry-weather

flows); during storms, this runoff mixes with large amounts of rainfall (wet-weather flows). Thus, transboundary flows that cross the U.S.-Mexico international border can transport pollutants generated in Mexico that impact downstream surface waters in the United States.

Paragraph 16 of Minute 283 states, "[t]he Government of Mexico will assure that there are no discharges of treated or untreated domestic or industrial wastewaters into waters of the Tijuana River that cross the international boundary, and that in the event of a breakdown in collection or other detention facilities designed to prevent such discharges, the Government of Mexico will take special measures to immediately stop such discharges and make repairs. Should Mexico request it through the Commission, the United States Section will attempt to assist with equipment and other resources in the containment of such discharges and temporary repairs under the supervision of the Commission."

Response

Comment Noted.

Action Taken

None.

1.8. Comment

III. Specific Provisions of the Tentative Order

A. Section 2.3

This section rightly recognizes that some provisions of the Tentative Order implement only State law (namely, the California Water Code) while others implement State law and the CWA. Discharges of waste to land, for example, may be prohibited under California Water Code, but they cannot be categorically prohibited under the CWA, which prohibits only the "discharge" of pollutants "from a point" to a navigable water, the contiguous zone, or the ocean, 33 U.S.C. § 1362(12), and which "prohibits only actual discharges, not potential discharges," *Waterkeeper All., Inc.*, 399 F.3d at 505. A "discharge" to land, for example, does not on its face violate the CWA, and would constitute a CWA violation only if it was "the functional equivalent" of a "direct discharge from a point source into navigable waters." *Cnty. of Maui*, 140 S. Ct. at 1476. Thus, the Regional Board has appropriately clarified that "[d]discharges from the Facility to land in violation of prohibitions contained in this Order are violations of the Water Code and are not subject to third party lawsuits under the CWA." Fact Sheet, Attachment F, Section 4.1.

For the sake of clarity, this acknowledgement should also be included in Section 2.3. The Regional Board must go further, however, because the prohibition of discharges to land is not the only discharge prohibition that exceeds the scope of the CWA and is therefore allowable only under State law (if at all). We elaborate on this point in our discussion of Discharge Prohibitions 3.1, 3.2, and 3.3, which

follows. For the reasons set forth below, section 2.3 should not just incorporate the above-quoted language from section 4.1 of the Fact Sheet, but should also make clear that a violation of a discharge prohibition in the Order is a violation of federal law *if and only if* it entails the "discharge of pollutants from a point source to a navigable water," within the meaning of the CWA. The Regional Board should clarify that any other violation of a discharge prohibition is a violation of the Water Code only and is not subject to third party lawsuits under the CWA.

As part of the Discharger's comment, it included suggested revisions to the draft Tentative Order in redline/strikeout (Suggested Revisions). The Discharger's Suggested Revisions also included revisions to Tentative Order section 2.3.

Response

While neither federal nor State of California (State) law requires NPDES permits to identify State law only requirements, the broad statement in section 2.3 of the Tentative Order appropriately lists the sections intending to implement State law only. The purpose of Section 2.3 is to identify the general authorities for the Tentative Order. The Discharge's requested revision would unduly narrow the enforceability of the permit, in contradiction with the CWA and its implementing regulations. (33 U.S.C. § 1342; 40 C.F.R. § 122.41(a).)

The Fact Sheet (Attachment F of the Tentative Order) appropriately clarifies that discharges from the Facility to surface waters in violation of the prohibitions are violations of the CWA and may be subject to third party lawsuits, and that discharges from the Facility to land in violation of the prohibitions are violations of the California Water Code (Water Code) and not subject to third party lawsuits. (Fact Sheet, § 4.1, p. F-22.) In some circumstances, discharges to land may also be a violation of the CWA and subject to third party lawsuits. (See *County of Maui, Hawaii v. Hawaii Wildlife Fund* (2020) 140 S.Ct. 1462.) Section 4.1 of the Fact Sheet (Attachment F of the Tentative Order) has been revised to recognize that some discharges to land may also be violations of the CWA.

Action Taken

Section 4.1 of the Fact Sheet (Attachment F of the Tentative Order) has been revised as follows:

This Order retains the discharge prohibitions from Order No. R9-2014-0009, as amended, as described below. Discharges from the Facility to surface waters in violation of prohibitions contained in this Order are violations of the CWA and therefore are subject to third party lawsuits. Discharges from the Facility to land in violation of prohibitions contained in this Order are violations of the Water Code and are not subject to third party lawsuits under the CWA because the Water Code does not contain provisions allowing third party lawsuits. In some circumstances, discharges to land may also be a violation of the CWA and subject to third party lawsuits. (*County of Maui, Hawaii v. Hawaii Wildlife Fund* (2020) 140 S.Ct. 1462.)

1.9. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

1. Discharge Prohibition 3.1 is unclear and requires clarification

Discharge Prohibition 3.1 is unclear in several respects and requires clarification.

First, the term “discharge of waste” is ambiguous. If “discharge of waste” is synonymous with “discharge” or “discharge of a pollutant,” as defined on page A-8 of the Tentative Order, then Discharge Prohibition 3.1 is internally inconsistent. The definition of “discharge” at A-8 tracks the statutory definition of “discharge” at 33 U.S.C. § 1362(12). Thus, something is a “discharge” under the permit if it entails an addition of a pollutant to “waters of the United States.” A-8. But Discharge Prohibition 3.1 prohibits “the discharge of waste” not just to waters of the United States, but to all locations “other than Discharge Point No. 001.” This could include locations in navigable waters, or locations outside of navigable waters. A discharge of waste to locations outside of navigable waters might not be a discharge “from any point source to navigable waters” and thus might not be a “discharge” at all within the meaning of the CWA or the definition at A-8. *See Cnty. of Maui,* 140 S. Ct. at 1476–77.

If the Regional Board intends “discharge of waste” to have a meaning different from “discharge” or “discharge of pollutant,” then, out of fairness to USIBWC and to the public, it should clearly define the term and identify the legal authority that allows it to prohibit the “discharge of waste” to all points other than the South Bay Ocean Outfall.[4] If, on the other hand, the Regional Board intends “discharge of waste” to mean “discharge” or “discharge of a pollutant,” as defined at A-8, then Discharge Prohibition 3.1 is incoherent as currently drafted.

The Discharger’s Suggested Revisions also included the following comment to Tentative Order section 3: “This section is unclear and potentially ultra vires for the reasons discussed in Part III.B – D of USIBWC’s Comment Letter.”

Response

Discharge Prohibition 3.1 is appropriately written to recognize the Tentative Order’s limited authorization to discharge secondary-treated effluent through the South Bay Ocean Outfall (SBOO) and into the Pacific Ocean, upon compliance

[4] If the Regional Board intends for “discharge of waste” to mean something other than “discharge” or “discharge of a pollutant,” then it must derive its authority from some authority other than Chapter 5.5 of the California Water Code. *See* Cal. Water Code § 13373 (“The terms ‘navigable waters,’ . . . ‘discharge’ and ‘point sources’ as used in this chapter shall have the same meaning as in the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto.”)

with certain conditions and requirements. (Tentative Order, § 2.1.; see also 33 U.S.C. § 1342; Water Code, § 13263.) Except as specifically regulated by the order, the Tentative Order does not purport to authorize any other discharges from the Facility[5].

However, Discharge Prohibition 3.1 also recognizes that other discharges from the Facility may be authorized and regulated by separate WDRs.[6] If the Discharger believes it is discharging from the Facility without appropriate WDRs, it should submit a report of waste discharge for such discharge and seek appropriate permit coverage. (Water Code, §§ 13260, 13263.)

Regarding compliance with State laws, please refer to Response to Comment No. 1.35. For clarify and consistency, the definitions of “discharge” and “waste” in Attachment A have been revised.

Action Taken

Part 2 of Attachment A of the Tentative Order has been revised as follows:

Discharge of a Pollutant

Discharge of a pollutant means: (a) Any addition of any ‘‘pollutant’’ or combination of pollutants to ‘‘waters of the United States’’ from any ‘‘point source,’’ or (b) Any addition of any pollutant or combination of pollutants to the waters of the ‘‘contiguous zone’’ or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the U.S. from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any ‘‘indirect discharger.’’

Waste

“Waste” includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal. ~~As used in the Ocean Plan, waste includes a Discharger’s total discharge, of whatever origin, i.e., gross, not net, discharge.~~

1.10. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

[5] As defined in Part 2 of Attachment A of the Tentative Order.
[6] In California, WDRs serve as NPDES permits. (See Tentative Order, § 2.1.)

1. Discharge Prohibition 3.1 is unclear and requires clarification

Second, it is unclear whether and to what extent the Regional Board intends for Discharge Prohibition 3.1 to bar "Canyon Collector Transboundary Flow Events" as defined at 6.3.2.1.1.2. Certain sections of the permit strongly suggest, however, that the Regional Board does not intend that Discharge Prohibition 3.1 should apply to all such events. In the Fact Sheet, for example, the Tentative Order excludes from the definition of "Spill Event" "(1) wet weather flows that bypass the canyon collectors and (2) any portion of dry weather flows which exceed the maximum design capacity of the canyon collector and are not diverted by the canyon collector." Fact Sheet, Attachment F, 6.2.2.1.4. We note that in implementing the current NPDES permit, the Regional Board has flagged as unpermitted discharges in violation of Discharge Prohibition III.A only those events that were designated as "Facilities Spill Events." *See* 2.4.1. The definition of a "Facilities Spill Event" under the current NPDES Permit and the definition of a "Spill Event" under the Tentative Order are much the same. The terms of Discharge Prohibition III.A in the current permit, and the terms of Discharge Prohibition 3.1 are identical. Based on past practice, then, it appears that the Regional Board does not intend to regulate as unpermitted discharges, "(1) wet weather flows that bypass the canyon collectors and (2) any portion of dry weather flows which exceed the maximum design capacity of the canyon collector and are not diverted by the canyon collector." Fact Sheet, Attachment F, 6.2.2.1.4. The strong inference is that the Regional Board intends to regulate as unpermitted discharges only those Canyon Collector Flow Events that occur during dry weather and that do not exceed the design capacity of the relevant canyon collector—that is, only those Canyon Collector Flow Events that are also Spill Events. This conclusion is consistent with the Regional Board's characterization of its own legal position in ongoing litigation with USIBWC (*see* Fact Sheet, Attachment F, Section 2) and with our understanding of the Regional Board's representations to us during limited discussions prior to the release of the Tentative Order for public comment.

If the Regional Board intends to limit the application of Discharge Prohibition 3.1 to Canyon Collector Flow Events that are also designated as Spill Events, then it should make plain its intention, either by revising Discharge Prohibition 3.1 itself, or by revising the explanation of the Discharge Prohibitions at Section 4.1 of the Fact Sheet. This could be done, for example, by adding to section 3.1 the following: "This discharge prohibition applies to Spill Events, but not to Canyon Collector Flow Events that are not designated as Spill Events."[7]

Such a revision would be necessary because Discharge Prohibition 3.1 as currently worded might be read to prohibit all Canyon Collector Flow Events. We

[7] We do not concede that all Canyon Collector Transboundary Flow Events meeting the definition of a Spill Event are actually discharges subject to NPDES permitting requirements. *See* Part III.B.2.ii, *supra*.

do not believe that this is the best reading of the permit and it assumes that Canyon Collector Flow Events are themselves discharges, which is legally and factually incorrect, for the reasons set forth below. But setting that to one side, the current wording of the discharge prohibition creates unnecessary confusion for USIBWC and for the public if the Board's intention is not, in fact, to prohibit all Canyon Collector Flow Events. This ambiguity unfairly prejudices USIBWC by creating litigation risk.

The Discharger's Suggested Revisions also included revisions to portions of Fact Sheet sections 6.2.2.1. – 6.2.2.2.

Response

Discharge Prohibition 3.1 and the definition of a Spill Event in the Tentative Order are separate provisions that function differently. While certain events may trigger both provisions, Discharge Prohibition 3.1 and section 6.3.2.1, Spill and Transboundary Flow Event Prevention and Response Plans, are not intended to be read together.

For further clarification about Discharge Prohibition 3.1, please refer to Response to Comment No. 1.9. The Fact Sheet, clarifies that Discharge Prohibition 3.1 "also applies to any dry weather discharges of waste overflowing the canyon collectors." (Fact Sheet, § 6.2.2.1.3, F-48.)

Section 6.3.2.1 of the Tentative Order defines various transboundary flow events, including Spill Event and Canyon Collector Transboundary Flow Event. Section 6.3.2.1.2 of the Tentative Order also requires the Discharger to submit a Spill and Transboundary Flow Prevention and Response Plan (Flow Prevention/Response Plan). The stated goals of the Flow Prevention/Response Plan are the reduction, elimination, and prevention of the recurrence of spills and transboundary flows; the protection of public health and safety; and the prevention of adverse impacts to the environment from spills and transboundary flows, including but not limited to, adverse impacts to waters of the United States (U.S.) and/or State. (Tentative Order, § 6.3.2.1.2.1) The Flow Prevention/Response Plan shall include guidelines and procedures for remediating Spill Events. (Tentative Order, § 6.3.2.1.2.8)

The San Diego Water Board expects the Discharger to divert dry weather canyon collector transboundary flows up to each canyon collector's maximum design capacity for treatment at the SBIWTP. In the event that a dry weather canyon collector transboundary flow bypasses a canyon collector system that is within the design capacity of the canyon collector system and thus should have diverted for treatment at the SBIWTP, the Tentative Order defines this dry weather Canyon Collector Transboundary Flow Event as a Spill Event and the Discharger is required to contain and cleanup as much of the Spill Event as possible. (Tentative Order, §§ 6.3.2.1.2.8 – 6.3.2.1.2.8.3; see also §§ 6.3.2.1.1.1, 6.3.2.1.1.2)

The Tentative Order has been revised to request that the Discharger contain and cleanup dry weather Canyon Collector Transboundary Flow Events in excess of the design capacity of the canyon collector systems and Other Canyon Transboundary Flow Events, which are not also Spill Events. This would not include Tijuana River Transboundary Flow Events. Dry weather Canyon Collector Transboundary Flow Events in excess of their design capacity and Other Canyon Transboundary Flow Events, which are not also Spill Events, are flows that would not have been diverted to the SBIWTP for treatment. However, to assist in achieving the stated goals of the Flow Prevention/Response Plan and protecting water quality and beneficial uses, the San Diego Water Board is requesting the Discharger contain and cleanup as much of these transboundary flows as reasonably possible. Failure to implement the Flow Prevention/Response Plan for dry weather Canyon Collector Transboundary Flow Events in excess of their design capacity and Other Canyon Transboundary Flow Events would not be a violation of the Tentative Order.

To ensure compliance with the Flow Prevention/Response Plan, it will be important for the Discharger to accurately monitor and report on all dry weather Canyon Collector Transboundary Flow Events and remediation efforts, including remediated amounts. This information will allow the San Diego Water Board to independently assess whether a dry weather Canyon Collector Transboundary Flow Event was within or exceeded the canyon collector systems' design capacity, and if the Discharger properly implemented its Flow Prevention/Response Plan.

Section 6.3.2.1.2.8 of the Tentative Order and section 6.2.2.1.3 of the Fact Sheet (Attachment F of the Tentative Order) were revised to clarify the types of events that apply to Discharge Prohibition 3.1 and the Flow Prevention/Response Plan's containment and cleanup requirements.

Action Taken

Section 6.3.2.1.2.8 of the Tentative Order and section 6.2.2.1.3 of the Fact Sheet (Attachment F of the Tentative Order) have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.11. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

2. The Regional Board cannot use Discharge Prohibition 3.1 to prohibit categorically Canyon Collector Transboundary Flow Events under the CWA.

For the reasons set forth above, it is unclear how the Regional Board intends Discharge Prohibition 3.1 to apply. We note, however, that the Regional Board cannot prohibit all Canyon Collector Transboundary Flow Events under the CWA.

Response

Please refer to Response to Comment Nos. 1.9 and 1.12.

Action Taken

None.

1.12. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

2. The Regional Board cannot use Discharge Prohibition 3.1 to prohibit categorically Canyon Collector Transboundary Flow Events under the CWA.

i. The Regional Board cannot impose on USIBWC an open-ended obligation to capture and treat all Canyon Collector Transboundary Flow Events.

Requiring USIBWC to capture and treat to secondary standards all Transboundary Canyon Collector Flow Events would impose on USIBWC a legal responsibility to treat an unlimited quantity of stormwater and Tijuana's waste. That is both practically untenable and legally beyond the Regional Board's power. The 1944 Treaty is the means by which the United States assumes any such responsibilities. *See* Part II.A, *supra*. The CWA expressly cannot impair or affect the provisions of any treaty and so a NPDES permit cannot supplant the 1944 Treaty a vehicle for regulating cross-border pollution. *See* Part I.B, *supra*. Nor can State law, which is preempted by the 1944 Treaty and in any case cannot usurp or direct the federal government's authority in matters of foreign policy. *See* Part I.C, *supra*

Response

Discharge Prohibition 3.1 does not require the Discharger to capture and treat to secondary treatment standards all Canyon Collector Transboundary Flow Events. Regarding the limited authorization of the Tentative Order, please refer to Response to Comment No. 1.9.

On its face, Discharge Prohibition 3.1 does not purport to impair or affect any treaty obligations or direct the federal government's authority in matters of foreign policy. In addition to assuming certain responsibilities to treat transboundary flows through the 1944 Treaty, the Discharger is subject to State water pollution laws. (33 U.S.C. § 1323, subd. (a).) Regarding compliance with State laws, please refer to Response to Comment No. 1.35.

At this time, the San Diego Water Board does not intend for wet weather canyon collector transboundary flows to violate Discharge Prohibition 3.1. Regarding discharge, please refer to Response to Comment No. 1.13. Section 6.2.2.1.3 of the Fact Sheet (Attachment F of the Tentative Order) has been revised to state that wet weather Canyon Collector Transboundary Flow Events do not violate Discharge Prohibition 3.1. The San Diego Water Board is exercising its

enforcement authority and prosecutorial discretion to explain that it does not intend wet weather Canyon Collector Transboundary Flow Events to be a violation of Discharge Prohibition 3.1.

Action Taken

Section 6.2.2.1.3 of the Fact Sheet (Attachment F of the Tentative Order) has been revised as follows:

Discharge Prohibition 3.1 of the Order prohibits the discharge of waste from the Facility to a location other than Discharge Point No. 001, unless specifically regulated by this Order or separate WDRs. This prohibition also applies to any dry weather discharge of waste overflowing the canyon collectors. This prohibition does not apply to wet weather Canyon Collector Transboundary Flow Events.

1.13. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

2. The Regional Board cannot use Discharge Prohibition 3.1 to prohibit categorically Canyon Collector Transboundary Flow Events under the CWA.

ii. Transboundary flows that entail the mere movement of pollutants from upstream to downstream sections of a waterway are not discharges under the CWA.

Canyon collectors are improved sections of natural features that span the border with Mexico, as the Tentative Order itself makes clear. *See, e.g.*, Tentative Order at A-6 ("Canyon collectors are concrete channels and basins designed to capture transboundary dry weather flows from Mexico in canyons and ravines draining north across the U.S. – Mexico international border to the Tijuana River Valley in California."); Fact Sheet, Attachment F, Section 2 (describing the canyon collectors as diverting for treatment "some transboundary flows in canyon [sic.] and gullies that empty from Tijuana into the Tijuana River Estuary on the U.S. side of the international border."); *Id.*, Section 2.1 ("All five diversion structures, also referred to as canyon collectors, are concrete-lined portions of natural drainages and basins").

The natural features containing canyon collectors are intermittent, second- or third-order tributaries of the Tijuana River and Estuary and, within the United States, are WOTUS. The attached report of Dr. Lee (Attachment 3) sets forth the factual bases and analyses supporting each of these points.

Pollutants entering and exiting the canyon collectors originate in Mexico. *See, generally*, Fact Sheet, Attachment F, Sections 6.2.2.1.2 and 6.2.2.1.3 (discussing history of cross-border pollution). Indeed, a Canyon Collector Transboundary Flow Event is, by definition, a "*flow across the U.S.– Mexico international border*. ... to any one of the five canyons equipped with a canyon collector

system. ... that is not captured by the canyon collector system for treatment at the SBIWTP and disposal through the SBOO." 6.3.2.1.1.2 (emphasis added).

Each collector diverts for treatment at the plant, those transboundary flows that enter the collector's screened drain/inlet. Fact Sheet, Attachment F, section 2.1; *see also* Part III.B.2.iii, *infra*. Flows that do not enter that screened drain/inlet—and this will be true of most if not all Canyon Collector Transboundary Flow Events—simply "continue north in the natural drainage []" in which the collector is situated. *Id.*

Canyon Collector Transboundary Flow Events, then, include flows of water from one section of a waterway (the section south of a canyon collector), through an improved section of the waterway (a canyon collector's concrete channel), to downstream portions of the same waterway (sections of the waterway that are north of a canyon collector). The Regional Board has never alleged, let alone demonstrated, that the canyon collectors add anything to the waters that pass through them. Nor could it; the collectors simply divert for treatment, or do not divert for treatment, flows from Mexico though the natural drainages. Thus, Canyon Collector Transboundary Flow Events include the mere movement of pollutants within hydrologically indistinct waters. This, the Supreme Court and Ninth Circuit have repeatedly held, does not constitute a "discharge" subject to 33 U.S.C. § 1311's broad prohibition and thus is not subject to NPDES permitting requirements. *L.A. Cnty. Flood Control Dist.*, 568 U.S. at 82; *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 109–10; *ONRC Action*, 798 F.3d at 937–38. Those decisions are controlling.

To maintain otherwise is to open a Pandora's Box of CWA liability with absurd results. We remind the Regional Board that the California State Parks System operates a sediment basin immediately downstream of the Goat Canyon collector. As the Regional Board knows, flows that enter the Tijuana River or Estuary after passing the Goat Canyon collector will necessarily also pass through the Goat Canyon Sediment Basin, which is no less a "point source" than the canyon collector itself. We also note for the Board's benefit that any flows that enter the Tijuana River or Estuary after passing through the Canyon del Sol canyon collector will also pass through a pipe that was constructed by the City of San Diego and which passes beneath the City's South Bay Water Reclamation Plant. As detailed in San Diego's attached CWA section 404 permit materials (Attachment 4), that pipe captures and diverts the Canyon del Sol waterway from its historical path. A photo showing the terminus of that pipe, which ends just shy of the Tijuana River, is included in Exhibit E to Dr. Lee's Report (Dr. Lee's report is Attachment 3 to this letter). If Canyon Collector Transboundary Flow Events are subject to the CWA's prohibition on discharges, then so too are flows through the Goat Canyon Sediment Basin and the culverted stretches of the Canyon del Sol stream that pass by the South Bay Reclamation Plant. And if flows through the sediment basin and culverted stretches of Canyon del Sol are subject to the

CWA's prohibition on discharges, then those works too are subject to NPDES permitting requirements.

Response

Discharge Prohibition 3.1 is appropriately interpreted to include all dry weather Canyon Collector Transboundary Flow Events. Transboundary flows which bypass the canyon collectors can constitute the discharge of a pollutant pursuant to the CWA and the discharge of waste pursuant to the Water Code.

For instance, the resuspension of pollutants and sediments by dry weather canyon collector transboundary flows can constitute discharges of a pollutant. (*Rybachek v. EPA* (9th Cir. 1990) 904 F.2d 1276, 1285 ["even if the material discharged…originally comes from the streambed itself, [the] resuspension [of the material in the waters] may be interpreted to be an addition of a pollutant under the [CWA]."]; see also *Borden Ranch Partnership v. U.S. Army Corps of Engineers* (9th Cir. 2001) 261 F.3d 810, 814-815, affd 537 U.S. 99 (2002); *United States v. Deaton* (4th Cir.2000) 209 F.3d 331, 335-336.) The canyon collector systems regularly collect sediment, trash, and other pollutants. The Discharger does not always remove the accumulated sediment, trash, or other pollutants in the canyon collector systems before successive Canyon Collector Transboundary Flow Events. The San Diego Water Board understands that the Discharger routinely uses heavy equipment, such as a tractor, to collect accumulated sediment, trash, and other debris from the canyon collector systems. The Discharger generally piles the debris within the canyon collector systems to allow it to dry for approximately a week. The heavy equipment used by the Discharger may also release oil, grease, other fluids, or debris into the canyon collector systems. The Discharger should implement best management practices to ensure their equipment does not release oil, grease, or other pollutants into the canyon collector systems.

Successive Canyon Collector Transboundary Flow Events will resuspend the sediment and pollutants, adding them to the flow, and cause the discharge of pollutants through the canyon collectors. Additionally, the tractor, or other equipment, used by the Discharger may also release oil or grease into the canyon collector systems. Thus, previous dry weather Canyon Collector Transboundary Flow Events have violated Order No. R9-2014-0009 and will continue to violate the Tentative Order if the canyon collector systems are not properly cleaned.

As another example, flows through the canyon collector systems may constitute discharges of waste pursuant to the Water Code. The Water Code defines "waste" as "sewage and any and all other waste substances, liquid, solid, gaseous or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature prior to, and for purposes of, disposal." (Water Code, § 13050, subd. (d).) Under the Water Code, "waste" is more than just sewage and includes

constituents or materials that are harmful to water quality or beneficial uses when discharged. (*Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region* (2021) 61 Cal.App.5th 1, 463, petn. for review pending, petn filed March 29, 2021; *Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163, 169 ["concentrated silt or sediment associated with human habitation and harmful to the aquatic environment is 'waste'"].) The canyon collector systems may collect and accumulate sediment, pollution, and other harmful substances. Subsequent flows may resuspend such sediment, pollution, or other harmful substances to be discharged through the canyon collector systems. Thus, canyon collector transboundary flows may constitute waste under the Water Code.

While the Water Code does not define the term "discharge," courts typically apply the common sense meaning of "discharge." Dictionary definitions of "discharge" include "to allow (a liquid, gas, or other substance) to flow out from where it has been confined," "to give outlet or vent to," and "to emit." (*Sweeney, supra*, 61 Cal.App.5th 1, 464—465.) As stated in the Fact Sheet (Attachment F of the Tentative Order), transboundary flows may "overflow[ ]" or "bypass[ ]" the canyon collector systems. (Fact Sheet, § 2.1, F-7.) Transboundary flows which overflow or bypass the canyon collectors fall within the common sense meaning of discharge and thus constitute discharges under the Water Code. Therefore, canyon collector transboundary flows may be discharges of waste under the Water Code.

For further clarification about Discharge Prohibition 3.1, please refer to Response to Comment No. 1.9. Regarding natural drainages, please refer to Response to Comment No. 1.30. Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

The Discharger's comment also mentioned a sediment basin and culvert. The sediment basin and culvert are outside the scope of this Tentative Order.

Action Taken

None.

1.14. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

2. The Regional Board cannot use Discharge Prohibition 3.1 to prohibit categorically Canyon Collector Transboundary Flow Events under the CWA.

iii. Discharge Prohibition 3.1's requirement of secondary treatment is inapplicable to transboundary flows that do not enter the canyon collectors' diversion boxes.

Even if the Regional Board could prohibit Canyon Collector Transboundary Flow Events (and again, it cannot under the CWA), it could not do so under Discharge

Prohibition 3.1. That provision bars the "discharge of waste from the Facility *not treated by a secondary treatment process*." But the application of a secondary treatment requirement to Canyon Collector Transboundary Flow Events is flatly inconsistent with longstanding EPA regulations implementing the CWA. Before turning to those regulations, it is helpful to review the term "Canyon Collector Transboundary Flow Event" in light of a more precise explanation of the canyon collectors' design and function.

We refer the Regional Board to Attachment 5, which includes annotated photographs of Silva Drain and Canyon del Sol. The features on these photographs that are highlighted are also found at Stewart's Drain, Smuggler's Gulch, and Goat Canyon, each of which also contains a canyon collector.

Each canyon collector structure begins downstream (north) of a box culvert. The box culverts at Silva Drain and Canyon del Sol are outlined in green in Attachment 5. Some box culverts about the international border. At least one (Smuggler's Gulch) is well north of the border. As the Regional Board knows, the box culverts at Silva Drain, Canyon del Sol, Smuggler's Gulch, and Goat Canyon are neither owned nor operated by USIBWC.[8] See Attachment 6 (email correspondence between Customs and Border Protection and the Regional Board). The box culverts in these locations are not part of the canyon collector system that is owned and operated by USIBWC.

Each canyon collector structure includes a concrete apron (outlined in red in Attachment 5), which begins downstream (north) of the box culvert and ends in a gradually inclined terminal weir (the crest of which is outlined in dark blue in Attachment 5). The canyon collectors—that is, the structures owned and operated by USIBWC—end after those terminal weirs. The waterways in which the canyon collectors are situated continue northward after the terminal weir. The concrete apron and terminal weir are contained entirely within the natural features (e.g., Canyon del Sol) in which the collectors are situated.

Just before the terminal weir, each canyon collector box has an inlet (indicated in light blue in Attachment 5) that opens into a diversion box (indicated in yellow). As illustrated in Attachment 7, schematic drawings of Silva Drain, the diversion box contains two sub-grade chambers. Water that enters the inlet goes into these chambers and then on to the Plant for treatment. The same is true for the other four collector boxes.

Applying the terms of the Tentative Order to the facts outlined above and in Attachments 5 and 7, Canyon Collector Transboundary Flow Events occur when water flows from Mexico, crosses the border at some point upstream (south) of the canyon collector structures, passes over the structures' concrete aprons, and crests the terminal weirs, without entering the inlets to the diversion boxes, and

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[8] USIBWC believes that the same is true of the box culvert at Stewart's Drain.

thus without entering the collectors' sub-grade chambers. Only those flows that enter the collectors' diversion boxes go to the SBIWTP for treatment.

With that as background, we turn to the relevant regulations. Under longstanding and currently operative EPA regulations, the requirement of treatment to secondary standards applies only to discharges from treatment works. *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 590–592 (D.C. Cir. 1980). A "Publicly Owned Treatment Works or POTW," in turn, "includes sewers, pipes and other conveyances *only if they convey wastewater to a POTW treatment plant*." 40 CFR § 403.3(q) (emphasis added). The only features of the canyon collector structure that "convey wastewater" to the SBIWTP are the diversion boxes, sub-grade chambers, and the connected pipes, junction boxes, and pumps. Any flows that do not enter those features—that is, any flows that merely pass over the collectors' concrete aprons and terminal weirs—are, by definition, not conveyed to the treatment works.

The SBIWTP is not a "publicly owned" treatment plant for purposes of the CWA. Yet throughout the Tentative Order, the Regional Board relies on regulations applicable to POTWs to craft requirements for the SBIWTP, including the requirement of secondary treatment applicable to POTWs and even to other provisions in 40 C.F.R. § 403. *See, e.g.*, A-10, A-12, F-19, F-52. We do not concede that the Board's reliance on POTW regulations is appropriate here, particularly with respect to pretreatment requirements. But assuming arguendo that non-pretreatment POTW regulations are applicable to the SBIWTP, the Board cannot arbitrarily apply those POTW regulations inconsistently. Stated differently, if the Regional Board insists on treating the Facility as a POTW, it cannot do so selectively. Thus, the requirement of secondary treatment set forth in Discharge Prohibition 3.1 cannot be applied to Canyon Collector Transboundary Flow Events that never enter the collectors' inlets and diversion boxes.

Response

Discharge Prohibition 3.1 does not purport to impose secondary treatment standards on Canyon Collector Transboundary Flow Events. For further clarification about Discharge Prohibition 3.1, please refer to Response to Comment No. 1.9. Regarding discharges, please refer to Response to Comment No. 1.13. Regarding the canyon collector systems, please refer to Response to Comment No. 1.30.

The Discharger's reading of the discharge prohibition neglects to acknowledge that Discharge Prohibition 3.1 recognizes other discharges may be regulated by separate WDRs. Thus, the Discharger may obtain separate WDRs as necessary and appropriate for discharges which bypass the canyon collector systems. Discharge Prohibition 3.1 is not overly restrictive because the Discharger can obtain separate WDRs for discharges not specifically authorized by the Tentative Order.

Action Taken

None.

1.15. Comment

III. Specific Provisions of the Tentative Order

B. Section 3.1

3. Discharge Prohibition 3.1 may be enforceable only as a matter of State law, in which case it is not enforceable under 33 U.S.C. § 1365.

For the foregoing reasons, if the Regional Board wishes to regulate Canyon Collector Transboundary Flow Events under Discharge Prohibition 3.1 then it must rely on some authority other than the CWA or Chapter 5.5 of the California Water Code, which tracks the CWA. It has not done so in the Tentative Order, which mentions in passing only the CWA and its implementing regulations as the bases for Discharge Prohibition 3.1. *See* Fact Sheet, Attachment F, section 4.1.

Assuming without conceding that the Regional Board could rely on its State law authority to flatly prohibit Canyon Collector Transboundary Flow Events, the Board should clarify that violations of that prohibition "are not subject to third party lawsuits," just as it has done for the prohibition on discharges to land. *See id*. Again, this could be accomplished by including the following language in section 3: "a violation of a discharge prohibition in the Order is a violation of federal law *if and only if* it entails the 'discharge of any pollutants from any point source to a navigable water,' within the meaning of the CWA."

Response

Please refer to Response to Comment Nos. 1.9, 1.12, 1.13, 1.14, and 1.35.

Action Taken

Please refer to Response to Comment Nos. 1.9, 1.12, 1.13, 1.14, and 1.35.

1.16. Comment

III. Specific Provisions of the Tentative Order

C. Section 3.2

As drafted, Discharge Prohibition 3.2 is ambiguous and may be flawed for several reasons. First, the provision contains an apparent internal contradiction. Section 3.2 purports to require USIBWC to "comply with Discharge Prohibitions contained in the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan), incorporated into this Order as if fully set forth herein." We note, however, that certain of the discharge prohibitions in the Ocean Plan do not, on their face, apply to USIBWC. In particular, the Ocean Plan provides that "The discharge of trash to surface waters of the State or the deposition of trash where it may be discharged into surface waters of the State is prohibited." But the Ocean Plan also provides that "Dischargers with NPDES

permits, WDRs, or waivers of WDRs that do not contain specific requirements for the control of Trash* are exempt from these Trash Provisions*." There are no "specific requirements for the control of trash" in the Tentative Order. Also, the Facilities cannot "discharge" trash due to the nature of the treatment the wastewater receives at South Bay and the screens on the canyon collectors. So, the Ocean Plan's discharge prohibition regarding trash does not, on its face, apply to USIBWC. USIBWC could thus comply with the provisions of the Ocean Plan without complying with prohibition on discharges of trash.

It is also unclear why the Regional Board believes that USIBWC "discharges" trash to surface waters of the State. In a few places in the Tentative Order, the Regional Board notes that transboundary flows from Mexico may contain trash. *See, e.g.*, Monitoring and Reporting Program, Attachment E, Section 4.2; Fact Sheet, Attachment F, Section 7.2.2. But, for the reasons noted above, the movement of pollutants—and trash is a pollutant—through improved sections of waterways into unimproved sections of the same waterways are not discharges within the meaning of the CWA.

The Ocean Plan's prohibition on the discharge of trash also exceeds the scope of the CWA by purporting the ban "the *deposition* of trash where *it may be* discharged into *surface waters of the State* is prohibited." Attachment G, section 1.5. The CWA regulates "discharges," not "depositions;" it regulates actual discharges, not potential discharges; and it regulates discharges to "navigable waters," not "surface waters of the State." As with a general prohibition on Canyon Collector Transboundary Flow Events, if the Water Board wishes to prohibit the flow of trash past the canyon collectors, it must rely on some authority other than the CWA or Chapter 5.5 of the California Water Code, which tracks the CWA. And again, assuming without conceding that the Regional Board can identify such authority, it should clarify that violations of that prohibition "are not subject to third party lawsuits," just as it has done with respect to violations against the prohibition on discharges to land. *See* Fact Sheet, Attachment F, section 4.1.

Finally, Discharge Prohibition 3.2 is ambiguous as to its scope. The Tentative Order purports to prohibit "discharges" from the "Facility" to "surface waters" or "land." Fact Sheet, Attachment F, section 4.1. While this statement of intent is clear enough, the lack of any reference to the "Facility" in Discharge Prohibition 3.2 might lead a careless reader to conclude that Discharge Prohibition 3.2 applies not only to the Facility, but to other USIBWC infrastructure that is not subject to NPDES permitting requirements, including the flood control channel on the Tijuana River. We do not believe that this is a reasonable construction of the permit, but to avoid any confusion on this point, the Regional Board should include language in Discharge Prohibition 3.2 that clearly cabins the scope of the prohibition to USIBWC's operation of the Facility. For example, beginning section 3.2 with the phrase "In its operation of the Facility," would clarify this point.

Response

As required by section 303 of the CWA, the State Water Resources Control Board (State Water Board) adopted the *Water Quality Control Plan for Ocean Waters of California, California Ocean Plan* (Ocean Plan). (See generally Wat. Code, § 13170.2.) The Ocean Plan establishes water quality standards and effluent limitations, including narrative criteria, under section 303 of the CWA. The Ocean Plan discharge prohibitions are narrative criteria and limitations.

Water Code section 13377 requires NPDES permits to implement water quality control plans (e.g., the Ocean Plan). Federal regulations also requires NPDES permits to include ”any requirements in addition to or more stringent than promulgated effluent limitations, guidelines, or standards … necessary to … achieve water quality standards established under section 303 of the Clean Water Act, including state narrative criteria for water quality.” (40 CFR 122.44, subd. (d).) The Ocean Plan discharge prohibitions are necessary to implement and achieve water quality standards, criteria, and limitations established in the Ocean Plan, consistent with federal law.

The Discharger discharges effluent through the South Bay Ocean Outfall to the Pacific Ocean. Therefore, the Discharger is subject to the Ocean Plan, including its discharge prohibitions. To the extent the Discharger's discharge does not contain constituents prohibited by the Ocean Plan, then the Discharger is not in violation of the Ocean Plan prohibitions.

Regarding compliance with State laws, please refer to Response to Comment No. 1.35.

Action Taken

None.

1.17. Comment

III. Specific Provisions of the Tentative Order

D. Section 3.3

Discharge Prohibition 3.3 suffers from similar defects as Discharge Prohibition 3.2. First, like section 3.2, section 3.3 is inconsistent with the provision it purports to implement, which on its face, does not apply to USIBWC. The Basin Plan, “incorporated . .. as if fully set forth” in Discharge Prohibition 3.3, limits the application of its discharge prohibitions to “any person, as defined by section 13050(c) of the Water Code, *who is a citizen, domiciliary, or political agency or entity of California* whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.” Basin Plan 4-18 (emphasis added). USIBWC, an agency of the United States, is not “a citizen, domiciliary, or political agency of California.” Nor does the federal facilities provision at CWA section 313 make it one. That limited waiver of sovereign immunity merely provides that the United States shall be subject to State or local

requirements "to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). USIBWC, then, is no more subject to the Basin Plan's prohibitions than a private non-citizen. *See Reuben H. Donnelley Corp. v. F.T.C.*, 580 F.2d 264, 266–67 (7th Cir. 1978) (holding that federal agencies are not residents, for purposes of determining venue, of the states in which they maintain offices).

As with the Ocean Plan, the Basin Plan's discharge prohibitions also exceed the scope of the CWA for other reasons. For example, the Basin Plan prohibits discharges to "land," to "waters of the State," to "a storm water conveyance," to "a natural or excavated site below historic water levels," and "in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger." Attachment G, section 2. In some cases, these discharges might entail the discharge of a pollutant from a point source to navigable waters. In other cases, they would not. And if not, then they would not be violations of the CWA. The Water Board has appropriately noted that discharges to land are prohibited under state law and violations of that prohibition are not enforceable under the CWA's citizen suit provision, 33 U.S.C. § 1365. *See* Fact Sheet, Attachment F, section 4.1. For the sake of clarity, the Board should go further by noting that violations of Discharge Prohibition 3.3 are only enforceable by citizen suit if they entail the discharge of a pollutant from a point source to "navigable waters."

Finally, as with Discharge Prohibition 3.2, Discharge Prohibition 3.3 is unnecessarily ambiguous as to scope. Again, the Tentative Order purports to prohibit "discharges" from the "Facility" to "surface waters" or "land." Fact Sheet, Attachment F, section 4.1. Consistent with that clearly stated intent, the Regional Board should include in section 3.3 language that cabins the scope of that provision to the Facility. As noted above, beginning section 3.3 with the phrase "In its operation of the Facility," would clarify this point.

Response

As required by section 303 of the CWA, the San Diego Water Board adopted the Water Quality Control Plan for the San Diego Basin (9) (Basin Plan). (See generally Wat. Code, § 13164.) The Basin Plan establishes water quality standards and effluent limitations, including narrative criteria, under section 303 of the CWA. The Basin Plan discharge prohibitions are narrative criteria and limitations.

Water Code section 13377 requires NPDES permits to implement water quality control plans (e.g., the Basin Plan). Federal regulations also requires NPDES permits to include "any requirements in addition to or more stringent than promulgated effluent limitations, guidelines, or standards … necessary to … achieve water quality standards established under section 303 of the Clean Water Act, including state narrative criteria for water quality." (40 CFR 122.44, subd. (d).) The Basin Plan discharge prohibitions are necessary to implement and achieve water quality standards, criteria, and limitations established in the

Basin Plan, consistent with federal law. Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

The Discharger commented that it is not subject to the Basin Plan discharge prohibitions because it is not a citizen of California. The Discharger's reading of the Basin Plan applicability language is incorrect. The Basin Plan discharge prohibitions apply to "any person, as defined by section 13050(c) of the Water Code, who is a citizen, domiciliary, or political agency or entity of California." (Basin Plan, 4-18.) Said differently, the Basin Plan prohibitions apply to three types of persons: (1) a citizen; (2) a domiciliary; or (3) a political agency or entity of California. Pursuant to the Water Code, "person" is defined to include "any city, county, district, state, and the United States, to the extent authorized by federal law." (Wat. Code, § 13050, subd. (c).) The reference to Water Code section 13050(c) must be read to include the United States as a person. The Discharger discharges effluent in the San Diego region. Therefore, the Discharger is subject to the Basin Plan, including its discharge prohibitions.

Regarding discharges to land, please refer to Response to Comment No. 1.8.

Action Taken

None.

1.18. Comment

III. Specific Provisions of the Tentative Order

E. Sections 6.3.2.1.2., 6.3.2.1.2.2.4., 6.3.2.1.2.3.4., 6.3.2.1.2.4.-6.3.2.1.2.4.6. ("Flow Prevention/Response Plan Provisions")

The Flow Prevention/Response Plan Provisions affect or impair provisions of the 1944 Treaty and Minutes by dictating the means, frequency, and substance of consultation between USIBWC and CILA with regard to border sanitation issues. These provisions direct USIBWC to develop a Flow Prevention/Response Plan "in consultation with" CILA to "provide a framework for binational actions and cooperation." Tentative Order §§ 6.3.2.1.2, 6.3.2.1.2.2.4. To fulfill this purpose, the Regional Board requires USIBWC, CILA, and various Mexican agencies to disclose "a complete description of the roles and responsibilities and lines of authority for implementation of the [Flow] Prevention/Response Plan" and compels USIBWC to request this information in writing and share the communication, and any response from CILA, or lack thereof, with the Regional Board. *Id.* § 6.3.2.1.2.3.4. The Regional Board compels USIBWC to document, through regular meetings and communications, "the framework and procedures for coordination between" USIBWC, CILA, Mexican agencies, the Regional Board, and "interested parties," *Id.* § 6.3.2.1.2.4, with the express intent of developing binational emergency response and notification procedures, *Id.* §§ 6.3.2.1.2.4.1; 6.3.2.1.2.4.2., reviewing existing plans, § 6.3.2.1.2.4.3., assisting CILA and Mexican agencies in managing transboundary flows, *id.* § 6.3.2.1.2.4.4., creating a "framework for binational actions and cooperation," *id.* §

6.3.2.1.2.4.5., and "[o]ptimiz[ing] use of available wastewater infrastructure capacity on both sides of the U.S.-Mexico international border," including "increases in available sewage collection and treatment capacity in Tijuana, Mexico," *id.* § 6.3.2.1.2.4.6.

The Flow Prevention/Response Plan Provisions require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. These requirements affect the binational framework governed by the 1944 Treaty and the process for addressing border sanitation issues outlined in Minute 261, which requires that IBWC prepare a Minute for the approval of both governments in which it identifies the appropriate course of action and the timing of its implementation. *E.g.*, 1944 Treaty arts. 2, 3, 24, protocol; Minute 261 ¶ 4-6. Furthermore, under Minute 283, CILA is responsible for preventing and addressing uncaptured transboundary flows, though it may call upon USIBWC for assistance. Minute 283, ¶ 16. These provisions may also affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of a treaty, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on its state law authority to enforce the Flow Prevention/Response Plan Provisions, such law is preempted under conflict and field preemption doctrines. The Flow Prevention/Response Plan Provisions compel USIBWC and CILA to take specific actions to prevent and respond to transboundary flows. *E.g.*, Tentative Order §§ 6.3.2.1.2., 6.3.2.1.2.3.4. USIBWC cannot compel CILA to take an action. Beyond the fact that CILA is a component of a foreign sovereign government, purporting to compel such action would directly undermine the purpose and provisions of the 1944 Treaty and Minutes, which involve addressing border sanitation issues in a mutually-agreed upon manner and within the powers and limitations set forth in those international agreements. Here, there are existing agreements between the U.S. and Mexico that require Mexico to prevent and mitigate uncaptured flows into the United States; the Flow Prevention/Response Plan Provisions proposed by the Board shift that burden to USIBWC by requiring that USIBWC prevent and mitigate uncaptured flows. That is, the manner of addressing uncaptured flows that has been agreed upon is already captured in a specific binational agreement—Minute 283—and the proposed permit requirement changes the respective roles of the USIBWC and CILA under that agreement. Furthermore, where the 1944 Treaty requires "joint action or joint agreement" or "the furnishing of reports, studies or plans," the matter is to be handled by the United States Department of State and the Mexican Ministry of Foreign Relations. 1944 Treaty, art. 2. Because the Flow Prevention/Response Plan Provisions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal

policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), they are preempted by the 1944 Treaty and Minutes.

Furthermore, the Flow Prevention/Response Plan Provisions are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including the conduct of a foreign country or a United States federal agency's actions in a foreign country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under federal CWA authority.[9] *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, the Flow Prevention/Response Plan Provisions have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these provisions are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to consult with CILA to develop a Flow Prevention/Response Plan, USIBWC would be acting with CILA in its capacity as an international organization. *See* E.O. 12467; 22 U.S.C. § 288a(b). Such consultation would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, aspects of the Flow Prevention/Response Plan Provisions may ultimately be unenforceable and not subject to suit against USIBWC. 22 U.S.C. § 288a(b); *see also Jam*, 139 S. Ct. at 766. Additionally, the provisions requiring USIBWC to share communications to and from CILA, Tentative Order §§ 6.3.2.1.2.3.4., 6.3.2.1.2.4., are inconsistent with the protections that USIBWC enjoys under the IOIA when acting on matters not under its exclusive control, supervision, or jurisdiction. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to portions of Tentative Order sections 6.3.2.1. – 6.3.2.1.2.8.3.

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[9] It appears that the Regional Board is attempting to use its jurisdictional authority over USIBWC's day-to-day operational control of the SBIWTP to otherwise reach into Mexico. The United States has waived sovereign immunity under Section 313(a) of the CWA only to the extent that it is treated "in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). USIBWC is unaware of any provision of state or federal law that provides the Regional Board with jurisdictional authority to regulate activities over which the regulated discharger has no operational control or jurisdiction. Nor is USIBWC aware of any regulated entity in the State of California over which the regional boards attempt to assert such jurisdictional authority.

Response

The Flow Prevention/Response Plan requirements have been revised to focus on outcome-based requirements, without specifying the method of compliance. The San Diego Water Board does not typically prescribe the method of compliance for the Tentative Order's requirements. (See Water Code, § 13360, subd. (a).) Thus, the Discharger may choose the appropriate course of action that achieves the requirements and conditions of the Tentative Order.

The Flow Prevention/Response Plan has been modified to require the Discharger to consult or coordinate with "interested stakeholders." For purposes of the Flow Prevention/Response Plan, interested stakeholders *may* include, but are not limited to, the San Diego Water Board, the County of San Diego Department of Environmental Health (DEH), non-governmental organizations (NGOs), or international partners, such Comision Internacional de Limites y Aguas (CILA). As revised, the Flow Prevention/Response Plan does not affect or impair the 1944 Treaty, federal sovereign immunity, and federal foreign affairs by dictating the means, frequency, or substance of consultation between the Discharger and CILA.

While the Discharger is not required to include international partners in developing and implementing Flow Prevention/Response Plan, the San Diego Water Board encourages and recommends the Discharger include a diverse group of interested stakeholders who can provide technical input and support in developing and implementing the Flow Prevention/Response Plan. A diverse group of interested stakeholders will provide the Discharger with unique insights into the challenges and potential solutions for addressing the goals and desired outcomes of the Flow Prevention/Response Plan.

For consistency, other provisions of the Tentative Order have also been revised to focus on outcome-based requirements and coordination with interested stakeholders.

Action Taken

Sections 6.3.2.1. – 6.3.2.1.2.8.3. of the Tentative Order have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.19. Comment

III. Specific Provisions of the Tentative Order

E. Sections 6.3.2.1.2., 6.3.2.1.2.2.4., 6.3.2.1.2.3.4., 6.3.2.1.2.4.-6.3.2.1.2.4.6. ("Flow Prevention/Response Plan Provisions")

1. Section 6.3.2.1.2.9. (Notifications and Reporting of Spill Events and Canyon Collector Transboundary Flow Events).

To the extent this section applies to Canyon Collector Transboundary Flow Events that are not also Spill Events, the Regional Board lacks jurisdiction to require such reporting under the CWA and in the Tentative Order. First, for the

reasons already discussed, Canyon Collector Transboundary Flow Events that are not also Spill Events are neither discharges within the meaning of the CWA nor subject to or caused by a regulated activity under the Tentative Order. *See* 40 C.F.R. § 122.48(c).[10] Second, Canyon Collector Transboundary Flow Events that are not also Spill Events are not reasonably related to the regulated activity. *See* 40 C.F.R. § 122.41(h). To the extent that such reporting is necessary to ensure compliance with the operation and maintenance provisions of the permit, *see* 40 C.F.R. § 122.41(l)(7), Canyon Collector Transboundary Flow Events triggering reporting requirements must be limited to Canyon Collector Transboundary Flow Events that also constitute a Spill Event. Third, because, pursuant to international agreements in force with Mexico, the adequate implementation of efforts to reduce, eliminate, and prevent transboundary flows is within the exclusive control, supervision, and jurisdiction of Mexico, USIBWC is immune from the jurisdiction of the Regional Board over such flows under the CWA, the IOIA, and the United States Constitution. *See* Part I.B and C, and Part II.A, *supra*.

The Discharger's Suggested Revisions also included revisions to Tentative Order section 6.3.2.1.2.9.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding monitoring of dry weather Canyon Collector Transboundary Flow Events, please refer to Response to Comment No. 1.10. Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

The San Diego Water Board disagrees that "efforts to reduce, eliminate, and prevent transboundary flows [are] within the exclusive control … of Mexico." Previous agreements between the Discharger and the San Diego Water Board recognized that "the ultimate resolution of this problem is the responsibility of the federal government of the United States." (Letter of Understanding International Wastewater Treatment Plant, IBWC US Section, EPA Region 9, RWQCB SD (1995), p. 3; see also San Diego Water Board Hearing Transcript (October 10, 1996), Tentative Order No. 96-50 and Tentative Cease and Desist Order No. 96-52, 21:1-5 ["continuing effort to ensure we maintain the facilities and do the necessary planning …"].).) Moreover, the Discharger has a measure of control over the transboundary flows. The Discharger controls operation and maintenance of the canyon collector systems, including their design capacity, their detention capacity, their inspection and maintenance schedule, and the volume of flow accepted into the collector inlets. Further, the Discharger can build berms or place sandbags around the concrete apron to control canyon collector transboundary flows. Regarding the canyon collector systems, please refer to Response to Comment No. 1.30. The Discharger can implement best

[10] This is not to suggest that Canyon Collector Flow Events that are Spill Events are necessarily discharges within the meaning of the CWA. *See* Part III.B.2, *supra*.

management practices to reduce the amount of transboundary flow volume bypassing the canyon collectors, impacting water quality and beneficial uses, and reaching the Tijuana River or Pacific Ocean. Thus, the Discharger does have some ability to control and reduce transboundary flows without Mexico. (See also San Diego Water Board Hearing Transcript (October 10, 1996), *supra*, 112:22-25.)

As revised, section 6.3.2.1.2.9 of the Tentative Order requires the Discharger to notify appropriate parties of Spill Events and Transboundary Flow Events and to maintain a regularly updated notification and reporting contact list. This provision does not affect or impair the 1944 Treaty.

Action Taken

Sections 6.3.2.1.2.9 and 6.3.2.1.2.10 of the Tentative Order have been revised as follows:

6.3.2.1.2.9. Notifications and Reporting of Spill Events and ~~Canyon Collector~~ Transboundary Flow Events. This section of the Flow Prevention/Response Plan shall apply to Spill Events and ~~wet and dry weather Canyon Collector~~ Transboundary Flow Events. The Flow Prevention/Response Plan shall describe procedures for prompt notification and reporting of Spill Events and ~~wet and dry Canyon Collector~~ Transboundary Events to appropriate parties as described in section 6.3.2.3 ~~6.3.2.4~~ of this Order. The Flow Prevention/Response Plan shall provide for maintenance of a regularly updated notification and reporting contact list (emails and phone numbers) and adequate public notification to protect the public from exposure to ~~spills and/or transboundary flows~~ Spill and Transboundary Flow Events. Adequate notification is satisfied with an email or other written notification to the reporting contact list. Written notifications and reports should be provided to appropriate regulatory agencies, municipalities, and other potentially affected entities to the extent required by this Order, other permits and licenses, State and federal laws, local ordinances or as otherwise described in the Flow Prevention/Response Plan. These organizations shall include, but are not be limited to:

California Governor's Office of Emergency Services (Cal OES);
San Diego County DEH;
San Diego Water Board;
California Department of Fish and Wildlife;
U.S. Fish and Wildlife Service;
City of Chula Vista;
City of Coronado;
City of Imperial Beach;
City of National City;
City of San Diego;
USEPA;
Local water agencies if a water supply has been affected;

Interested ~~non-governmental organizations (~~NGOs~~)~~ ; and
Other interested ~~parties~~ stakeholders.

6.3.2.1.2.10. Documentation**.** The Flow Prevention/Response Plan shall include procedures for documentation of each Spill and Transboundary Flow Event as required under section 6.3.2.4 of this Order including, but not limited to, a description of the ~~Spill Event~~ event and its cause; exact dates and times for when the event started, when the Discharger responded, when the event stopped, when containment and cleanup occurred, the volume recovered, the volume released to the environment, notifications made, and the steps taken or planned to mitigate and prevent recurrence of the event.

1.20. Comment

III. Specific Provisions of the Tentative Order

E. Sections 6.3.2.1.2., 6.3.2.1.2.2.4., 6.3.2.1.2.3.4., 6.3.2.1.2.4.-6.3.2.1.2.4.6. ("Flow Prevention/Response Plan Provisions")

2. Section 6.3.2.1.2.11. (Notifications and Reporting of Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events).

The Regional Board lacks jurisdiction to require such reporting under the CWA and in the Tentative Order. First, for the reasons already discussed, Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events are neither discharges within the meaning of the CWA nor subject to or caused by a regulated activity under the Tentative Order. *See* 40 C.F.R. § 122.48(c). Second, Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events are not reasonably related to the regulated activity. § 122.41(h). Third, because, pursuant to international agreements in force with Mexico, the adequate implementation of efforts to reduce, eliminate, and prevent transboundary flows is within the exclusive control, supervision, and jurisdiction of Mexico, USIBWC is immune from the jurisdiction of the Regional Board over such flows under the CWA, the IOIA, and the United States Constitution. *See* Part I.B and C, and Part II.A, *supra*.

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.2.1.2.11., 6.3.2.1.2.12., and 6.3.2.1.3.1.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding compliance with State laws, please refer to Response to Comment No. 1.35.

The State of California and the San Diego Water Board have a strong interest in understanding the nature and extent of transboundary flows that enter the State from the southern border. Former section 6.3.2.1.2.11 of the Tentative Order has been combined with section 6.3.2.1.2.9 of the Tentative Order and requires the Discharger to report Spill and Transboundary Flow Events. Regarding notification

and reporting of Spill and Canyon Collector Transboundary Flow Events, please refer to Response to Comment No. 1.19.

To the extent the Discharger becomes aware of Transboundary Flow Events, it is reasonable to request the Discharger to notify and report of such events to interested stakeholders. (See Wat. Code, § 13383, subd. (b) [“other information as may be reasonably required”].) Regarding Tijuana River Transboundary Flow Events, the Discharger owns and operates the Tijuana River Flood Control Channel and has a flow meter, or other device to measure flow, in the Tijuana River Flood Control Channel. Moreover, the Discharger may become aware of Other Canyon Transboundary Flow Events if informed by U.S. Customs and Border Protection, NGOs, or other entities. Thus, the Discharger is in the best position to notify and report on Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events to the extent it becomes aware of them. The Discharger is not required to actively monitor, investigate, assess, contain, or cleanup Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events.

Action Taken

Section 6.3.2.1.2.9 of the Tentative Order has been revised. Please refer to the Response to Comment No. 1.20.

Section 6.3.2.1.2.11 of the Tentative Order has been deleted as follows:

~~6.3.2.1.2.11. **Notifications and Reporting of Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events.** This section of the Flow Prevention/Response Plan shall apply to wet and dry weather Tijuana River Transboundary Flow Events and wet and dry weather Other Canyon Transboundary Flow Events. The Flow Prevention/Response Plan shall describe procedures for notification and reporting of wet and dry weather Tijuana River Transboundary Flow Events and wet and dry weather Other Canyon Transboundary Flow Events. These events should be reported within 24 hours of the time the Discharger becomes aware of the event. The procedures shall provide for notification and reporting of such events to governmental agencies, municipalities, and other organizations as described in section 6.3.2.1.2.9 above. (This Order does not require the Discharger to investigate, assess, contain, or cleanup, Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events, but does require the Discharger to report such events to the Discharger’s knowledge.)~~

Section 6.2.2.2 of the Fact Sheet has been revised as follow:

6.2.2.2. Spill and Transboundary Flow Event Reporting Requirements

Spill and Transboundary Flow Event reporting requirements have been established in section 6.3.2.4 of this Order to determine compliance with Discharge Prohibitions 3.1 and 3.2; provide appropriate notification to ~~the~~ public health agencies, such as the Cal OES and San Diego County DEH, for the

protection of public health; and to address lack of reporting, lack of detailed information when reporting, and lack of response when these details are requested. Additionally, Spill and Transboundary Flow Event reporting will provide information regarding the background quantity of Transboundary Flow Events which may traverse the Tijuana River Valley and reach the Pacific Ocean or travel to nearby beaches with recreational beneficial uses. This information may also be used to determine if any receiving water limitation exceedances in ocean waters may be attributed to a Spill or Transboundary Flow Event. Spill and Transboundary Flow Event Reporting is consistent with federal and state laws, as explained in section 7 of this Fact Sheet. Minimal staff time will likely be required to monitor and report Spill and Transboundary Flow Events. Thus, the burden, including costs, of these reports bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. This Order does not require the Discharger to investigate, assess, contain, or cleanup, Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events, but does require the Discharger to report such events to the Discharger's knowledge.

1.21. Comment

III. Specific Provisions of the Tentative Order

F. Sections 6.3.2.2. - 6.3.2.2.6. and Table 4 ("Binational Meetings Provisions")

The Binational Meetings Provisions affect or impair the provisions of the 1944 Treaty and Minutes by dictating the means, frequency, and substance of consultation between USIBWC and CILA with regard to the border sanitation issue of transboundary flow events. These provisions compel USIBWC to initiate a Binational Technical Committee ("BTC") to discuss "transboundary flow prevention and response in the international border region," Tentative Order § 6.3.2.2.1., host meetings with CILA to discuss transboundary flow events, *id.* § 6.3.2.2.5, and dictate the means, frequency, participants, location, and substance of those meetings, *id.* §§ 6.3.2.2.1.1., 6.3.2.2.1.2., 6.3.2.2.1.3., 6.3.2.2.1.5., 6.3.2.2.5., 6.3.2.2.5.1., 6.3.2.2.5.4., 6.3.2.2.6.; Table 4. These provisions also require USIBWC and CILA to meet, *id.* §§ 6.3.2.2.2., 6.3.2.2.5.1., and consult, *id.* § 6.3.2.2.1.1, and compels USIBWC to disclose its communications to and from CILA, *id.* §§ 6.3.2.2.2., 6.3.2.2.3., 6.3.2.2.5.2., 6.3.2.2.5.3.

The Binational Meetings Provisions require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016. Section 6.3.2.2.3. expressly states the Regional Board's intent to influence USIBWC's implementation of Commitment No. 16 of Minute 283. These provisions also affect the process for identifying border sanitation problems and developing solutions outlined in Minute 261, which requires that IBWC prepare a Minute for the approval of both governments in which it identifies the appropriate course of action and the timing of its implementation. Minute 261, ¶ 4. Furthermore,

binational working groups are specifically governed by Minute 320. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair provisions of the 1944 Treaty and Minutes, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on its state law authority to enforce the Binational Meetings Provisions, such law is preempted under conflict and field preemption doctrines. First, these provisions compel USIBWC and CILA to meet and consult. USIBWC cannot compel the action of a foreign government. Beyond the fact that CILA is a component of a foreign sovereign government, purporting to compel such action would directly undermine the purpose and provisions of the 1944 Treaty and Minutes, which involve addressing border sanitation issues in a mutually-agreed upon matter and within the powers and limitations set forth in those international agreements. *E.g.*, 1944 Treaty arts. 2, 3, 24, protocol; Minute 261 ¶ 4-6. Specifically, where the 1944 Treaty requires "joint action or joint agreement" or "the furnishing of reports, studies or plans," the matter is to be handled by the United States Department of State and the Mexican Ministry of Foreign Relations. 1944 Treaty, art. 2. Because the Binational Meetings Provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), they are preempted by the 1944 Treaty and Minutes.

Second, the Binational Meetings Provisions are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including dictating the conduct of a foreign country or a United States federal agency's actions in a foreign country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, the Binational Meetings Provisions have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these provisions are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to meet and consult with CILA to develop a BTC, USIBWC would be acting with CILA in its capacity as an international organization. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). Such consultation would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive

control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, aspects of the Binational Meetings Provisions may ultimately be unenforceable and not subject to suit against USIBWC. *Id.*; *see also Jam*, 139 S. Ct. at 766. Additionally, the provisions requiring USIBWC to share communications, meeting agendas and notes, and presentations between USIBWC and CILA, Tentative Order §§ 6.3.2.2.2., 6.3.2.2.3., 6.3.2.2.5., 6.3.2.2.5.2., 6.3.2.2.5.3., and Table 4, appear inconsistent with the protections that USIBWC enjoys under the IOIA when acting on matters not under its exclusive control, supervision, or jurisdiction. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.2.2. - 6.3.2.2.6.

Response

Section 6.3.2.2 of the Tentative Order has been revised to focus on biannual technical committee (BTC) meetings with interested stakeholders to regularly share information regarding Transboundary Flow Events and prevention and response. The goal of the BTC meetings is to bring together governmental, regulatory, and funding agencies, along with the environmental community and other stakeholders in pursuit of partnerships and collaboration towards achieving meaningful reductions in transboundary flows and associated water quality issues in the Tijuana River Valley. As part of the BTC meetings, the Discharger shall promote collaborative approaches and discussion of interests that affect the Facility to guide efforts on actions to achieve meaningful reduction or elimination of spill or transboundary flows to the Tijuana River Valley as soon as possible. The Discharger shall also share the Flow Prevention/Response Plan at each BTC meeting.

Instead of requiring the Discharger to consult or coordinate with CILA, the BTC meeting provisions have been modified to require the Discharger to consult or coordinate with "interested stakeholders." For purposes of the BTC meeting provisions, interested stakeholders *may* include, but are not limited to the San Diego Water Board, USEPA, the County of San Diego, the City of San Diego, the City of Imperial Beach, California State Parks, U.S. Fish and Wildlife, California Department of Fish and Wildlife, NGOs (e.g., Tijuana-based Tijuana Calidad de Vida and Proyecto Fronterizo de Educación Ambiental, WILDCOAST, Surfrider Foundation San Diego, and San Diego Coastkeeper), and international partners, such as CILA, Secretaría de Protección al Ambiente (SPA), Comisión Estatal de Servicios Públicos de Tijuana (CESPT), Procuraduría Federal de Protección al Ambiente (PROFEPA), Comisión Nacional del Agua (CONAGUA), and the City of Tijuana's Secretaría de Desarrollo Urbano y Ecología (SDUE).

In the past, the Discharger has failed to provide timely notice of BTC meetings, which limits the meaningful participation of interested stakeholders. This Tentative Order has been revised to require the Discharger to provide interested stakeholders at least two weeks' notice prior to the schedule BTC meeting date.

Sufficient notice will allow more interested stakeholders to attend the meeting and provide meaningful input on the BTC meeting goals.

As revised, the BTC meeting provisions do not affect or impair the 1944 Treaty, federal sovereign immunity, and federal foreign affairs by dictating the means, frequency, and substance of consultation between the Discharger and CILA.

While the Discharger is not required to include international partners in the BTC meetings, the San Diego Water Board encourages and recommends the Discharger include a diverse group of interested stakeholders who can promote and provide technical input and support on Transboundary Flow Events and prevention and response. A diverse group of interested stakeholders will provide the Discharger with unique insights into the challenges and potential solutions for addressing Transboundary Flow Events.

For consistency, other provisions of the Tentative Order have also been revised to focus on outcome-based requirements and coordination with interested stakeholders.

Action Taken

Sections 6.3.2.2 - 6.3.2.2.6 of the Tentative Order have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.22. Comment

III. Specific Provisions of the Tentative Order

G. Sections 6.3.2.3.1.—6.3.2.3.6. ("Other Transboundary Flow Requirements Provisions")

The Other Transboundary Flow Requirements Provisions require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016. These provisions compel USIBWC to "work through CILA" to coordinate with Mexican agencies to address transboundary wastewater flows. Tentative Order § 6.3.2.3.1. The Regional Board requires USIBWC to improve communication with Mexico, provide "training, available funding, and other assistance to SPA and CESPT," *id.* § 6.3.2.3.1.,[11] minimize "the intake into the Facility from La Morita and Arturo Herrera Wastewater Treatment Plants," *id.* § 6.3.2.3.4.,[12] and coordinate "binational inspections of the Tijuana River and canyons," *id.* §

[11] Section 6.3.2.3.1. would require USIBWC to spend federal dollars in a foreign nation without authorization, which may violate the Anti-Deficiency Act and other laws pertaining to the expenditure of federal dollars.

[12] The intake from La Morita and Arturo Herrera Wastewater Treatment Plants occurs either at PB CILA (in Mexico) or in Mexico where the effluent from these Mexican-side plants enter the Tijuana River.

6.3.2.3.5. These provisions also require USIBWC to request sensitive information from CILA regarding Mexico's programs, administrative, staffing, and funding levels, enforcement policies, activities undertaken to educate the public, and operating records. *Id.* §§ 6.3.2.3.2., 6.3.2.3.6.

Compelling USBWC to "work through CILA" to address transboundary flows and exchange information and resources clearly "produce[s] an effect" on or "influence[s] in some way" the provisions of the 1944 Treaty and Minutes. *Affect*, *Black's Law Dictionary* (11th ed. 2019). The "regulation and exercise of the rights and obligations" assumed under the 1944 Treaty and Minutes are governed and entrusted to the IBWC, which functions "in conformity with the powers and limitations set forth in" the 1944 Treaty and Minutes. 1944 Treaty, art. 2. The Other Transboundary Flow Requirements Provisions influence the manner in which USIBWC and CILA exercise their rights and obligations and affect the process for identifying border sanitation problems and developing solutions as governed by Minute 261. Minute 261, ¶¶ 4-6. Compelling USIBWC to request information from CILA also implicates Article 24(e) of the 1944 Treaty, which requires that "the Commissioner of the other Government must have the express authorization of his Government in order to comply with such [information] request." These provisions may also affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of the 1944 Treaty and Minutes, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

Nor can the Regional Board rely on any purported state law authority to compel USIBWC to take certain actions when it conducts foreign affairs. Such state law is preempted under conflict and field preemption doctrines. First, the Other Transboundary Flow Requirements Provisions are unenforceable on their face because neither the Regional Board nor any U.S. agency or instrumentality can compel action on the part of a foreign entity. Specifically, here, the Regional Board cannot require USIBWC to "work through CILA," to provide training, funding, and assistance in Mexico, and obtain sensitive information from Mexico. The Other Transboundary Flow Requirements Provisions also purport to require USIBWC to report to the Regional Board when CILA refuses requests or fails to respond to communications. Tentative Order § 6.3.2.3.2. Beyond the fact that CILA is a component of a foreign sovereign government, purporting to compel such action would directly undermine the purpose and provisions of the 1944 Treaty and Minutes, which involve addressing border sanitation issues in a mutually-agreed upon matter and within the powers and limitations set forth in those international agreements. *E.g.*, 1944 Treaty, arts. 2, 3, 24; Minute 261 ¶¶ 4-6. Thus, these provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592

F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Second, the Other Transboundary Flow Requirements Provisions are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, such as compelling a United States federal agency to "work through" a foreign government's agency in the territory of that country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, the Other Transboundary Flow Requirements Provisions have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these provisions are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to implement the Other Transboundary Flow Requirements Provisions, it would be acting with CILA in its capacity as an international organization. *See* E.O. 12467, § 2. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). Such actions would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, aspects of the Other Transboundary Flow Requirements Provisions may ultimately be unenforceable and not subject to suit against USIBWC. 22 U.S.C. § 288a(b); *see also Jam*, 139 S. Ct. at 766. Additionally, the provisions requiring USIBWC to request the information outlined in Section 6.3.2.3.2. from CILA are likely unenforceable. USIBWC cannot be compelled to share archival material or official correspondence pursuant to the IOIA when not acting on matters under its exclusive control, supervision, or jurisdiction. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.2.2.6. – 6.3.2.3.6.

Response

The San Diego Water Board encourages and recommends that the Discharger work with interested stakeholders to prevent, reduce, terminate, and recover Transboundary Flow Events for the protection of downstream water quality and beneficial uses in the Tijuana River Valley and coastal waters. As renumbered, section 6.3.2.2.1 of the Tentative Order has been revised to require the Discharger to work with interested stakeholders to achieve this goal. The

Discharger could achieve this goal in several ways, including engaging with NGOs to provide education and encourage reduction of Transboundary Flow Events, pollution prevention, and best management practices; improving communication between the Discharger, CILA, SPA, and CESPT; and providing training, available funding, and other assistance to SPA and CESPT. Regarding the method of compliance, please refer to Response to Comment No. 1.18

As renumbered, section 6.3.2.2.2.2 of the Tentative Order requires the Discharger to notify the San Diego Water Board if it becomes aware of any action to turn on or off the CILA pump station and the reason for such action. The Discharger is not required to actively monitor whether the CILA pump station is on or off. Turning on/off the CILA pump station will have direct water quality impacts in California as flow in the Tijuana River will cross the U.S.- Mexico border. To the extent the San Diego Water Board becomes aware of such activity, it can notify and coordinate with appropriate agencies to mitigate any resulting transboundary flows. The Discharger is in the best position to report on such activity because it works closely with international partners. The San Diego Water Board and other U.S. entities may not otherwise become aware that the CILA pump station is turned on or off.

As renumbered, section 6.3.2.2.2.3 of the Tentative Order has been revised to recommend the Discharger minimize and control influent flows into the Facility from other treatment plants as well as City of Tijuana stormwater flows to allow the maximum use of the Facility for untreated sewage from Tijuana, Mexico. The SBIWTP was intended to treat sewage from Tijuana, not other sources of influent. The Discharger is encouraged to limit its intake of treated or partially-treated effluent or stormwater in an effort to reserve as much capacity of the Facility as possible for untreated Tijuana sewage. Further, the San Diego Water Board requests the Discharger include a summary of its efforts in its annual presentation to the Board.

As renumbered, section 6.3.2.2.2.4 of the Tentative Order has been revised to recommend that the Discharger work with appropriate interested stakeholders to regularly inspect the Tijuana River and canyon collectors to estimate the amount of raw sewage entering the Tijuana River Valley and to identify remedial actions to reduce, eliminate, and prevent Transboundary Flows Events. The Discharger is in the best position to estimate transboundary flows entering the Tijuana River Valley because it owns and operates structures at the border where a majority of transboundary flows pass through. The San Diego Water Board requests the Discharger include a summary of its efforts in its annual presentation to the Board.

As renumbered, section 6.3.2.2.2.5 of the Tentative Order has been revised to recommend the Discharger request access to documents related to vital infrastructure from CILA. These documents are important for the Discharger to understand the nature and extent of its influent. The San Diego Water Board

requests the Discharger include a summary of its efforts in its annual presentation to the Board.

Action Taken

Sections 6.3.2.3 - 6.3.2.3.6 of the Tentative Order have been revised and renumbered as Sections 6.3.2.2.2 - 6.3.2.2.2.5 of the revised Tentative Order. Please refer to the redline/strikeout text in the revised Tentative Order.

1.23. Comment

III. Specific Provisions of the Tentative Order

H. Sections 6.3.2.4.1.1-6.3.2.4.1.3

Each of these provisions makes reference to "discharges." This is inaccurate and misleading. The events referred to in these provisions as "discharges" include Canyon Collector Transboundary Flow Events, Other Canyon Transboundary Flow Events, and Tijuana River Transboundary Flow Events. These events are not, in fact, "discharges" within the meaning of the CWA and the definition at A-8, since each event type merely entails the flow of water from one section of a waterway to downstream sections of the same waterway without any addition of pollutants. And even if Other Canyon Transboundary Flow Events, and Tijuana River Transboundary Flow Events were "discharges"—and again, they are not—they would not be subject to the Discharge Prohibitions outlined in section 3 because they do not implicate any piece of USIBWC-owned infrastructure that is part of the "Facility" subject to the Discharges Prohibitions.

Relatedly, the Tentative Order makes general reference to flows reaching a "municipal separate storm sewer system (MS4)." We note here that USIBWC does not own or operate an MS4. If the Regional Board believes otherwise, we ask that it provide clarification so that we have an opportunity to respond.

The Discharger's Suggested Revisions also included revisions to portions of Tentative Order sections 6.3.2.4. – 6.3.2.4.10.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding notification and reporting of Tijuana River Transboundary Flow Events and Other Canyon Collector Transboundary Flow Events, please refer to Response to Comment No. 1.20.

As renumbered, sections 6.3.2.3.1.1 through 6.3.2.3.1.3 of the Tentative Order categorize certain Spill or Transboundary Flow Events as Category 1 through 3 Events. Section 6.3.2.3.1.1 clarifies the San Diego Water Board's expectations and understanding regarding Category 1 Events.

Specifically, for Category 1 Events that enter a municipal separate storm sewer system (MS4), any volume not recovered from the MS4 is considered to have reached surface waters, unless the MS4 discharges to a dedicated storm water

or groundwater infiltration basin. Further, section 6.3.2.3.1.1. defines all Canyon Collector Transboundary Flow Events as Category 1 Events. To the extent these events constitute a discharge of waste, the San Diego Water Board is authorized to require notification and reporting of Spill Events and Transboundary Flow Events.

Whether the Discharger owns or operates structures or facilities that operate as an MS4 is not addressed in this Tentative Order. Sections 6.3.2.3.1.1 through 6.3.2.3.1.3 do not state that the Discharger owns or operates an MS4.

The Discharger also requested an additional opportunity to respond to any clarifications made in response to this comment. The San Diego Water Board provided an administrative draft of the Tentative Order to the Discharger on January 8, 2021. The San Diego Water Board released the Tentative Order for public comment and provided notice of the public hearing on February 25, 2021. The public comment period ended on March 25, 2021. The Discharger submitted timely comments on March 25, 2021. The San Diego Water Board has provided sufficient due process prior to the adoption of this Tentative Order by giving notice of the public hearing and providing the Discharger an opportunity to be heard on the Tentative Order. The San Diego Water Board is not required to provide an additional, written public comment period. The Discharger may provide oral comments on any revisions to the Tentative Order at the public hearing. Therefore, the Discharger will have an additional opportunity to be heard on the Tentative Order.

Action Taken

As renumbered, sections 6.3.2.3.1 through 6.3.2.3.10 of the Tentative Order have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.24. Comment

III. Specific Provisions of the Tentative Order

I. Section 6.3.2.5.

The Regional Board lacks jurisdiction to regulate transboundary Flows that are neither discharges within the meaning of the CWA, nor subject to or caused by a regulated activity under the Tentative Order. *See* 40 C.F.R. § 122.48(c). Moreover, Tijuana River Transboundary Flow Events and Other Canyon Transboundary Flow Events are not reasonably related to the activity regulated under the Tentative Order. *See* 40 C.F.R. § 122.41(h). Finally, because, pursuant to international agreements in force with Mexico, the adequate implementation of efforts to reduce, eliminate, and prevent transboundary flows is within the *exclusive control, supervision, and jurisdiction of Mexico*, USIBWC is immune from the jurisdiction of the Regional Board over such flows under the CWA, the IOIA, and the United States Constitution. *See* discussion *supra* Part II.

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.2.5 – 6.3.2.5.2, and included the following comment in section 6.3.2.5.2: Responsibility for Public Notification rests with California's public health agencies, not USIBWC.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding notification and reporting of Tijuana River Transboundary Flow Events and Other Canyon Collector Transboundary Flow Events, please refer to Response to Comment No. 1.20. [VRR BOOKMAKR]

As renumbered, section 6.3.2.4 of the Tentative Order has been modified to only apply to Spill Events. This modification limits the remedial actions to events that are reasonably related to the Facility which is owned, operated, or maintained by the Discharger. The San Diego Water Board expects that the canyon collector systems will operate at their full design capacity during dry weather Canyon Collector Transboundary Flow Events. To the extent the dry weather Canyon Collector Transboundary Flow Events should have been diverted (i.e., were within the design capacity of the canyon collector systems and thus Spill Events), the Discharger is required to implement remedial actions, including the recovery and proper disposal of as much spill or transboundary flow volume as should have been captured. However, the San Diego Water Board recommends, requests, and encourages the Discharger to apply the remedial actions to dry weather Canyon Collector Transboundary Flow Events in excess of their design capacity and Other Canyon Transboundary Flow Events as much as reasonably possible to protect water quality and beneficial uses.

Moreover, the Discharger misapprehends the purpose of these provisions. Section 6.3.2.4 of the Tentative Order does not require the Discharger to "reduce, eliminate, or prevent" Transboundary Flow Events. Instead, the San Diego Water Board is relying on appropriate federal and State law to regulate the operation of the SBIWTP, as it has for the last 25 years. To the extent a Spill Event occurs, those flows should have been diverted to the Facility for treatment. Thus, it is appropriate for the Discharger to remediate Spills Events that enter the environment.

Action Taken

Sections 6.3.2.5 through 6.3.2.5.2 of the Tentative Order have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.25. Comment

III. Specific Provisions of the Tentative Order

J. Section 6.3.5.2

The Tentative Order includes a new provision requiring USIBWC to submit a report four years prior to the time wastewater flow are projected to reach plant

capacity showing how flow volumes will be prevented from exceeding existing capacity or how capacity will be increased. The SBIWTP is designed to treat up to 25 million gallons per day of sewage captured by Tijuana's wastewater collection system and diverted to the plant for treatment. The SBIWTP was designed, permitted, and does operate at capacity. Unlike POTWs that treat domestic wastewater within their jurisdictions, the SBIWTP does not have reserve capacity to accommodate expanded or new discharges in the future. Additionally, USIBWC cannot be compelled to increase capacity at the SBIWTP. The treatment capacity of SBIWTP is subject to international agreements in force with Mexico regarding jointly financed works. Minute 283, ¶ 14; Minute 320, ¶ 8. Any such attempt to compel USIBWC to take unilateral action to expand plant capacity so to treat additional sewage captured by Tijuana's wastewater collection violates existing international agreements and the foreign affairs field of the United States Constitution. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see also Zschernig*, 389 U.S. at 440-41. Thus, this provision is superfluous and should be deleted.

The Discharger's Suggested Revisions also included revisions to Tentative Order section 6.3.5.2. The Discharger's Suggested Revisions also included the following comment to Tentative Order section 6.3.5.2.: The construction of jointly-financed works, including the SBIWTP, is supervised by the IBWC, United States and Mexico Sections, pursuant to Minutes 283 and 296. Pursuant to international agreements in force with Mexico, the USIBWC acts in its capacity as an International Organization in reviewing alternatives for treatment of Tijuana sewage in excess of 25 mgd, including making recommendation for the terms of Mexico's financial participation in any such expansion. See ¶ 8 of Minute 293. This provision would require USIBWC to act in a manner inconsistent with Minute 283 and 296, and is therefore preempted. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 961 (9th Cir. 2010). The Regional Board is precluded from enforcing this provision under the CWA, the IOIA, and the United States Constitution.

The Discharger's Suggested Revisions also included revisions to Fact Sheet section 6.2.5.2.

Response

Section 6.3.5.2 of the Tentative Order requires the Discharger to submit a Treatment Plant Capacity Report four years prior to the treatment works reaching its design capacity. The Treatment Plant Capacity Report shall include actions to demonstrate how flow volumes will be prevented from exceeding capacity or how capacity will be increased. On its face, the provision does not intrude on the federal government's foreign affairs. The Treatment Plant Capacity Report does not require the Discharger to increase treatment capacity at the Facility, only to report on potential actions. To fulfil this requirement, the technical report may include actions such as, but not limited to, installation of flow equalization

basins,[13] request funding from Congress to modify or expand the Facility, or engage with interested stakeholders (such as NGOs) to provide education on and encourage reductions of influent flows, pollution prevention, and best management practices. Describing actions the Discharger could take to ensure proper operations and maintenance in the future is a part of the Discharger's day-to-day responsibilities in properly operating a treatment plant and adequately managing its assets.

Action Taken

None.

1.26. Comment

III. Specific Provisions of the Tentative Order

K. Sections 6.3.3.1.–6.3.3.2.5.4. ("Pollutant Minimization Program Provisions")

The stated goal of the Pollutant Minimization Program Provisions is to reduce "potential sources of pollutants through pollutant minimization (control) strategies[.]" Tentative Order § 6.3.3.1. Because the water flows directly from Mexico into the Plant, any such pollutant control strategies would have to be implemented in Mexico. In addition to raising concerns about extraterritorial actions beyond U.S. jurisdiction (let alone California's), this clearly affects or impairs provisions of the 1944 Treaty and accompanying Minutes, which provides that USIBWC and CILA retain exclusive control and jurisdiction over the real property and works in their respective countries. 1944 Treaty, arts. 2, 23, 24; Minute 283, ¶ 14. More broadly, the Pollutant Minimization Program Provisions influence that manner in which USIBWC and CILA identify and address border sanitation problems, which is a matter governed by the 1944 Treaty and Minute 261. When USIBWC and CILA identify a border sanitation issue, they jointly develop an approved course of action and record the decision in a Minute. 1944 Treaty, art. 25; Minute 261 ¶¶ 4-6. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of a treaty, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on its state law authority to enforce the Pollutant Minimization Program Provisions, such law is preempted under both conflict and field preemption doctrines. If a state law conflicts with a treaty, it is preempted. U.S. Const. art. VI, cl. 2; *see also Von Saher*, 592 F.3d at 961. Because water flows directly from Mexico into the Plant, USIBWC would have to take a unilateral action in a foreign country to comply with the Pollutant

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

Minimization Program Provisions. In addition to raising concerns about extraterritorial action beyond U.S. jurisdiction (let alone California's), this action would directly undermine the ongoing diplomatic relationship and function, purpose, and provisions of the 1944 Treaty and Minutes, which is to address border sanitation issues in a mutually-agreed upon matter and within the powers and limitations set forth in those international agreements. *E.g.*, 1944 Treaty, arts. 2, 3, 23, 24; Minute 261; Minute 320. Moreover, there are existing international agreements that require Mexico to address pretreatment in Mexico; the proposed Pollutant Minimization Program Provisions shift the burden to USIBWC to perform pretreatment functions. That is, the manner of addressing pretreatment that has been agreed upon is already captured in a specific binational agreement—Minute 283—and this proposed permit requirement would change the respective roles of USIBWC and CILA under that agreement. *See also* Minute 296, ¶ 10. ¶¶ 4-6. Thus, these provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Furthermore, the Pollutant Minimization Program Provisions are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including limiting pollutants in a foreign country or dictating the conduct of a foreign country or a United States federal agency's actions in a foreign country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, the Pollutant Minimization Program Provisions have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these provisions are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to implement a pollutant minimization program, it would be acting with CILA in its capacity as an international organization. *See* Exec. Order12467; 22 U.S.C. § 288a(b). Such action would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is acting on matters not under its exclusive control, supervision, or jurisdiction. 22 U.S.C. § 288a(b). As such, the Pollutant Minimization Program Provisions may ultimately be unenforceable and not subject to suit against USIBWC. *Id.*; *see also Jam*, 139 S. Ct. at 766.

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.3.1. – 6.3.3.2.5.4., Attachment A, Parts 1 and 2, and Fact Sheet section 6.2.3.

Response

The Ocean Plan requires dischargers to develop and conduct a pollutant minimization program under specified circumstances, including where a calculated effluent limit is lower than certain reporting levels and there is evidence showing that the pollutant is present in the effluent above the calculated effluent limitation. (Ocean Plan, Chapter III.C.9.) This Order includes the Pollutant Minimization Program as required by the Ocean Plan. As explained in the Ocean Plan, the goal of the program is to reduce potential sources of pollutants by using source control measures if the specified circumstances occur. If the Discharger is required to implement the Pollutant Minimization Program, it will be required to submit a control strategy designed to proceed towards the goal of maintaining concentrations of the reportable pollutant(s) in the effluent at or below the effluent limitation. The requirement focuses on an outcome-based measure—develop and implement a control strategy to meet effluent limits. Regarding the method of compliance, please refer to Response to Comment No. 1.18. On its face, the provision does not purport to influence the manner in which the Discharger and CILA interact nor intrude on the federal government's foreign affairs. Potential control strategies may include, but are not limited to, working with interested stakeholders (such as NGOs) to raise awareness and provide education on and advancement of source control measures, pollution prevention, and best management practices; requesting the U.S. Department of State to provide assistance with control strategies; modifying the Facility; and investigating opportunities for industry to reduce and prevent pollution at the source through cost-effective changes in production, operation, and raw materials use.

Action Taken

Section 6.2.3 of the Fact Sheet has been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.27. Comment

III. Specific Provisions of the Tentative Order

L. Sections 6.3.5.3.1, 6.3.5.3.1.1., 6.3.5.3.1.3, and 6.3.5.3.1.3.1.

Sections 6.3.5.3.1., 6.3.5.3.1.1., 6.3.5.3.1.3., and 6.3.5.3.1.3.1. require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016. The Regional Board seeks to require USIBWC and CILA to develop an influent limitation study, determine, and control the sources of influent limitation exceedances. Tentative Order §§ 6.3.5.3.1., 6.5.3.1.3., 6.3.5.3.1.3.1. The Regional Board considers any influent limitation exceedance to be "inconsistent"

with Minute 283 and compels USIBWC to "take all actions available under U.S. law and international treaty and agreement to achieve compliance with the influent limitations" and "formally elevate" the matter to the U.S. Department of State. *Id.* § 6.3.5.3.1.1.

The 1944 Treaty and Minutes govern the rights and obligations of USIBWC and CILA regarding border sanitation issues and entrusts the IBWC with the exclusive authority to "exercise and discharge the specific powers and duties" authorized under the 1944 Treaty and Minutes, "and to carry into execution and prevent the violation of the provisions of those treaties and agreements." 1944 Treaty, art. 2, 24(c); *see also* Minute 261; Minute 283. Furthermore, the IBWC has the authority to "settle all differences that may arise . . . with respect to the interpretation or application of" the 1944 Treaty. 1944 Treaty, art. 24(d). Thus, to the extent the Regional Board seeks to exercise its CWA authority to compel USIBWC to take legal action against CILA to achieve compliance with its purported obligations under Minute 283, those requirements affect or impair provisions of the 1944 Treaty and Minutes. Likewise, requiring USIBWC and CILA to collaborate to develop and implement an influent limitation study, Tentative Order §§ 6.3.5.3.1.3., 6.3.5.3.1.3.1., would require the consent of Mexico, over which the Regional Board has no authority, and encroaches on the mechanisms for developing binational plans, studies, and solutions governed by the 1944 Treaty and Minutes. 1944 Treaty, arts. 2, 23, 24; Minute 261 ¶¶ 4-6. These provisions may also affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of the 1944 Treaty and Minutes, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on any purported state law authority, it is preempted by treaty and, more broadly, by the federal government's foreign affairs power. If a state law conflicts with a treaty, it is preempted. U.S. Const. art. VI, cl. 2; *see also Von Saher I*, 592 F.3d at 961. Compelling a federal agency to take legal action against a foreign government agency for violation of a state law requirement, or a state government purporting to require a foreign government to collaborate on a study, clearly conflicts with the foreign policy goals embodied in the 1944 Treaty and Minutes and is, therefore, preempted.

Even absent this glaring conflict, Sections 6.3.5.3.1. and 6.3.5.3.1.1 directly impact foreign affairs, as they purport to require Mexico to abide by influent limitations in the United States and to compel USIBWC to take legal action against a foreign government agency. A state cannot regulate the actions of a foreign country or actions outside the state's borders. *See Int'l Paper Co.*, 479 U.S. at 490. Nor can a state regulate foreign affairs if it is not with the state's "traditional state responsibility." *Movsesian*, 670 F.3d at 1074. The Regional Board fails to identify any state law providing this authority, nor could it. Therefore, Sections 6.3.5.3.1. and 6.3.5.3.1.1 are preempted by the federal

government's exclusive authority to conduct foreign affairs. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Furthermore, in the event USIBWC elevates an issue to the U.S. Department of State, it would purportedly be required to provide a copy of such request to the Regional Board. Tentative Order § 6.3.5.3.1.1. This task would be undertaken in USIBWC's capacity as an international organization. USIBWC's official communications on matters not under its exclusive control, supervision, or jurisdiction would be entitled to protections pursuant to the IOIA. 22 U.S.C. § 288a(c), (d). And because the IBWC, United States and Mexico Sections, enjoy the same immunity from suit as a foreign state when acting as an international organization but not on matters under the U.S. Section's exclusive control, supervision, or jurisdiction, Sections 6.3.5.3.1. and 6.3.5.3.1.1 may be unenforceable. 22 U.S.C. § 288a(b); *see also Jam*, 139 S. Ct. at 766.

The Discharger's Suggested Revisions also included revisions to portions of Tentative Order sections 6.3.5.3. – 6.3.5.3.1.4. and Fact Sheet section 4.3.5.4.

Response

The Tentative Order has been revised to focus on outcome-based requirements, without specifying the method of compliance. Regarding the method of compliance, please refer to Response to Comment No. 1.18. As revised, the Influent Limitation and Influent Limitation Study provisions require the Discharger to meet its influent limitations and develop an influent limitation study when certain conditions are met. The influent limitations do not apply to Mexico; they apply to the Discharger and its compliance with the Tentative Order. The Discharger may choose the appropriate course of action that achieves the requirements and conditions of the Tentative Order. At a minimum, the Discharger seems to have a measure of control over the influent flows entering the treatment works. (See generally San Diego Water Board Hearing Transcript (October 10, 1996), *supra*, 25:7-13, 96:8-12.)

In developing the influent Limitation Study, the Discharger is encouraged to work with interested stakeholders who can provide technical input and support. The San Diego Water Board may reopen the Tentative Order to modify the influent limits based on the Influent Limitation Study. As revised, the Influent Limitation and Influent Limitation Study provisions do not affect or impair the 1944 Treaty, federal sovereign immunity, and federal foreign affairs by dictating the means, frequency, and substance of consultation between the Discharger and CILA.

If the Discharger is unable to achieve compliance with the influent limitations, the Tentative Order requires the Discharger to elevate the matter to and request assistance from the U.S. Department of State and U.S. Environmental Protection Agency. Elevating an issue to other federal agencies would be part of the Discharger's day-to-day responsibilities in properly operating and maintaining its treatment plant and complying with the influent limits, not as part of its sovereign acts as a public international organization. The United States Section of IBWC

has exclusive control and sole discretion to elevate a matter to other federal agencies. The Discharger has not presented any evidence or explanation of how elevating an issue to and requesting assistance from the U.S. Department of State and U.S. Environmental Protection Agency would instead require action from the International Boundary and Water Commission.

Failure to meet influent limitations will affect the treatment works at the Facility, leading to introduction of pollutants into the treatment works that will interfere with its operation, including interference with the use or disposal of Facility sludges; introduction of pollutants that may pass through the treatment works, or otherwise be incompatible with it; reduced opportunity to recycle and reclaim Facility wastewaters and sludges; improper operation and maintenance; harm to the treatment works; and incomplete treatment such that the treatment works is not able to meet effluent limitations. The influent limitations are directly related to the Discharger's compliance with the effluent limitations in the Tentative Order and its proper operations and maintenance of the Facility. The request for assistance from the U.S. Department of State and U.S. Environmental Protection Agency to achieve its influent limits is necessary for the Discharger to accomplish its daily operational tasks.

Action Taken

Sections 6.3.5.3.1, 6.3.5.3.1.1, 6.3.5.3.1.3.1, and 6.3.5.3.1.4 of the Tentative Order have been revised. Please refer to the redline/strikeout text of the revised Tentative Order.

1.28. Comment

III. Specific Provisions of the Tentative Order

M. Sections 6.3.5.3.2.–6.3.5.3.2.5. and Table 6 ("Influent and Source Control Provisions")

The Influent and Source Control Provisions affect or impair the provisions of the 1944 Treaty and Minutes by purporting to dictate the means, frequency, and substance of consultation between USIBWC and CILA regarding the border sanitation issue of influent limitations and source control requirements. Tentative Order §§ 6.3.5.3.2.1., 6.3.5.3.2.4. They control the substance, frequency, and participants of the meetings, *id.* §§ 6.3.5.3.2.1.1., 6.3.5.3.2.4., 6.3.5.3.2.4.2., 6.3.5.3.2.4.7., Table 6, and direct USIBWC to "promote discussion of binational interests" regarding influent limitations, *id.* § 6.3.4.3.2.1.5. USIBWC is directed to request that CILA share presentations and information sheets to various audiences. *Id.* §§ 6.3.5.3.2.4.3., 6.3.5.3.2.4.4., 6.3.5.3.2.4.5. "If there is an exceedance of allocated loadings for a given constituent during a quarter," USIBWC must request the CILA host a source control workshop in Mexico. *Id.* § 6.3.5.3.2.4.6.

The Influent and Source Control Provisions require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. §

1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016. These provisions influence USIBWC's exercise of its "rights and obligations" with regard to border sanitation issues, which are governed exclusively by the 1944 Treaty and Minutes. 1944 Treaty, arts. 2, 3, 24; *see also* Minute 261 ¶¶ 4-6. The Influent and Source Control Provisions also affect the process for identifying border sanitation problems and developing solutions outlined in Minute 261, which requires that IBWC prepare a Minute, for the approval of both governments, in which it identifies the appropriate course of action and the timing of its implementation. Minute 261, ¶ 4. Furthermore, binational workings groups are specifically governed by Minute 320. These provisions may also affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of a treaty, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on any purported state law authority to enforce the Influent and Source Control Provisions, such law is preempted under conflict and field preemption doctrines. First, these provisions purport to compel USIBWC and CILA to meet and consult, Tentative Order §§ 6.3.5.3.2.1.1., 6.3.5.3.2.4., and require USIBWC to report CILA to the Regional Board when it refuses requests or fails to respond to communications, *id.* §§ 6.3.5.3.2.4.3.–.6. These actions would directly undermine the ongoing diplomatic relationship, function, and purpose of the 1944 Treaty and Minutes, which is to address border sanitation issues in a mutually agreed upon matter and within the powers and limitations set forth in those international agreements. 1944 Treaty, art. 2; Minute 261. Thus, these provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Second, The Influent and Source Control Provisions are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including dictating the conduct of a foreign country or a United States federal agency's actions in a foreign country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, the Influent and Source Control Provisions have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these provisions are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to meet and consult with CILA to "promote discussion of binational interests" as they relate to influent limitations and source control requirements, as required by the Influent and Source Control Provisions, USIBWC would be acting with CILA in its capacity as an international organization. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). Such consultation would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, the Influent and Source Control Provisions may be unenforceable and not subject to suit against USIBWC. *Id.*; *see also Jam*, 139 S. Ct. at 766. Additionally, the provisions requiring USIBWC to share correspondence between USIBWC and CILA, Tentative Order §§ 6.3.5.3.2.4.3, 6.3.5.3.2.4.4., 6.3.5.2.4.5., 6.3.5.3.2.4.6., appear inconsistent with the privileges and immunities the USIBWC enjoys when not acting on matters under its exclusive control, supervision or jurisdiction and may be unenforceable. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to portions of Tentative Order sections 6.3.5.3.2. – 6.3.5.3.2.5., including Table 6, and Fact Sheet section 6.2.5.3.

Response

Sections 6.3.5.3.2 through 6.3.5.3.2.5 (Sharing Influent and Source Control Information with Interested Stakeholders) of the Tentative Order have been revised to focus on outcome-based requirements, without specifying the method of compliance. Regarding the method of compliance, please refer to Response to Comment No. 1.18. Instead of requiring the Discharger to consult or coordinate with CILA, the provisions have been modified to require the Discharger to consult or coordinate with "interested stakeholders." For purposes of the Sharing Influent and Source Control Information provisions, interested stakeholders shall consist of a diverse group of individuals or entities to provide technical input on influent limitations and source control matters. Interested stakeholders *may* include, but are not limited to, the San Diego Water Board, the County of San Diego Department of Environmental Health (DEH), non-governmental organizations (NGOs), or international partners, such CILA. As revised, the Sharing Influent and Source Control Information with Interested Stakeholders provisions do not affect or impair the 1944 Treaty, federal sovereign immunity, and federal foreign affairs by dictating the means, frequency, and substance of consultation between the Discharger and CILA.

While the Discharger is not required to share influent and source control information with international partners, the San Diego Water Board encourages and recommends the Discharger to share influent and source control information with a diverse group of interested stakeholders who can provide technical input on influent limitations and source control matters. A diverse group of interested

stakeholders may provide the Discharger with unique insights into the challenges and potential solutions for addressing influent limitations and source control matters.

Action Taken

Sections 6.3.5.3.2. through 6.3.5.3.2.5. have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.29. Comment

III. Specific Provisions of the Tentative Order

N. Sections 6.3.5.3.3.–6.3.5.3.3.6. ("Untreated Industrial Wastewater and Pollutant Prevention Provisions")

The Untreated Industrial Wastewater and Pollutant Prevention Provisions affect or impair the provisions of the 1944 Treaty and Minutes by requiring USIBWC to take action in Mexico and collaborate with CILA to address border sanitation issues. Citing the 1944 Treaty and Minute 283, the Regional Board requires USIBWC and CILA to work together "to prevent the discharge of untreated industrial wastewater into the Tijuana sewage collection system." Tentative Order § 6.3.5.3.3.1. Specifically, USIBWC is to work with CILA to "improve communication" and provide training and funding to Mexican agencies on source control requirements and influent limitations. *Id.* §§ 6.3.5.3.3.3.1.–6.3.5.3.3.3.3. USIBWC is also compelled to "monitor and *limit the pollutants in the influent from Mexico to the Facility*[.]" *Id.* § 6.3.5.3.3.2. USIBWC must also request from CILA a description of activities undertaken in Mexico to address industrial wastewater and pollutant prevention. *Id.* §§ 6.3.5.3.3.4–6.3.5.3.3.4.5.

The Untreated Industrial Wastewater and Pollutant Prevention Provisions require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016. Importantly, in order to comply with Section 6.3.5.3.3.2., USIBWC would have to take action in Mexico to limit the pollutants in influent—as the water flows directly from Mexico into the Plant. This requirement clearly affects or impairs provisions of the 1944 Treaty, which provides that USIBWC and CILA retain exclusive control and jurisdiction over the real property and works in their respective countries. 1944 Treaty, arts. 2, 23, 24; Minute 283, ¶ 14. Specifically, Paragraph 12 of Minute 283 governs the pretreatment of industrial wastewaters in Mexico before they enter the Plant. The government of Mexico is charged with ensuring efficient pretreatment of industrial waste in accordance with the laws of its country. Minute 283, ¶ 12. As such, the Untreated Industrial Wastewater and Pollutant Prevention Provisions directly implicate Minute 283. Furthermore, these provisions may affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair a treaty's provisions, the Regional Board lacks

jurisdiction to impose these provisions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on any purported state law authority, it is preempted by treaty and, more broadly, by the federal government's foreign affairs power. If a state law conflicts with a treaty, it is preempted. U.S. Const. art. VI, cl. 2; *see also Von Saher*, 592 F.3d at 961. Because the water flows directly from Mexico into the Plant, USIBWC would have to take a unilateral action in a foreign country to comply with Section 6.3.5.3.3.2. USIBWC is also directed to report CILA to the Regional Board when it refuses requests or fails to respond to communications. Tentative Order § 6.3.5.3.3.4. In addition to raising concerns about extraterritorial action beyond U.S. jurisdiction (let alone California's), these actions would directly undermine the purpose and provisions of the 1944 Treaty and Minutes, which involve addressing border sanitation issues in a mutually-agreed upon matter and within the powers and limitations set forth in those international agreements. *E.g.*, 1944 Treaty, arts. 2, 3, 23, 24; Minute 261. Thus, these provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Even absent a conflict between federal and state approaches, the Untreated Industrial Wastewater and Pollutant Prevention Provisions directly impact foreign affairs, as they purport to require USIBWC to take direct actions in Mexico, including "limit[ing] the pollutants in influent from Mexico." Tentative Order § 6.3.5.3.3.2. A state cannot regulate the actions of a foreign country or actions outside the state's borders. *See Int'l Paper Co.*, 479 U.S. at 490. Nor can a state regulate foreign affairs if it is not with the state's "traditional state responsibility." *Movsesian*, 670 F.3d at 1074. The Regional Board fails to identify any state law providing this authority, nor could it. Therefore, Sections 6.3.5.3.1. and 6.3.5.3.1.1 are preempted by the federal government's exclusive authority to conduct foreign affairs. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to implement the Untreated Industrial Wastewater and Pollutant Prevention Provisions, it would be acting with CILA in its capacity as an international organization. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). Such consultation would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, the Untreated Industrial Wastewater and Pollutant Prevention Provisions may be unenforceable and not subject to suit against USIBWC. *Id.*; *see also Jam*, 139 S. Ct. at 766. Additionally, in the event CILA provides the requested information in Sections 6.3.5.3.3.4.–6.3.5.3.3.4.5 and

6.3.5.3.3.5.8. to USIBWC, such information would likely enjoy protections under the IOIA because USIBWC would have obtained and retained the information in its capacity as an international organization. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.5.3.3. – 6.3.5.3.3.6. and Fact Sheet, Attachment F, section1.

Response

The Source Control Requirements of the Tentative Order have been revised to focus on outcome-based requirements, without specifying the method of compliance. Regarding the method of compliance, please refer to Response to Comment No. 1.18. The goal of the source control requirements is to ensure proper operations and maintenance of the Facility, protection of water quality and beneficial uses, and that influent limitations will be met. To achieve this goal, section 6.3.5.3.3 of the Tentative Order has been revised to require the Discharger to work with interested stakeholders to prevent introduction of pollutants into the Facility that 1) inhibit or disrupt the Facility, the treatment processes and/or operations, or the sludge processes, use, or disposal; or 2) pass through the Facility in quantities or concentrations that cause or contribute to an exceedance of an applicable water quality standard in the receiving water. Sections 6.3.5.3.3.3.1 through 6.3.5.3.3.3.3 provide specific outcome-based goals to be achieved by the interested stakeholder meetings.

Section 6.3.5.3.3.5 of the Tentative Order requires the Discharger to submit an annual report to USEPA, Region 9, and the San Diego Water Board summarizing the previous calendar year regarding source control efforts. Sections 6.3.5.3.3.5.1 through 6.3.5.3.3.5.8 describe the type of information the annual report in section 6.3.5.3.3.5. should contain. These provisions have been revised to focus on actions the Discharger has taken with interested stakeholders.

As revised, the source control provisions do not affect or impair the 1944 Treaty, federal sovereign immunity, and federal foreign affairs by dictating the means, frequency, and substance of consultation between the Discharger and CILA.

Action Taken

Sections 6.3.5.3.3 – 6.3.5.3.3.6 of the Tentative Order have been revised. Please refer to the redline/strikeout text of the revised Tentative Order.

1.30. Comment

IV. Attachment A-Abbreviations and Definitions

A. "Canyon Collectors" definition at A-7–A-8

The definition of canyon collectors on pages A-7 and A-8 is ambiguous. In particular, it is unclear what the Regional Board means by "detention basin." USIBWC agrees that the canyon collectors each have a detention basin but understands these basins to be the sub-grade chambers inside the diversion boxes. For additional explanation of these terms, we refer the Regional Board to

the discussion regarding Discharge Prohibition 3.1 (Part III.B.2.iii) and to Attachments 5 and 7 referenced in that discussion.

The understanding of “detention basins” as “diversion boxes” is consistent with the Regional Board’s repeated reference to the canyon collectors as “diversion structures.” *See, e.g.*, Tentative Order at A-9; *id.* at F-6. Flows are *diverted* from the waterways in which the collectors are situated only after they pass through the collectors’ inlets the diversion boxes’ sub-grade chambers. By contrast, a flow that never enters those diversion boxes is never “captured by the canyon collector system,” 6.3.2.1.1.2, and merely “continue[s] north in the natural drainages,” Fact Sheet, Attachment F, Section 2.1.

If the Regional Board understands the term “detention basin” to be something other than the diversion boxes, then we request that the Board state so clearly and provide USIBWC with a meaningful opportunity to respond.

The definition of canyon collectors also provides that “the five canyon collector systems . . . are considered part of the Facility.” This is inaccurate. For the reasons set forth in our comment on the definition of Facility (Part IV.C, *infra*), the only parts of the “canyon collector systems” that are properly deemed part of the Facility are the collectors’ diversion boxes and the pipes, junction boxes, and pumps that connect the sub-grade chambers in those diversion boxes to the SBIWTP.

The Discharger’s Suggested Revisions also included revisions to the definition of “canyon collector” in Attachment A.

Response

The Discharger’s definition of the canyon collector system is inappropriately narrow and contradicts the description in their own operations and maintenance manual.

The canyon collector systems (or canyon collectors) are designed to capture and convey dry weather transboundary flows to the SBIWTP for treatment and disposal through the South Bay Ocean Outfall (SBOO). These dry weather transboundary flows begin in Mexico and drain north through canyons and ravines across the U.S. – Mexico international border to the Tijuana River Valley in California. The five canyon collector systems located in Smugglers Gulch, Goat Canyon, Canyon del Sol, Stewart’s Drain and Silva Drain are considered part of the Facility that is owned and operated by USIBWC and regulated by the Tentative Order. Each canyon collector system consists of multiple components, including but not limited to a concrete apron, a weir, a diversion box which functions to trap sediment and floatable debris, and a gravity conveyance to the SBIWTP or pump stations.

The concrete apron protects the area from erosion. The weir captures canyon flows. Together, the concrete apron and weir are designed to capture and divert transboundary flows towards the inlet of the diversion box. The elevation of the

concrete apron is sloped and graded towards the diversion box inlet, and the weir is at an elevation higher than the diversion box inlet. Due to the height of the weir, the weir creates an area where transboundary flows, debris, sediment, and trash collect. Those transboundary flows are then directed towards the inlet by the grade and slope of the concrete apron. The Discharger must maintain the concrete apron and weir at the appropriate slope, grade, and height to divert flows towards the inlet.

The diversion box traps sediment and floatable debris that has entered the diversion box. The diversion box has a screened inlet to prevent larger debris from entering the diversion box. The gravity conveyance is a series of pipes and vaults that conveys the canyon flow to a pump station or a junction box.

Without the concrete apron and weir, water may not naturally accumulate where the canyon collector systems are located. The canyon collector systems have altered the natural waterways and changed the natural flow of water. These intentional design features control and divert transboundary flows. Thus, the concrete apron and weir are part of the canyon collector system.

For the canyon collector systems to operate properly, the box culvert must be inspected and kept free of debris, the concrete apron must be kept free of sediment and debris, and the inlet and diversion box must also be kept free of sediment and debris. When these elements are properly maintained and operated, dry weather flows are captured and diverted towards the inlet for conveyance and treatment. The entire canyon collector system operates as a system to exert a measure of control over transboundary flows. Thus, the Tentative Order appropriately defines the entire canyon collector system as part of the Facility.

Regarding the definition of Facility, please refer to Response to Comment No. 1.32.

Action Taken

Attachment A of the Tentative Order was revised as follows:

Canyon Collector Systems

The canyon collector systems (or canyon collectors) are designed to capture and convey dry weather transboundary flows to the SBIWTP for treatment and disposal through the SBOO. These dry weather transboundary flows begin in Mexico and drain north through canyons and ravines across the U.S. – Mexico international border to the Tijuana River Valley in California. The five canyon collector systems located in Smugglers Gulch, Goat Canyon, Canyon del Sol, Stewart's Drain and Silva Drain are considered part of the Facility that is owned and operated by USIBWC and regulated by this Order. Each canyon collector system consists of multiple components, including but not limited to a concrete apron, a weir, a diversion box which functions to trap sediment and floatable debris, and a gravity conveyance to the SBIWTP or pump stations.

~~Canyon collectors are concrete channels and basins designed to capture transboundary dry weather flows from Mexico in canyons and ravines draining north across the U.S. – Mexico international border to the Tijuana River Valley in California. The five canyon collector systems located in Smugglers Gulch, Goat Canyon, Canyon del Sol, Stewart's Drain and Silva Drain are considered part of the Facility that is owned and operated by USIBWC and regulated by this Order. Each canyon collector system includes a detention basin designed to capture dry weather flows, a screened drain/inlet, and a gravity conveyance to the SBIWTP, or pump stations.~~

Section 2.1 of the Fact Sheet was revised as follows:

Canyon Collector Systems~~Diversion Structures~~

~~All five diversion structures, also referred to as canyon collectors, are concrete-lined portions of natural drainages and basins that capture transboundary dry weather flows. Each canyon collector system includes a detention basin designed to capture dry weather flow, a screened drain/inlet, and a gravity conveyance to the SBIWTP or pump stations tributary thereto. The captured, dry weather flows from these canyon collector systems are diverted to the SBIWTP for treatment and disposal through the SBOO. The canyon collector systems are designed to divert low-volume dry weather flows (the volume of these flows varies depending on the canyon) from Mexico in canyons and ravines draining north across the international border into the U.S.~~

The canyon collector systems are designed to capture and convey dry weather transboundary flows to the SBIWTP for treatment and disposal through the SBOO. These dry weather transboundary flows begin in Mexico and drain north through canyons and ravines across the U.S. – Mexico international border to the Tijuana River Valley in California. The five canyon collector systems located in Smugglers Gulch, Goat Canyon, Canyon del Sol, Stewart's Drain and Silva Drain are considered part of the Facility that is owned and operated by USIBWC and regulated by this Order. Each canyon collector system consists of multiple components, including but not limited to a concrete apron, a weir, a diversion box which functions to trap sediment and floatable debris, and a gravity conveyance to the SBIWTP or pump stations.

The maximum design capacity for each of the five canyon collector systems is as follows:

Table F-1. ~~Diversion Structures~~Canyon Collector Systems Design Capacities

~~Diversion Structure~~Canyon Collector System	Average Flow (MGD)	Peak Flow (MGD)
Goat Canyon	2.33	7.00

Smuggler's Gulch	4.67	14.00
Canyon del Sol	0.67	2.00
Silva's Drain	0.33	1.00
Stewart's Drain	1.67	5.00

~~Captured dry weather flows from these collectors are diverted to the SBIWTP for treatment and disposal through the SBOO.~~

The Goat Canyon ~~Diversion Structure~~Canyon Collector System conveys diverted flows by gravity to the Goat Canyon Pump Station. From the Goat Canyon Pump Station, the diverted flows are pumped to the Hollister Street Pump Station. The Smugglers Gulch ~~Diversion Structure~~Canyon Collector System conveys diverted flows by gravity to the Hollister Street Pump Station. From the Hollister Street Pump Station, the diverted flows are pumped to the SBIWTP headworks. The remaining three canyon collector systems located at Silva Drain, Canyon del Sol, and Stewarts Drain ~~canyon collectors (Silva Drain Canyon Collector, Canyon del Sol Collector, and Stewarts Drain Canyon Collector)~~ ultimately convey diverted flows by gravity to Junction Box 2.

Flows overflowing or bypassing the canyon collector systems continue north in the natural drainages, potentially polluting the Tijuana River Valley and Estuary, the Tijuana River, and the Pacific Ocean at San Diego beaches near the mouth of the Tijuana River. These flows during dry weather are a violation of the Order.

Combined flows gathered at Junction Box 2 are conveyed by gravity to the SBIWTP's headworks.

1.31. Comment

IV. Attachment A-Abbreviations and Definitions

B. "Discharge" definition at A-8

The definition of "discharge" begins "Discharge of a pollutant means." This clearly implies that "discharge" and "discharge of a pollutant" are synonymous. If that is not the Regional Board's intention, then we request that the Regional Board provide a clarification. Absent such a clarification, we will assume that the Regional Board agrees that "discharge" and "discharge of a pollutant" are synonymous.

The phrase "discharge of a pollutant" is defined in the CWA (33 U.S.C. § 1362(12)) and the definition of "discharge" at A-8 tracks this statutory definition. We therefore understand the definition of discharge at A-8 to be identical to the definition of discharge in the CWA. We note that this understanding is consistent with California Water Code § 13373, which provides that "'discharge' . . . as used in this chapter shall have the same meaning as in the [CWA] and acts amendatory thereof or supplementary thereto."

Again, if the Regional Board intends the definition of discharge at A-8 to diverge in any respect with the CWA definition of discharge, we ask that the Board explicitly state its intent, provide the legal justification and policy rationale for the deviation, and afford USIBWC a meaningful opportunity to respond.

Relatedly, the Regional Board should refrain from using "discharge" in the permit if it does not intend that word to have the technical sense provided at A-8. Use of "discharge" in both a common and technical sense introduces unnecessary confusion and unfairly prejudices USIBWC by depriving it of fair notice as to the Board's intent regarding the Tentative Order's meaning.

The Discharger's Suggested Revisions also included revisions to the definition of "discharge" in Attachment A.

Response

The definition of "discharge" has been revised to be the definition for "discharge of a pollutant." The definition of "waste" under the Water Code was revised be consistent with Water Code section 13050, subdivision (d). The definition of "discharge" is not defined under the Water Code. For the definition of "discharge" and "waste" under the Water Code, please refer to Response to Comment No. 1.13.

Regarding the Discharger's request for an additional opportunity to comment, please refer to Response to Comment No. 1.23.

Action Taken

See Response to Comment No. 1.9.

1.32. Comment

IV. Attachment A-Abbreviations and Definitions

C. "Facility" definition at A-9

As an initial matter, we do not read the definition of "Facility" at page A-9 to encompass the flood control works that USIBWC owns and operates in the Tijuana River, or to any structure or equipment that USIBWC does not own or operate. If the Regional Board has a different understanding, we ask that it provide a clarification and an opportunity for USIBWC to respond. Absent such a clarification, we will assume that the Regional Board agrees with this interpretation.

As drafted, the Regional Board's definition of Facility is inconsistent with EPA's definition of a POTW. As noted above (Part III.B.2.iii), that definition "includes sewers, pipes and other conveyances *only if they convey wastewater to a POTW Treatment Plant*." 40 C.F.R. § 403.3(q) (emphasis added). The only features of the canyon collectors that arguably meet this definition are diversion boxes, the sub-grade chambers, and the pipes, junction boxes, and pump stations into which those sub-grade chambers empty. As also noted above, throughout this

Tentative Order, the Regional Board has taken the position that the SBIWTP is "comparable to POTW" and can therefore be regulated like a POTW. Fact Sheet, Attachment F, F-19. The Regional Board therefore cannot simply ignore the definition of "treatment works" contained in the very regulations on which it otherwise relies.

The Discharger's Suggested Revisions also included revisions to the definition of "facility" in Attachment A and Attachment F sections 1.1, 1.2, 2, 2.1.

Response

The definition of "Facility" in Attachment A of the Tentative Order does not encompass the Tijuana River Flood Control Channel, which is also owned and operated by the Discharger. The Tentative Order and Fact Sheet contain appropriate descriptions of the Facility. Regarding the Discharger's request for an additional opportunity to comment, please refer to Response to Comment No. 1.23.

Regarding definition of canyon collector, please refer to Response to Comment No. 1.30. Since the entire canyon collector system operates as a whole to control and divert transboundary flows to the treatment works, the entire canyon collector system is a part of the Facility.

Action Taken

None.

1.33. Comment

IV. Attachment A-Abbreviations and Definitions

D. "Pollutant Minimization Program (PMP)" defined at A-13

The sources of pollution referenced in the Pollutant Minimization Program are in Mexico. Neither the Regional Board nor USIBWC have authority to implement these provisions in a foreign country. USIBWC hereby references and incorporates its comments regarding the Pollutant Minimization Program Provisions (Part III.K, *supra*) to Attachment A, definition of Pollutant Minimization Program.

Response

Please refer to Response to Comment No. 1.26.

Action Taken

None.

1.34. Comment

IV. Attachment A-Abbreviations and Definitions

E. "Sanitary Sewer System" and "Sanitary Sewer Overflow (SSO)" defined at A-13

It is unclear what portions of USIBWC-owned infrastructure the Regional Board considers to be sanitary sewers. It is therefore unclear what events the Regional Board considers to be SSOs. Without some indication of the Regional Board's understanding of this term, or its intent in applying it, USIBWC is unable to provide comments on this provision. We request therefore that the Regional Board expressly identify the portions of USIBWC infrastructure that it considers sanitary sewers.

The Discharger's Suggested Revisions also included revisions to the definition of "sanitary sewer overflow" in Attachment A. The Discharger's Suggested Revisions also included revisions to Fact Sheet section 6.2.5.5. and the following comment to Fact Sheet section 6.2.5.5.: The wastewater collection, conveyance, and treatment systems in Mexico are not components of the SBIWTP. Pursuant to international agreements in force with Mexico, USIBWC has no operational control or jurisdiction over systems in Mexico. Minute 283 states that "the construction of jointly financed works . . . shall in no way confer jurisdiction to one country over the territory of the other." Minute 283 at 8, ¶ 14. Thus, Minute 283 delegates to the governments of the United States and Mexico, operational control only over the works within their respective borders. See id. at 5 ¶ 3 (specifying that Mexico has responsibility for the "operations and maintenance" of all jointly-funded Mexico-side infrastructure).

Response

The definitions for "Sanitary Sewer Overflow (SSO)" and "Sanitary Sewer System" in Attachment A of the Tentative Order and section 6.2.5.5 of the Fact Sheet have been removed to reduce confusion. These provisions are redundant and unnecessary given the definition of Facility and Spill Event.

Action Taken

Attachment A of the Tentative Order has been revised:

~~Sanitary Sewer Overflow (SSO)~~

~~An SSO is any overflow, spill, release, discharge or diversion of untreated or partially treated wastewater from a sanitary sewer system. SSOs include: (i) Overflows or releases of untreated or partially treated wastewater that reach waters of the U.S.; (ii) Overflows or releases of untreated or partially treated wastewater that do not reach waters of the U.S.; and (iii) Wastewater backups into buildings and on private property that are caused by blockages or flow conditions within the publicly-owned portion of a sanitary sewer system.~~

~~Sanitary Sewer System~~

~~Any system of pipes, pump stations, sewer lines, or other conveyances, upstream of a wastewater treatment plant headworks used to collect and convey wastewater to the wastewater treatment facility. Temporary storage and conveyance facilities (such as vaults, temporary piping, construction trenches,~~

~~wet wells, impoundments, tanks, etc.) are considered to be part of the sanitary sewer system, and discharges into these temporary storage facilities are not considered to be SSOs.~~

Section 6.2.5.5. of the Fact Sheet has been revised:

~~6.2.5.5. Collection System~~

~~Sanitary sewer overflows (SSOs) often contain high levels of suspended solids, pathogenic organisms, toxic pollutants, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. SSOs may cause a public nuisance, particularly when raw untreated wastewater is discharged to areas with high public exposure, such as streets or surface waters used for drinking, fishing, or body contact recreation. SSOs may pollute surface or ground waters, threaten public health, adversely affect aquatic life, and impair the recreational use and aesthetic enjoyment of surface waters.~~

~~Minimum requirements to reduce, eliminate, and prevent SSOs are established as a condition of this Order and are included in Special Studies, Technical Reports, and Additional Monitoring Requirements section 6.3.2 of this Order.~~

1.35. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

Chapter 4, section 13267 of the California Water Code authorizes the Regional Board to require discharges, in connection with WDRs, to furnish technical or monitoring program reports investigating the quality of any waters of the state within its region. However, section 308(c) of the CWA provides sovereign immunity protection from state law authorities to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources owned or operated by the United States. The Regional Board is, therefore, prohibited from applying and enforcing procedures for inspection, monitoring, and entry provided for in the California Water Code.

Even if the Regional Board could enforce state law monitoring and inspection provisions —which it cannot—those provisions must have some reasonable relationship to the scope of the activity regulated by the NPDES permit. In other words, the authority to issue a NPDES permit does not give the Regional Board carte blanche to require monitoring and reporting that has no bearing on USIBWC's operation of the SBITWP or associated infrastructure.

The Tentative Order, if adopted would reissue the NPDES Permit authorizing discharge of up to 25 million gallons per day of treated wastewater from the SBIWTP to the Pacific Ocean through the SBOO. The Tentative Order defines transboundary flows as "wastewater and other flows that cross the international border from Mexico into the U.S." Tentative Order A-15. USIBWC has no control over and does not discharge transboundary flows that are generated in Mexico and merely flow over USIBWC property. With limited exception regarding some

Canyon Collector Transboundary Flows that are also Spill Events as defined in the Tentative Order, transboundary flows are, by definition, not captured, diverted, or treated at the SBIWTP. Once transboundary flows cross the international border into the United States, USIBWC neither owns nor operates any infrastructure nor conducts any activity that subjects transboundary flows to any intervening use. The SBIWTP is neither designed nor intended to be operated to address transboundary flows that cross into the United States and that are not diverted for treatment by the canyon collectors. Thus, transboundary flows are not in any way related to the regulated activity in the Tentative Order.

The objectives of the CWA are to restore and maintain the chemical, physical and biological integrity of the nation's waters and to eliminate the discharge of pollutants into the navigable waters. 33 U.S.C. § 1251(a)(1). To achieve those objectives, Congress has placed liability with those who control and discharge the pollutants being discharged. 33 U.S.C. § 1311(a) ("the discharge of any pollutant by any person [without a permit] shall be unlawful"). The touchstone of the statutory scheme is to regulate those sources emitting pollution into Waters of the United States. *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (explaining that the NPDES permitting program transforms the general regulatory standards established under the CWA into enforceable requirements for individual dischargers).

However, because USIBWC does not control or discharge transboundary flows within the meaning of the CWA, the monitoring and reporting requirements of the Tentative Order with respect to transboundary flows are not "reasonably required" to carry out the objectives of the CWA. Moreover, pursuant to international agreements in force with Mexico, the adequate implementation of efforts to reduce, eliminate, and prevent transboundary flows is within the *exclusive control, supervision, and jurisdiction of Mexico*. USIBWC may, in its sole discretion, assist with such efforts in Mexico, but only upon request by the Mexican section of the IBWC.

For these reasons, the Regional Board is prohibited by the CWA, the IOIA, and the United States Constitution from using its jurisdictional authority over USIBWC's operational control of the SBIWTP to otherwise regulate pollutants generated and discharged to the Tijuana River Valley from Mexico by requiring monitoring and reporting of all transboundary flows. *See* Part I.B and C, and Part II.A, *supra*.

The Discharger's Suggested Revisions also included revisions to the authorities cited in MRP section 5.2. and Fact Sheet sections 6.1., 6.2.1., and 7.

Response

Section 308(c), of the CWA is not applicable to California, as California has not submitted, nor has USEPA approved, any inspection, monitoring, and entry procedures pursuant to section 308(c). However, the Discharger is subject to

State requirements contained in the Water Code, including monitoring and reporting requirements pursuant to section 313 of the CWA.

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

Specifically, Congress amended section 313(a), of the CWA to clarify that federal facilities must comply with the substantive and procedural requirements of state law regarding the control of water pollution, including obtaining state permits. (Pub.L No. 95-217 (Dec. 27, 1977) 91 Stat. 1566, 1598 ["shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution. The preceding sentence shall apply … to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever"].)

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

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

Under the CWA, the USEPA administers the NPDES program in each state. If a state desires to implement its own NPDES program, the state may submit to USEPA "a full and complete description of the program it proposes to establish

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

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

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

"On May 14, 1973, California became the first State to be approved by [US]EPA to administer the NPDES permit program. On May 5, 1978, it also became the first State to receive [US]EPA approval to regulate discharges from federal facilities." (45 Fed. Reg. 40664 (Oct. 3, 1989).) In 1989, USEPA also approved California's NPDES Pretreatment Program, NPDES general permits, and revisions to the state's existing NPDES permit regulations. (*Id.*) To seek the 1989 approvals, the State of California submitted a statement from its Attorney General which certified that the laws of the state provide adequate authority for the State Water Resources Control Board and Regional Water Quality Control Boards to carry out a state NPDES program that is, at a minimum, consistent with federal law. (Attorney General's Statement for the State National Pollutant Discharge Elimination System Program and State Pretreatment Program Administered by the California State Water Resources Control Board and the California Regional Water Quality Control Boards (May 1987) (Attorney General's Statement), pp. 1, 7, 12-13 ["the Clean Water Act requirements incorporated into Chapter 5.5 of the Porter Cologne Act serve as minimum requirements; additional requirements may be imposed to the extent authorized by other

provisions of the Porter-Cologne Act. The Clean Water Act expressly provides that states may adopt and enforce their own standards and requirements, so long as they are not less stringent than the requirements of the Clean Water Act. Clean Water Act section 510; 33 U.S.C. § 1370."].)

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

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

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

The provisions of section 308(c) "cannot be read to weaken or render ineffective" the clear authority granted to states through waiver of sovereign immunity in section 313(a). (Memorandum from the Assistant Administrator for Enforcement and General Counsel, USPEA, to Regional Administrators and Directors of the Approved NPDES Programs (undated), at p. 5, fn. 3, at https://www3.epa.gov/npdes/pubs/owm521.pdf, as of April 7, 2021.) To interpret these two statutory provisions otherwise would create unnecessary internal conflict within the CWA. (See, e.g., *Boise Cascade Corp. v. USEPA* (9th Cir. 1991) 942 F.2d 1427, 1432; *Avila v. Spokane Sch. Distr. 81* (9th Cir. 2017) 852 F.3d 936, 942-94.)

The San Diego Water Board is authorized by Water Code sections 13267 and 13383 to require the Discharger to conduct the monitoring required in the

Monitoring and Reporting Program (MRP) (Attachment E of the Tentative Order). The Discharger discharges pollutants and waste from its Facility, including the discharge of pollutants and waste from the canyon collector systems that are owned and operated by the Discharger. Dry weather discharges from the canyon collector systems are violations of Discharge Prohibition 3.1. Thus, Water Code section 13383 provides sufficient authorization for the San Diego Water Board to require the MRP. (Water Code, § 13383, subds. (a) [“a regional board may establish monitoring, … reporting, and recordkeeping requirements … for any person who discharges, or proposes to discharge, to navigable waters … .”], (b) [“the regional boards may require any person subject to this section to … provide other information as may be reasonably required.”].) Water Code section 13267 provides additional authorization, independent of section 13383, to require the MRP.

The State of California and the San Diego Water Board have a strong interest in understanding the nature and extent of transboundary flows that enter the State from the southern border. The Discharger controls operation and maintenance of the canyon collector systems. Thus, the Discharger is in the best position to monitor water quality in the canyon collector systems and evaluate the water quality and beneficial use impacts of transboundary flows that bypass these canyon collector systems. The control of transboundary flows is not exclusively with the jurisdiction of Mexico. The Discharger also has a measure of control over the waste.

The Discharger controls the design capacity of the canyon collector systems, including the detention capacity of the collector basins, and all aspects of their operation, including the volume of flow accepted into the collector inlets. The Discharger can, and, to the San Diego Water Board’s knowledge, has, built earthen berms or placed sandbags around the canyon collector system detention basis to control the flow of waste. Thus, the Discharger does have a measure of control over and the ability to reduce transboundary flows through the canyon collector systems without Mexico. The Discharger may implement additional best management practices to further reduce transboundary flows from being discharged from the canyon collector systems. Regarding the canyon collector system, please refer to Response to Comment No. 1.30.

The San Diego Water Board expects the canyon collector systems to operate up to their maximum design capacity for all dry weather canyon collector transboundary flows. Improper, or lack of, operation and maintenance of the canyon collector systems may prevent the canyon collector systems from diverting their flows up to their full design capacity and increase polluted transboundary flows that enter the Tijuana River Valley and reach the Pacific Ocean. The Discharger’s operation of the Facility causes or contributes to water quality impairments and harm beneficial uses in the Tijuana River Valley and Pacific Ocean. Thus, the Discharger is in the best position to conduct the MRP. Such monitoring is reasonably required and related to the discharge of waste.

(See Water Code, § 13383, subds. (a), (b).) Monitoring at the canyon collector systems is also a form of influent monitoring. Regarding influent monitoring and source control, please refer to Response to Comment Nos. 1.27 and 1.29.

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding the definition of Facility, please refer to Response to Comment No. 1.32.

Action Taken

None.

1.36. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

A. Attachment E, Table E-1, Monitoring locations in Mexico

Even if it were possible for the Regional Board to require an action to take place in a foreign country, requiring monitoring in Mexico affects or impairs the 1944 Treaty and Minutes, which provides that USIBWC and CILA retain exclusive control and jurisdiction over the real property and works in their respective countries. 1944 Treaty, arts. 2, 23, 24; Minute 283, ¶ 14. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair the provisions of a treaty, the Regional Board lacks jurisdiction to impose these conditions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on any purported state law authority to require monitoring in Mexico, such law is preempted under both conflict and field preemption doctrines. If a state law conflicts with a treaty, it is preempted. U.S. Const. art. VI, cl. 2; *see also Von Saher*, 592 F.3d at 961. The 1944 Treaty and Minutes provide that USIBWC and CILA retain exclusive control and jurisdiction over the real property and works in their respective countries. 1944 Treaty, arts. 2, 23, 24; Minute 283, ¶ 14. Requiring USIBWC to take actions in Mexico's territory is dependent on Mexico's consent (which the Regional Board has no authority to compel) and would not only be inconsistent with the 1944 Treaty and Minutes but would undermine the ongoing diplomatic relationship and function and purpose of those international agreements. Thus, requiring monitoring in Mexico "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Furthermore, the monitoring locations in Mexico are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including dictating the conduct of a foreign country or a United States federal agency's actions in a foreign country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state

responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, requiring monitoring in Mexico has more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these requirements are preempted by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

Lastly, if USIBWC were to work with CILA to implement monitoring in Mexico, USIBWC would be acting with CILA in its capacity as an international organization. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). Such consultation would not involve the day-to-day operation of the Plant. As an international organization designated under the IOIA, the IBWC, United States and Mexico Sections, and its property and assets, enjoy the same immunity from suit as a foreign state when the U.S. Section is not acting on matters under its exclusive control, supervision or jurisdiction. *See* Exec. Order 12467; 22 U.S.C. § 288a(b). As such, aspects of the Binational Meetings Provisions may ultimately be unenforceable and not subject to suit against USIBWC. *Id.*; *see also Jam*, 139 S. Ct. at 766.

The Discharger's Suggested Revisions also included revisions to Figure 2 in Attachment B, MRP section 2, and the following comment for Figure 3 in Attachment B: Monitoring locations in Mexico must be removed; and the following comment for Figure 4 in Attachment B: The collection systems in Mexico are not components of the SBIWTP. Pursuant to international agreements in force with Mexico, USIBWC has no operational control or jurisdiction over systems in Mexico. Minute 283 states that "the construction of jointly financed works . . . shall in no way confer jurisdiction to one country over the territory of the other." Minute 283 at 8, ¶ 14. Thus, Minute 283 delegates to the governments of the United States and Mexico, operational control only over the works within their respective borders. See id. at 5 ¶ 3 (specifying that Mexico has responsibility for the "operations and maintenance" of all jointly-funded Mexico-side infrastructure).

Response

The monitoring locations in Mexico have been part of the receiving water monitoring program for the SBIWTP since Order No. 96-50, adopted by the San Diego Water Board on November 14, 1996, with slight modifications to the locations in Order No. R9-2014-0009, adopted by the San Diego Water Board on June 26, 2014. The monitoring requirements, including the monitoring locations in Mexico, were based on the monitoring program the Discharger performed to assess baseline ocean conditions before the discharge through the SBOO commenced. (See San Diego Water Board Hearing Transcript (October 10, 1996), supra, 10:2-10.) Furthermore, a 1995 Letter of Understanding between the Discharger, USEPA, and the San Diego Water Board stated that USEPA

would take the lead to develop and work with the Discharger on the implementation of the receiving water monitoring program for the discharge through the SBOO. (See Letter of Understanding International Wastewater Treatment Plant, IBWC US Section, EPA Region 9, RWQCB SD (1995), p. 3; see also Letter from C.W. Ruth, USIBWC, to Arthur L. Coe, San Diego Water Board (Aug. 11, 1994) [proposing baseline monitoring locations in Mexico].)

The Discharger is required to conduct a representative receiving water monitoring program to determine the effect of the discharge on the receiving water and impacts to water quality and beneficial uses. Monitoring locations in Table E-1 of the MRP (Attachment E of the Tentative Order) are designed to be representative of the discharge's potential impacts to water quality and beneficial uses. Monitoring at locations in Mexico provides regional context and essential information regarding the potential impact of the discharge through the SBOO. To assess the potential impacts of the discharge on the marine environment, it is necessary to sample throughout the water column in all directions around the outfall, whether that be in State or international waters.

The City of San Diego currently conducts all kelp/nearshore and offshore monitoring, including at the kelp/nearshore and offshore monitoring locations in Mexico, and supports continuing the monitoring at locations in Mexico. However, the San Diego Water Board acknowledges that sampling in Mexico requires approval of the Mexico government.

Attachment E, Table E-1, Footnote 2 of the Tentative Order acknowledges that the three shoreline monitoring locations in Mexico are collected by either CILA or the CESPT. The San Diego Water Board does not expect the Discharger to collect samples and conduct monitoring at the shoreline locations in Mexico. However, the San Diego Water Board requires the Discharger to conduct monitoring that is representative of its discharge. To ensure that its monitoring is representative of its discharge, the Discharger may request assistance from international partners to collect the samples. If the international partners fail to collect the samples, the Discharger would not be in violation of the Tentative Order.

The data collected at the shoreline, kelp/nearshore, and offshore monitoring locations in Mexico are also useful for differentiating the effects of shoreline sewage discharges in Mexico from the effects of discharge through the SBOO. During certain oceanographic conditions, ocean currents can transport sewage discharged in Mexican waters north causing exceedances of receiving water limitations for fecal indicator bacteria at monitoring locations in the U.S. The San Diego Water Board recommends that the Discharger continue sample collection at the shoreline, kelp/nearshore, and offshore monitoring locations to differentiate these impacts and explain receiving water limitation exceedances.

The San Diego Water Board has modified the Tentative Order to recommend monitoring at the shoreline monitoring locations in Mexico, rather than making it a

requirement. The San Diego Water Board has also modified the Tentative Order to clarify that monitoring is not required if Mexico does not approve of the monitoring.

Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

Action Taken

The following sections of the Tentative Order have been revised as follows:

New Footnote to Table E-1 of MRP:

[1] Monitoring at locations in Mexico is dependent on the approval of the Mexico government. Monitoring at these locations is not required if the Mexico government does not grant permission to enter and sample Mexico waters. In the event that the Mexico government does not grant permission to conduct the monitoring, the Discharger shall notify the San Diego Water Board in writing. Monitoring at locations in Mexico is needed to ensure representative sampling of the discharge's impact on water quality and beneficial uses.

Table E-1, Footnote 2 of the MRP:

[~~2~~3] Samples at shoreline stations S-0, S-2, and S-3 in Mexico are collected by either Comision Internacional de Limites y Aguas (CILA) or Comsion Estatal de Servicios Publicos de Tijuana (CESPT) and provided to the Discharger for sample analysis in the United States. Monitoring at these locations is recommended and requested to ensure representative sampling of the discharge's impact on water quality and beneficial uses. Failure to monitor at these locations is not a violation of the Order.

Section 4 of the MRP:

Receiving water monitoring in the vicinity of the SBOO and monitoring in the Tijuana River Valley shall be conducted as specified below. Station location, sampling, sample preservation, and analyses, when not specified, shall be by methods approved by the San Diego Water Board. Monitoring at locations in Mexico is dependent on the approval of the Mexico government. Monitoring is not required if the Mexico government does not grant permission to enter and sample Mexico waters. In the event that the Mexico government does not grant permission to conduct the monitoring, the Discharger shall notify the San Diego Water Board in writing. The purpose of the receiving water monitoring in Mexico is to ensure representative sampling of the discharge's impact on water quality and beneficial uses.

Section 4.1.1.1 of the MRP:

~~All~~ S~~s~~horeline monitoring locations in the U.S. listed in Table E-1 (i.e., monitoring locations ~~S-0,~~ S-~~2~~4 through S-6, and S-8 through S-12) shall be monitored ~~as follows:~~ in accordance with Table E-4 below. The San Diego Water Board

recommends and requests the Discharger apply these same requirements to shoreline monitoring locations in Mexico (i.e., monitoring locations S-0, S-2, and S-3).

Section 7.2 of the Fact Sheet:

… These monitoring requirements will remain in effect on an interim basis, pending development of a new and updated monitoring and assessment program. Monitoring at locations in Mexico is dependent on the approval of the Mexico government. Monitoring is not required if the Mexico government does not grant permission to enter and sample Mexico waters. In the event that the Mexico government does not grant permission to conduct the monitoring, the Discharger is required to provide written notice to the San Diego Water Board. The purpose of the receiving water monitoring in Mexico is to ensure representative sampling of the discharge's impact on water quality and beneficial uses. Sampling in the waters of Mexico provides regional context and essential information regarding the potential impact of the SBOO discharge south of the outfall and, thus, south of the border. To truly assess the potential impacts of the SBOO discharge on the marine environment, it is necessary to sample throughout the water column in all directions around the outfall, whether that be in State or international waters.

Section 7.2.1.1 of the Fact Sheet:

This Order also modifies the GPS coordinates for monitoring locations S4 and S5 due to access issues. Shoreline monitoring locations S-0, S-2, and S-3 are located in Mexico and samples at the locations are currently collected by agencies in Mexico and provided to the Discharger for analyses in the U.S. Monitoring location S-2 and S-3 have been incorporated into the monitoring and reporting program for the SBIWTP since the adoption of Order No. 96-50 by the San Diego Water Board on November 14, 1996. Monitoring location S-0 replaced monitoring location S-1 following adoption of Order No. R9-2014-0009 by the San Diego Water Board on June 26, 2014. Sampling at monitoring locations S-0, S-2, and S-3 is recommended and requested but not required as the stations are located in Mexico and sample collection is subject to the permission of the Mexico government. The San Diego Water Board recommends monitoring at these locations to ensure representative sampling of the effluent's impact on water quality and beneficial uses. The data collected at these monitoring locations are also useful for differentiating the effects of shoreline sewage discharges in Mexico from the effects of discharge through the SBOO. During certain oceanographic conditions, sewage discharges in Mexico can be transported north causing exceedances of receiving water limitations for fecal indicator bacteria at shoreline monitoring locations in the U.S.

1.37. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

B. Monitoring and Reporting Program, Attachment E, Sections 3.3.6.3 and 3.3.8.1.4.

Sections 3.3.6.3 and 3.3.8.1.4. of Attachment E require USIBWC to include in its TRE Work Plan "provisions for follow-up actions and communications, including communications with" CILA and other Mexican agencies when there are toxicity effluent limitation exceedances that are attributable to sources in Mexico. This action would be undertaken with CILA in USIBWC's capacity as an international organization, IBWC's international official communications are entitled protections pursuant to the IOIA. 22 U.S.C. § 288a(c), (d).

The Discharger's Suggested Revisions also included revisions to sections 3.3.6.3 and 3.3.8.1.4. of the MRP.

Response

Section 3.3.6.3 of the MRP (Attachment E of the Tentative Order) is part of the Tentative Order that describes the requirements of the Initial Investigation Toxicity Reduction Evaluation (TRE) Work Plan. The Initial Investigation TRE Work Plan will describe the steps that the Discharger intends to follow if toxicity is detected. Specifically, the Tentative Order requires that the Initial Investigation TRE Work Plan describe the investigation and evaluation techniques that will be used to identify potential causes and sources of toxicity, effluent variability, and treatment system efficiency; describe methods of maximizing *in-house* treatment efficiency and good housekeeping practices; list all chemicals used in operation of the facilities; describe how the Discharger will address toxicity effluent limitation exceedances; include provisions for follow-up actions and communications with interested stakeholders; and provide contact information for the person who would conduct the toxicity identification evaluation. The San Diego Water Board included a new provision for the Initial Investigation TRE Work Plan to include a description of how the Discharger will address toxicity effluent limitation exceedances. This provision has been revised to focus on an outcome-based goal of addressing toxicity, regardless of the source of toxicity.

Section 3.3.8.1.4 of the MRP is part of the Tentative Order that describes the requirements of the Detailed TRE Work Plan. Once the Discharger becomes aware of an exceedance of chronic toxicity, the Discharger shall begin the TRE Trigger Phase and increase monitoring of chronic toxicity. If certain conditions are met, the Discharger shall implement the TRE Process, including preparation and implementation of a Detailed TRE Work Plan. The Detailed TRE Work Plan shall include further actions to investigate, identify, and correct the causes of toxicity; actions to mitigate the effects of the discharge and prevent the recurrence of toxicity; a schedule for these actions, progress reports, and a final report; and, as revised, a schedule for follow-up actions and communications with interested stakeholders to reduce toxicity.

The Initial Investigation TRE Work Plan and Detailed TRE Work Plan are intended to ensure that the Discharger is prepared to respond and eliminate

toxicity in a timely manner. The San Diego Water Board's expectation is that the discharge is non-toxic, and the Discharger has an obligation under the CWA to only discharge non-toxic wastewater. Delays in responding can exacerbate harm to beneficial uses, affecting the ecosystem and public health. Ensuring the ability to respond promptly to any toxicity exceedance is an important tool for protection of water quality and beneficial uses.

The San Diego Water Board has modified sections 3.3.6.3 and 3.3.8.1.4 to focus on outcome-based requirements without prescribing a method of compliance. Regarding the method of compliance, please refer to Response to Comment No. 1.18.

The Discharger has several options to address toxicity exceedances, including upgrading the treatment plant to treat better treat toxicity, communicating with Mexico to control the source of toxicity, or working with NGOs to educate on toxicity issues. Regarding potential strategies with NGOs, please refer to Response to Comment No. 1.26.

If the toxicity exceedance is attributable to sources in Mexico, follow-up actions to control the source of toxicity may include communications with international partners, such as CILA, SPA, PROFEPA, and/or CESPT. Communications with Mexico is likely the most cost-efficient method to control toxicity.

While the Discharger is not required to follow-up and communicate with CILA for exceedances attributable to Mexico, the San Diego Water Board recommends and encourages the Discharger to engage with all interested stakeholders to control the source of toxicity. Additionally, the Discharger may notify the U.S. Department of State and USEPA of the toxicity exceedance and request assistance to control the source of toxicity. Regarding requesting assistance from other federal agencies, please refer to Response to Comment No. 1.27.

A toxicity exceedance is related to the Discharger's day-to-day operations of its Facility to comply with the effluent limits and protect water quality and beneficial uses which may be impacted by the toxic discharge occurring in the U.S. The Discharger is the exclusive entity that would be subject to enforcement action for violations of the Tentative Order.

Action Taken

The following sections of the Tentative Order have been revised as follows:

Sections 3.3.6.3 and 3.3.6.4 of the MRP:

3.3.6.3. A description of how the Discharger will address toxicity effluent limitation exceedances;

3.3.6. 3~~4~~. Provisions for follow-up actions and communications with interested stakeholders~~, including communications with Comisión Internacional de Límites y Aguas (CILA), Secretaría de Protección al Ambiente (SPA), Procuraduría Federal de Protección al Ambiente (PROFEPA), and Comisión Estatal de~~

~~Servicios Públicos de Tijuana (CESPT),~~ to reduce toxicity. ~~in instances where the probable cause of the toxicity effluent limitation exceedances is attributable to sources in Mexico.~~ If the toxicity exceedance is attributable to sources in Mexico, follow-up actions to control the source of toxicity may include communications with international partners, such as Comisión Internacional de Límites y Aguas (CILA), Secretaría de Protección al Ambiente (SPA), Procuraduría Federal de Protección al Ambiente (PROFEPA), and/or Comisión Estatal de Servicios Públicos de Tijuana (CESPT). Additionally, the Discharger may notify the U.S. Department of State and USEPA of the toxicity exceedance and request assistance to control the source of toxicity; and

Section 3.3.8.1.4 of the MRP:

A schedule for follow-up actions and communications~~, including communications with CILA, SPA, PROFEPA, and CESPT,~~ with interested stakeholders to reduce toxicity. ~~in~~ For instances where the probable cause of the toxicity effluent limitation exceedances is attributable to sources in Mexico, the schedule may include follow-up actions and communications with interested stakeholders, such as CILA, SPA, PROFEPA, and CESPT, to address the source of toxicity. Additionally, the Discharger may notify the U.S. Department of State and USEPA of the toxicity exceedance and request assistance to control the source of toxicity.

1.38. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

C. Monitoring and Reporting Program, Attachment E, Sections 3.3.9.4.3. and 3.3.10.

Section 3.3.9.4.3. of Attachment E requires USIBWC to compile a TRE Final Report that includes copies of correspondence to and from CILA, though it allows USIBWC to redact all or part of a document if exempt from public disclosure. Section 3.3.10. of Attachment E also requires USIBWC to disclose its communications with CILA and Mexican agencies requesting "assistance to address probable sources and causes of toxicity exceedance." However, IBWC's official communications are entitled to protection when USIBWC is acting in its capacity as an international organization, and not on matters under the U.S. Section's exclusive control, supervision, or jurisdiction. 22 U.S.C. § 288a(c), (d). Outside of the day-to-day operation of the Plant, when USIBWC requests information or coordination from CILA, those official communications are subject to the privileges, exemptions, and immunities conferred by the IOIA. *Id.* Therefore, provisions compelling disclosure of archival material and/or official communications would be unenforceable against USIBWC.

Sections 3.3.9.43. [sic] and 3.3.10. of Attachment E also require USIBWC to take certain actions for which USIBWC has not waived sovereign immunity. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

Attachment E compels USIBWC to request that CILA share the TRE Final Report with Mexican agencies and request their assistance in addressing toxicity exceedances. Attachment E, § 3.3.10. If CILA fails to respond or confirm within one month, USIBWC must report this information to the Regional Board. *Id.* These provisions influence the manner in which USIBWC and CILA identify and address border sanitation problems, which is a matter governed by the 1944 Treaty and Minute 261. When USIBWC and CILA identify a border sanitation issue, they jointly develop an approved course of action and record the decision in a Minute. 1944 Treaty, art. 25; Minute 261 ¶¶ 4-6. Compelling USIBWC to request information from CILA also implicates Article 24(e) of the 1944 Treaty, which requires that "the Commissioner of the other Government must have the express authorization of his Government in order to comply with such [information] request." These provisions may also affect or impair the distribution of costs governed by Minute 296. Because USIBWC has not waived sovereign immunity under the CWA as to requirements that affect or impair a treaty's provisions, the Regional Board lacks jurisdiction to impose these provisions. 33 U.S.C. § 1371(a)(3); *see also City of Imperial Beach*, 356 F. Supp. 3d at 1016.

To the extent the Regional Board relies on any purported state law authority, it is preempted under conflict and field preemption doctrines. If a state law conflicts with a treaty, it is preempted. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see also Von Saher I*, 592 F.3d at 961. First, Attachment E, Sections 3.3.9.4.3. and 3.3.10., dictate foreign affairs by requiring the public disclosure of diplomatic communications and reporting CILA's act or failure to act with the Regional Board. These actions would directly undermine the ongoing diplomatic relationship, function, and purpose of the 1944 Treaty and Minutes, which is to address border sanitation issues in a mutually agreed upon matter and within the powers and limitations set forth in those international agreements. 1944 Treaty, arts. 2, 3, 23, 24; Minute 261. Thus, these provisions "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy, *Von Saher I*, 592 F.3d at 961 (quoting *Crosby*, 530 U.S. at 373), and are therefore preempted by the 1944 Treaty and Minutes.

Second, Sections 3.3.9.4.3. and 3.3.10 are preempted by the federal government's foreign affairs power. The Tentative Order does not identify a state law that authorizes the Regional Board to regulate activities and water sources outside the state's borders, including dictating the conduct of a foreign country or a federal agency's actions in another country. Therefore, it is impossible to assess whether the Regional Board is exercising a "traditional state responsibility" when it imposes such requirements. *Movsesian*, 670 F.3d at 1074. The Regional Board is certainly not allowed to regulate activities and discharges outside its borders under its federal CWA authority. *Int'l Paper Co.*, 479 U.S. at 490. In any event, for the reasons stated *supra*, Sections 3.3.9.4.3. and 3.3.10 of Attachment E have more than "some incidental or indirect effect" on foreign affairs. *Zschernig*, 389 U.S. at 433. Therefore, these requirements are preempted

by the federal government's foreign affairs power. U.S. Const. art. II, § 2, cl. 2; art. VI, cl. 2; *see Zschernig*, 389 U.S. at 440-41.

The Discharger's Suggested Revisions also included revisions to MRP sections 3.3.9.4.4. and 3.3.10.

Response

As revised, section 3.3.9.4.3 of the MRP requires the Discharger to compile a TRE Final Report, which includes copies of correspondence to and from interested stakeholders requesting assistance to reduce toxicity. If the Discharger asserts that all or any portion of the documents are subject to an exemption from public disclosure, the Discharger is required to submit the documents with those portions that are asserted to be exempt in redacted form and identify the basis for the exemption from public disclosure. The Discharger alleges that any communications it has with CILA are protected from disclosure due to its status as a public international organization and the IOIA. However, the Discharger's efforts to reduce toxicity is related to its day-to-day responsibilities to comply with the effluent limits and protect water quality and beneficial uses which may be impacted by the toxic discharge occurring in the United States. Section 3.3.9.4.3 allows the Discharger to redact exempt information. As revised, section 3.3.9.4.3 is not a requirement that the Discharger communicate with Mexican agencies. It merely requests copies of communication that are not subject to an exemption from public disclosure.

The San Diego Water Board has modified section 3.3.9.4.4 to require the Discharger to include a list of corrective actions planned or taken by the Discharger. The San Diego Water Board also recommends and requests the Discharger provide a list of corrective actions taken or planned by interested stakeholders to reduce toxicity in the TRE Final Report.

As revised, section 3.3.10 of the MRP requires the Discharger to provide the TRE Final Report to interested stakeholders, if the source of toxicity is attributable to sources in Mexico. The Discharger is also required to request assistance from interested stakeholders to reduce, prevent, and eliminate the probable sources and causes of the toxicity exceedance. The goal is to reduce, prevent, or eliminate future toxicity issues from those sources or causes. Regarding potential strategies with NGOs, please refer to Response to Comment No. 1.26. While the Discharger is not required to provide the TRE Final Report to CILA, the San Diego Water Board strongly encourages the Discharger to provide the report to CILA.

As revised, sections 3.3.9.4.3, 3.3.9.4.4, and 3.3.10 do not interfere with the Discharger's capacity as a public international organization nor the federal government's foreign affairs powers.

Regarding the Discharger's day-to-day operations to comply with toxicity limitations, please refer to Response to Comment No. 1.37.

Action Taken

The following sections of the Tentative Order has been revised as follow:

Section 3.3.9.4.3 of the MRP:

Copies of any written request to ~~CILA~~ interested stakeholders for assistance to reduce toxicity and any responses received. If the Discharger asserts that all or any portion of the documents are subject to an exemption from public disclosure, the Discharger shall submit the documents with those portions that are asserted to be exempt in redacted form. The Discharger shall identify the basis for the exemption from public disclosure.

Section 3.3.9.4.4 of the MRP:

A list of corrective actions taken or planned by the Discharger ~~and/or CILA~~ to reduce toxicity so that the Discharger can achieve consistent compliance with the toxicity effluent limitation of this Order and prevent recurrence of exceedances of the limitation. The San Diego Water Board recommends and requests the Discharger provide a list of correction actions taken or planned by interested stakeholders; and

Section 3.3.10 of the MRP:

Reporting to ~~CILA~~ Interested Stakeholders

If the TRE Final Report determines that the toxicity exceedances were, or likely were, attributable to the introduction of pollutants into the SBIWTP from Mexico, then the Discharger shall provide a copy of the TRE Final Report to ~~CILA~~ interested stakeholders within 30 days after completion of the TRE Final Report. For purposes of this section, interested stakeholders shall include individuals or entities that can assist in addressing the probable sources and causes of the toxicity exceedance and may include, but are not limited to, CILA, SPA, CESPT, U.S. Department of State, USEPA, and non-governmental organizations (NGOs). The Discharger shall request ~~in writing that CILA share the TRE Final Report with SPA and CESPT and request their~~ assistance from interested stakeholders ~~in addressing probable source~~ in reducing, preventing, and eliminating the probable sources and causes of the toxicity exceedances. The San Diego Water Board requests that t~~T~~he Discharger ~~shall~~ provide a copy of the request to the San Diego Water Board. If the Discharger asserts that all or any portion of the documents are subject to an exemption from public disclosure, the Discharger shall submit the documents with those portions that are asserted to be exempt in redacted form. The Discharger shall identify the basis for the exemption from public disclosure. ~~If CILA refuses or does not confirm within one month, the Discharger shall communicate the same to the San Diego Water Board in writing in a timely manner.~~

1.39. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

D. Monitoring and Reporting Program, Attachment E, Section 4.2

The SBIWTP does not control transboundary flows in Mexico or discharge pollutants into the Tijuana River or Estuary in the Unites States. The Tijuana River and Estuary are not receiving waters with respect to the regulated activity in the Tentative Order. USIBWC does not have technical, jurisdictional, or operational control of pollutants that are generated in Mexico and flow across the international border into the United States, nor does USIBWC have technical, jurisdictional, or operational control over infrastructure in the United States that causes or results in discharges to the Tijuana River or Estuary. Thus, the rationale for including the Tijuana River and Estuary as receiving waters with respect to the Tentative Order lacks any factual basis. To the extent that there may be releases into the Tijuana River or Estuary due to technical or operational failures of SBIWTP and its associated infrastructure, the CWA provides "jurisdiction to regulate and control only actual discharges—not potential discharges." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005).

To the extent that such monitoring and reporting are necessary to ensure compliance with the operation and maintenance provisions of the permit, see 40 C.F.R. § 122.41(l)(7), Transboundary Flow Events triggering monitoring and reporting requirements must be limited to Canyon Collector Transboundary Flow Events that also constitute Spill Events. To the extent that the Regional Board amends the Tijuana River Valley Monitoring Program to be consistent with the regulated activity in the Tentative Order and necessary for achieving the objectives of the CWA, we request notice and an opportunity to comment on that the reasonableness of the program before the permit is finalized.

In addition to the above comment, the Discharger also indicated in the redline/strikeout comment document to remove or modify the following sections of the Tentative Order:

- Remove Figure 2 of Attachment B, Tijuana River Valley Monitoring Locations
- Remove monitoring locations TRV-1 through TRV-4 and TRV-10 through TRV-13 from Table E-1 of the MRP.
- Remove all from sections 4.2. through 4.2.1.1.1 and 4.2.1.1.3 of the MRP, Tijuana River Valley Receiving Water Monitoring Program, flow and water quality monitoring requirements for Tijuana River Valley monitoring locations excluding canyon collector monitoring locations.
- Remove wet weather flow monitoring requirements in for canyon collector monitoring locations in section 4.2.1.1.2 of the MRP,
- Modify water quality monitoring requirements for canyon collectors for only transboundary flow events that are also spill events and remove wet weather monitoring in section 4.2.1.2.1 of the MRP.

- Remove all water quality monitoring requirements for non-canyon collector Tijuana River Valley monitoring locations contained in sections 4.2.1.2.2 through 4.2.1.2.3, and Table E-8 of the MRP.
- Remove all sediment monitoring requirements in sections 4.2.2 through 4.2.2.4.2, and Table E-9 of the MRP.
- Remove the requirement for trash assessments in section 4.2.3 of the MRP.
- Remove the requirement for Human Health Risk Assessment requirements in section 4.2.4 of the MRP.
- Remove the requirement for the Tijuana River Valley Stressors Study in section 4.2.5 of the MRP.
- Remove the requirements for the Tijuana River Valley Monitoring Program work plan in section 4.2.6 of the MRP
- Remove all transboundary flow reporting requirements that are not applicable to canyon collectors in sections 4.2.7 through 4.2.7.1.1 of the MRP.
- Modify the requirements for reporting for canyon collector transboundary flows to only flows that are also spill events in section 4.2.7.1.2 of the MRP.
- Remove the requirements for Tijuana River Valley receiving water monitoring reports and State of the Tijuana River Valley oral report in sections 4.2.7.3 through 4.2.7.3.2 of the MRP.
- Remove the requirement to submit Tijuana River Valley monitoring data to the California Environmental Data Exchange Network in section 4.3 of the MRP.
- Remove all discussion of the Tijuana River Valley monitoring program in sections 7.2.2 through 7.2.2.6 of the Fact Sheet.

The Discharger’s Suggested Revisions also included revisions to MRP sections 4. and 4.2. – 4.3. and Fact Sheet sections 7.2. and 7.2.2. – 7.2.2.6.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding the Discharger’s measure of control over transboundary flows, please refer to Response to Comment No. 1.19. For additional information regarding monitoring in the Tijuana River Valley, please see Response to Comment Nos. 1.20 and 1.35. Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

While the San Diego Water Board is authorized to require monitoring within the Tijuana River Valley to evaluate effects of transboundary flows that bypass the canyon collector systems, the San Diego Water Board acknowledges that there are several other entities monitoring in the Tijuana River Valley that could

generate data useful for evaluating the impacts of transboundary flows on the Tijuana River and the Tijuana River Estuary. The San Diego Water Board is aware that the City of Imperial Beach, the Southern California Coastal Water Research Project (SCCWRP), San Diego State University, USEPA, Scripps Institution of Oceanography, and Boz Research & Teaching Institute are conducting monitoring within the Tijuana River Valley. To account for similar monitoring and save on costs by reducing duplicative monitoring, the San Diego Water Board has removed the requirement to monitor at the Tijuana River main channel near the U.S.-Mexico border, Hollister Street Bridge, Saturn Boulevard, Yogurt Canyon, the Naval Outlying Landing Field, and the Oneonta Slough. The San Diego Water Board has also removed the requirement to submit and implement a Human Health Risk Assessment Work Plan (section 4.2.4 of the MRP) and conduct a Tijuana River Valley Stressors Study (section 4.2.5 of the MRP).

The San Diego Water Board is retaining the requirements to monitor at the canyon collector systems, Dairy Mart Bridge, and the Tijuana River mouth. However, the San Diego Water Board has reduced the frequency of wet weather monitoring, from the three different category storm events per year, to only a single category storm event and the frequency of dry weather monitoring, from once per month, to once per quarter at Dairy Mart Bridge and the Tijuana River mouth. Dry weather sampling should take place during a flow event, if possible. The Discharger is encouraged to expand on the Tijuana River Valley monitoring program and collaborate with other entities in monitoring in the Tijuana River Valley. Additionally, the San Diego Water Board recommends monitoring weekly for *E. coli* and fecal coliform at Dairy Mart Bridge to evaluate the impact of transboundary flows on public health and beneficial uses.

The San Diego Water Board is also retaining the requirements to report both wet and dry weather flows and submit a Tijuana River Valley monitoring report. The State and the San Diego Water Board have a strong interest in understanding the nature and extent of transboundary flows that enter the State from the southern border. The Discharger controls operation and maintenance of the canyon collector systems and the flood control channel. The majority of transboundary flows flow through these structures and eventually flow through Dairy Mart Bridge and to the Tijuana River Valley. Thus, the Discharger is in the best position to monitor and report on water quality in the canyon collector systems, Dairy Mart Bridge, Tijuana River Mouth and evaluate the water quality and beneficial use impacts of transboundary flows.

Monitoring at the canyon collector systems is needed to evaluate the extent and magnitude of pollutants coming across the border that bypass the canyon collector systems. Monitoring of all dry weather flows at the canyon collector systems is needed so the Discharger and, independently, the San Diego Water Board can assess whether those flows are within or exceed the canyon collector systems' design capacity. It would be difficult for the Discharger to distinguish

whether the flow exceeds the design capacity of the canyon collector systems while the flow is occurring, which could result in the failure to collect a sample. Thus, monitoring for all dry weather Canyon Collector Transboundary Flow Events is required to assess compliance with the Tentative Order.

Monitoring at Dairy Mart Bridge is needed to determine the effects of transboundary flows occurring at Stewart's Drain, which have been occurring more frequently due to infrastructure issues in Mexico as well as at the SBIWTP. When transboundary flows at Stewart's Drain are not occurring, Dairy Mart Bridge can serve as a control monitoring location to prevent a skewed assessment of the impact from canyon collector transboundary flows by distinguishing the influences and/or contributing factors of transboundary flows at the Tijuana River main channel. The Discharger is also in the best position to monitor at Dairy Mart Bridge because Dairy Mart Bride is within the Tijuana River Flood Control Channel owned and operated by the Discharger.

Monitoring at the Tijuana River mouth is needed to distinguish the impacts of transboundary flows in the Tijuana River that reach the shoreline and Pacific Ocean from the impacts of the discharge through the SBOO. Wet weather monitoring at canyon collector systems, Dairy Mart Bridge, and the Tijuana River mouth is needed to differentiate the impact of the wet weather flows to the impact of the dry weather canyon collector transboundary flows.

The San Diego Water Board does not agree that reporting of all transboundary flows should be removed. As noted in sections 6.2.2.2 and 7.2.2.4 of the Fact Sheet (Attachment F of the Tentative Order), reporting of all transboundary flows provides for the protection of public health. The reporting will also provide information regarding the background quantity of transboundary flows which may traverse the Tijuana River Valley and reach the Pacific Ocean or travel to nearby beaches with recreational beneficial uses, and can used to determine if any receiving water limitation exceedances in ocean waters may be attributed to transboundary flows. The Discharger is in the best position to report transboundary flows as the Discharger conducts daily canyon collector inspections and has a permanent flow measuring device at the Tijuana River main channel.

The Discharger's past monitoring reports have been difficult to understand and often failed to report Transboundary Flow Events as required. Reporting of all transboundary flows allows for clearer reporting to determine compliance with the Tentative Order. As noted in former section 7.2.2.6 of the Fact Sheet (renumbered to section 7.2.2.4 of the Fact Sheet), during the previous permit term, several transboundary flows started during dry weather, continued during wet weather, and ended during dry weather, making transboundary flow reporting unclear. Reporting all transboundary flows, regardless of the weather condition, provides a complete picture of each flow event and leaves less interpretation as to when the flow started and ended. Reporting both wet and dry transboundary flows also provides the public information on the extent and magnitude of

transboundary flows and allows public agencies to assess the threat to public health and the environment.

The San Diego Water Board also does not agree that the Tijuana River Valley Monitoring Report or the State of the Tijuana River Valley oral report should be removed. It is important that the results of the Tijuana River Valley monitoring program are synthesized in a clear and approachable manner for the San Diego Water Board and public. The Tijuana River Valley Monitoring Report and the State of the Tijuana River Valley oral report help educate the public on the water quality and beneficial use impacts of transboundary flows.

Action Taken

Attachment B, Figure 2; Attachment E, Table E-1, Table E-11, and sections 4, 4.2 – 4.2.7.3.2, and 4.3; and Fact Sheet, Attachment F, section 7.2, and 7.2.2 – 7.2.2.6 have been revised or removed. Please refer to the redline/strikeout of the revised Tentative Order.

1.40. Comment

V. Attachment E - Monitoring and Reporting Program (MRP)

E. Monitoring and Reporting Program, Attachment E, Table E-11

Table E-11 references numerous reports that USIBWC is required to submit under the Tentative Order. USIBWC hereby references and incorporates its objections regarding the Binational Meetings Provisions (Part III.F, *supra*), Influent and Source Control Provisions (Part III.M, *supra*), Pollutant Minimization Program Provisions (Part III.K, *supra*), and Untreated Industrial Wastewater and Pollutant Prevention Provisions (Part III.N, *supra*), to Table E-11.

The Discharger's Suggested Revisions also included revisions to Table E-11 in the MRP.

Response

The San Diego Water Board has modified the Tentative Order to remove or modify reports in Table E-11 of the MRP (Attachment E of the Tentative Order) based on the changes made in response to comments.

Action Taken

Table E-11 of the MRP has been revised as follows:

Report	Location of requirement	Due Date
ROWD (for reissuance)	Signature Page	No later than 180 days before the Order expiration date [1]

Report	Location of requirement	Due Date
Updated Spill and Transboundary Flow Prevention and ~~/~~Response Plan (Flow Prevention/Response Plan)	Section 6.3.2.1.2	180 days after the effective date of this Order
Daily Canyon Collector Inspection and Maintenance Log	Section 6.3.2.1.2.5.2	With the monthly SMR
Revised Flow Prevention/Response Plan	Section 6.3.2.1.3	No later than 60 days after the close of the comment period
Amendment to the Flow Prevention/Response Plan	Section 6.3.2.1.3.1	Within 30 days of amending the Prevention/Response Plan
Agenda and Meeting Summary for ~~binational~~ biannual technical committee (BTC) meetings on transboundary flow prevention and response	Section 6.3.2.2.1.3	Within 30 days after the BTC meeting
~~A copy of the written request to CILA and written confirmation from CILA shall be included as an amendment to the Prevention/Response Plan.~~	~~Section 6.3.2.2.2~~	~~Within 30 days after the next BTC meeting~~
A copy of written notifications to the U.S. Department of State and USEPA regarding transboundary flow events and any responses received	Section 6.3.2.2.3	Include with the monthly SMR for the month in which the transboundary flow occurred, or the next available SMR
~~Presentation and one-page summary information sheet on transboundary flows~~	~~Section 6.3.2.2.5~~	~~See Table 4 of this Order~~

Report	Location of requirement	Due Date
Annual Presentations to the San Diego Water Board	Sections 6.3.2.2.5 and 6.3.5.3.2.4	Annually as requested by the San Diego Water Board
Preliminary Spill and Transboundary Flow Report	Section ~~6.3.2.4.3~~ 6.3.2.3.3	Within three business days of becoming aware of the spill/flow
Certified Spill and Transboundary Flow Report	Section ~~6.3.2.4.4.~~ 6.3.2.3.4	Within 15 calendar days of spill/flow end date
Asset Management Plan	Section 6.3.2.5.1	Within 180 days of the effective date of this Order
Pollutant Minimization Program Annual Status Report	Section 6.3.3.2.5	Annually on February 1
Certification for new or expanded facilities	Section 6.3.4.1	Prior to beginning construction of new or expansions of existing treatment facilities
South Bay Ocean Outfall Capacity Report	Section 6.3.5.1	No later than 180 days before the Order expiration date
A copy of written requests to the U.S. Department of State and USEPA regarding the inability to achieve compliance with influent limitations	Section 6.3.5.3.1.1	Concurrently with request to U.S. Department of State and USEPA
Notification of Influent Significantly Changing	Section 6.3.5.3.1.2	Within seven days
Influent Limitation Study	Section 6.3.5.3.1.3	With 180 days of the Notification required in Section 6.3.5.1.2
Revised Influent Limitations	Section 6.3.5.3.1.4	Within one year of initiating an Influent Limitation Study
Agenda and Meeting Summary for ~~binational technical committee~~ BTC meetings on influent and source control	Section ~~6.3.5.3.2.4~~ 6.3.5.3.2.1.3	Within 30 days after the BTC meeting
~~Presentation and one-page summary information sheet on Influent and Pretreatment~~	~~Section 6.3.5.3.2.4~~	~~See Table 6 of this Order~~

Report	Location of requirement	Due Date
A copy of written notifications to the U.S. Department of State and USEPA regarding influent limitation exceedances and any responses received	Section 6.3.5.3.2.2	Include with the monthly SMRs for the month in which the influent limitation was exceeded, or the next available SMR
Annual Source Control Report	Section 6.3.5.3.3.5	Annually on March 31
Proposal for additional actions to meet untreated industrial wastewater and pollutant prevention goals	Section 6.3.5.3.3.6	Within 6 months of becoming aware that the requirements are not sufficient to achieve the goals
Annual Biosolids Report	Section 6.3.5.4.8	Annually on February 19
Resource Recovery Notice	Section ~~6.3.5.6~~ 6.3.5.5	As needed
DMR-QA Study	Attachment E, Section 1.7	Annually on December 31 [2]
Initial Investigation TRE Work Plan	Attachment E, Section 3.3.6	Within 90 days of the effective date of this Order
Detailed TRE Work Plan	Attachment E, Section 3.3.8.1	As needed
Interim Ocean Receiving Water Monitoring Report (executive summary)	Attachment E, Sections 4.1.5.1.2	July 1 of the year following the even years (e.g., separate reports for calendar years 2022 (due 7/1/2023), 2024 (due 7/1/2025), and 2026 (due 7/1/2027))
Biennial Ocean Receiving Water Monitoring and Assessment Report (full assessment)	Attachment E, Sections 4.1.5.1.3	July 1 of the year following the odd years (e.g., biennial reports for calendar years 2020-2021 (due 7/1/2022), 2022-2023 (due 7/1/2024), and 2024-2025 (due 7/1/2026))

Report	Location of requirement	Due Date
Oral/Written Biennial State of the Ocean Report	Attachment E, Section 4.1.5.2	By December 31 of the year following the odd years (e.g., biennial reports for calendar years 2020-2021 (due 12/2022), 2022-2023 (due 12/2024), and 2024-2025 (due 12/2026))
~~Human Health Risk Assessment Work Plan~~	~~Attachment E, Section 4.2.4~~	~~Within 90 days of the effective date of this Order~~
~~Tijuana River Valley Stressor Study Work Plan~~	~~Attachment E, Section 4.2.5~~	~~Within one year of the effective date of this Order~~
Tijuana River Valley Work Plan	Attachment E, Section ~~4.2.6~~ 4.2.4	Within 90 days of the effective date of this Order
Tijuana River Valley ~~Receiving Water~~ Monitoring Report	Attachment E, Section ~~4.2.7.3.1~~ 4.2.5.3.1	No later than 180 days before the Order expiration date
Oral/Written State of the Tijuana River Valley Report	Attachment E, Section ~~4.2.7.3.2~~ 4.2.5.3.2	No later than 180 days before the Order expiration date
CEDEN Certification Statement	Attachment E, Section 4.3	Annually on March 1
Kelp Bed Canopy Report	Attachment E, Section 5.1	Annually on October 1
CCAP	Attachment E, Section 6.1	No later than three years of the effective date of this Order
Plume Tracking Progress Report	Attachment E, Section 6.2	Annually on March 1
Coastal Remote Sensing Study Recommendations Report	Attachment E, Section 6.3	No later than October 31, 2022~~December 1, 2023~~

1.41. Comment

VI. Attachment F - Fact Sheet

A. Fact Sheet, Attachment F, section 1.1

This provision restates the definition of “Facility” set forth on A-9. We reiterate our comments in response to that definition (Part IV.C, *supra*).

Response

See Response to Comment No. 1.32.

Action Taken

None.

1.42. Comment

VI. Attachment F - Fact Sheet

B. Fact Sheet, Attachment F, section 2.1

According to this provision: "Flows overflowing or bypassing the canyon collectors continue north in the natural drainages, potentially polluting the Tijuana River Valley and Estuary, the Tijuana River, and the Pacific Ocean at San Diego beaches near the mouth of the Tijuana River. These flows during dry weather are a violation of the Order." There are several problems with this statement.

First, for the reasons set forth above, flows that do not enter the canyon collectors' diversion boxes are not discharges and so cannot be categorically prohibited under the CWA. *See* Parts III.B.2.ii and III.B.2.iii, *supra*.

Second, as the Regional Board knows, the canyon collectors have finite capacities. Transboundary flows above the capacities of the canyon collectors will necessarily pass over the collectors' terminal weirs and continue along the natural features in which the canyon collectors are situated. By constructing canyon collectors to mitigate dry weather transboundary flows, USIBWC did not assume an open-ended obligation to capture all such flows.

Imposing such a general obligation would impose on USIBWC a legal responsibility to treat an unlimited quantity of Tijuana's waste. That is both practically untenable and legally beyond the Regional Board's power. The 1944 Treaty is the means by which the United States assumes any such responsibilities. The CWA expressly cannot impair or affect the provisions of any treaty and so an NPDES permit cannot supplant the 1944 Treaty a vehicle for regulating cross-border pollution. 33 U.S.C. § 1371(a)(3). Nor can State law, which is preempted by the 1944 Treaty and in any case cannot usurp or direct the federal government's authority in matters of foreign policy. See Part I.B, *supra*.

Third, the existence of a dry weather Canyon Collector Flow Event does not necessarily imply improper operations and maintenance, even when the flow through the collector was at or below the collector's rate capacity. As the Regional Board also knows, transboundary flows may contain trash or sediment that can occlude the collectors' inlets. Thus, the Tentative Order, like USIBWC's current NPDES permit, requires that USIBWC conduct daily inspections of the canyon collectors and promptly remove any debris that might prevent flows from entering the inlets. USIBWC does this, but despite its compliance with appropriate inspection and cleaning protocols, trash- or sediment-bearing flows

may still occur without warning for reasons beyond USIBWC's control. So, the Board cannot reasonably presume that every dry weather Canyon Collector Transboundary Flow Event is the result of improper maintenance practices. A categorical prohibition on dry weather Canyon Collector Flow Events is therefore unreasonable.

Response

Regarding discharge, please refer to Response to Comment No. 1.13. Regarding the definition of "Canyon Collector" and "Facility," please refer to Response to Comment Nos. 1.30 and 1.32. Regarding the limited authorization of the Tentative Order, please refer to Response to Comment No. 1.9.

The Discharger is required to properly operate and maintain its Facility. (40 CFR § 122.41(e).) Proper operations and maintenance of the Facility may include clearing any debris or sediment that enters a canyon collector system on an as-needed basis, which may be more than once a day. If a canyon collector inlet becomes blocked or clogged "without warning for reasons beyond the Discharger's control," the Discharger should attempt to clear the blockage or clog as soon as reasonably possible to reduce or eliminate the Canyon Collector Transboundary Flow Event. As part of the San Diego Water Board's prosecutorial discretion, it may consider the Discharger's timely and proper maintenance of the canyon collectors. Thus, it will be important for the Discharger to maintain a detailed written log of the daily canyon collector inspections and maintenance, as required by revised section 6.3.2.1.2.5.2 of the Tentative Order.

To assist the San Diego Water Board in determining compliance with the Tentative Order, section 6.3.2.1.2.5.2 of the Tentative Order has been revised for clarity and to require a written log of daily canyon collector inspections.

Action Taken

<u>Section 6.3.2.1.2.5.2 of the Tentative Order has been revised as follows:</u>

6.3.2.1.2.5.2. Inspection and Preventative Maintenance Program. The Flow Prevention/Response Plan shall provide a description of the routine inspection and preventative maintenance program for the Discharger's wastewater system. The description shall include schedules, protocols, documentation procedures, and associated activities for inspection, preventative maintenance, and cleaning. The documentation procedures shall include the system used to document the inspection and preventive maintenance activities, such as work orders. The Flow Prevention/Response Plan shall include exercising and testing of all key systems and components to verify adequate operation of the system and associated backup alarms.

Each canyon collector system shall be inspected daily.

The Flow Prevention/Response Plan shall provide for daily inspections of each canyon collector system and maintenance of a written log describing 1) the date, time, location and duration of the inspection, 2) visual observations and photos of sediment and trash accumulation in the canyon collector basin, 3) any steps taken to remove accumulated sediment and trash, including estimates of the volume removed and how it was disposed, and 4) the condition of the canyon collector after maintenance, including if any sediment or trash was not able to be removed. The logs shall be submitted to the San Diego Water Board monthly as part of the monthly self-monitoring reports. ~~Each canyon collector system shall be inspected daily.~~ The Flow Prevention/Response Plan shall also provide a description of the specific circumstances, mechanisms, and frequency of occurrence whereby the hydraulic capacity of the canyon collector system~~s~~ is reduced below its maximum design capacity from stoppage, blockage, debris obstructions, vandalism or other causes that impact or limit the flow of wastewater into ~~and through~~ the canyon collector systems and to the treatment plant. The Flow Prevention/Response Plan shall identify the best practices and procedures employed by the Discharger to reduce, prevent, or eliminate the severity and impact of ~~these mechanisms~~ reductions in canyon collector capacity and to restore the system's functional capacity to handle ~~transboundary wastewater flows~~ Canyon Collector Transboundary Flow Events at the maximum design capacity flow rate as quickly as possible. These practices and procedures shall also address the steps taken or planned to ensure adequate clearing and removal of accumulated sand/silt and blockages and correction of all capacity deficiencies in the canyon collector systems within 96 hours following a storm event of 0.1 inches or greater (i.e. 24 hours after wet weather, as the term wet weather is defined in Attachment A of this Order).

1.43. Comment

VI. Attachment F - Fact Sheet

C. Fact Sheet, Attachment F, section 4.1.3

This provision references a "Discharge Prohibition 3.4" which is nowhere else included in the Tentative Order. We assume that this is a drafting error. But if the Regional Board intends to include a fourth discharge prohibition, then we request notice and an opportunity to comment on that provision before the permit is finalized.

Response

Section 4.1.3 of the Fact Sheet is a drafting error.

Action Taken

Section 4.1.3 of the Fact Sheet has been removed.

1.44. Comment

VI. Attachment F - Fact Sheet

D. Fact Sheet, Attachment F, Sections 6.2.2.1.2. and 6.2.2.1.3.

USIBWC hereby references and incorporates its comments regarding the Flow Prevention/Respond Plan Provisions (Part III.E, *supra*) to Attachment F, Sections 6.2.2.1.2. and 6.2.2.1.3

Response

Please refer to Response to Comment Nos. 1.18, 1.19, and 1.20.

Action Taken

Please refer to Response to Comment Nos. 1.18, 1.19, and 1.20.

1.45. Comment

VI. Attachment F - Fact Sheet

E. Fact Sheet, Attachment F, section 6.2.2.1.3

This provision restates that definition of Facility set forth at A-9 and asserts that “the canyon collectors are considered part of the treatment works of the Facility.” We refer the Regional Board to our comments in response to Discharge Prohibition 3.1 (Part III.B.2.iii) and to the definition of Facility (Part IV.C); for the reasons set forth in those comments, the canyon collectors’ concrete aprons and terminal weirs are not properly considered to be “part of the treatment works of the Facility.”

This provision also purports to extend Discharge Prohibition 3.1 to “any dry weather discharge of waste overflowing the canyon collectors.” This assertion is ambiguous and improper for several reasons. First, if the Regional Board wishes to define the scope of Discharge Prohibition 3.1, it should do so either in Discharge Prohibition 3.1 itself, or in Section 4.1 of the Fact sheet, which purports to set forth the rationale and scope of the discharge specifications in the Tentative Order. Doing so instead in a section of the permit applicable to “Special Studies and Additional Monitoring Requirements” creates unnecessary confusion.

Second, the meaning of the phrase “discharge of waste overflowing the canyon collectors” is ambiguous and nowhere defined. For the reasons discusses at length in response to Discharge Prohibition 3.1, a Canyon Collector Transboundary Flow Event that never enters the canyon collectors’ diversion box is not a “discharge” within the meaning of the CWA or the definition set forth at A-8 because it entails no “addition” of pollutants. If the Board intends a different meaning of the word “discharge” in Attachment F, section 6.2.2.1.4, then out of fairness it should make that intent plain, provide an explanation of its decision, and provide USIBWC with an opportunity to meaningfully respond.

Response

Regarding the definition of “Canyon Collector” and “Facility,” please refer to Response to Comment Nos. 1.30 and 1.32. Regarding discharge, please refer to

Response to Comment No. 1.13. Regarding Discharge Prohibition 3.1, please refer to Response to Comment No. 1.14. Regarding the Discharger's request for an additional opportunity to comment, please refer to Response to Comment No. 1.23.

Action Taken

Please refer to Response to Comment Nos. 1.13, 1.14, 1.23, 1.30, and 1.32.

1.46. Comment

VI. Attachment F - Fact Sheet

F. Fact Sheet, Attachment F, Sections 6.2.5.3. and 7.1.1.

USIBWC hereby references and incorporates its comments regarding the Influent Limitations and Source Control Provisions (Part III.M, *supra*) to Attachment F, Sections 6.2.5.3. and 7.1.1.

Response

Please refer to Response to Comment No. 1.28.

Action Taken

<u>Please refer to Response to Comment No. 1.28.</u>

1.47. Comment

The Discharger's Suggested Revisions also included the following comment to section 6.3.1.2, of the Tentative Order: This section should be deleted to the extent it depends on procedures under California law for inspection, monitoring, and entry for the reasons discussed in Part V of USIBWC's Comment Letter. Specifically, section 308(c) of the CWA provides sovereign immunity protection from state law authorities to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources owned or operated by the United States. The Regional Board is, therefore, prohibited from applying and enforcing procedures for inspection, monitoring, and entry provided for in the California Water Code.

Response

Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

Action Taken

None.

1.48. Comment

The Discharger's Suggested Revisions also included revisions to Tentative Order sections 6.3.2.6 – 6.3.2.6.2.5 and following comment to Tentative Order section 6.3.2.6: USIBWC will share its existing asset management plans that cover the SBIWTP. However, the Regional Board cannot dictate how a federal agency

prioritizes its expenditures or manages its budget. All expenditures are subject to the Anti-Deficiency Act and the budget supported and submitted to Congress. Further, federal agency cannot project what funding they will receive from Congress for each budget cycle. The Discharger's Suggested Revisions also included the following comment to Tentative Order section 6.3.2.6.1.3.: The Regional Board cannot dictate how a federal agency prioritizes its expenditures or manages its budget. All expenditures are subject to the Anti-Deficiency Act and the budget supported and submitted to Congress. The Discharger's Suggested Revisions also included the following comment to Tentative Order section 6.3.2.6.2.4.: Federal agency cannot project what funding they will receive from congress for each budget cycle.

The Discharger's Suggested Revisions also included revisions to Fact Sheet section 6.2.2.3 and the following comment to Fact Sheet Section 6.2.2.3: USIBWC will share its existing asset management plans that cover the SBIWTP. However, the Regional Board cannot dictate how a federal agency prioritizes its expenditures or manages its budget. All expenditures are subject to the Anti-Deficiency Act and the budget supported and submitted to Congress. Further, federal agency cannot project what funding they will receive from Congress for each budget cycle.

Response

The San Diego Water Board appreciates that the Discharger is willing to share its existing asset management plan for the SBIWTP. The Tentative Order memorializes the Discharger's commitment to share its asset management plan and establishes requirements for what the asset management plan should include. Operations and maintenance of an aging facility, such as the SBIWTP, is an ongoing task. Asset management can help the Discharger maximize the value of its capital as well as its operation and maintenance dollars. Asset management provides utility managers and decision-makers with critical information on capital assets and timing of investments. Some key steps for asset management are making an inventory of critical assets, evaluating their condition and performance, and developing plans to maintain, repair, and replace assets and to fund these activities. Asset management will help the Discharger plan for and prioritize operations and much needed maintenance of the Facility. A well functioning treatment system will better protect water quality and beneficial uses. For more information on asset management, please refer to USEPA's website on the topic. (Available at: https://www.epa.gov/sustainable-water-infrastructure/asset-management-water-and-wastewater-utilities.) The San Diego Water Board is not dictating how the Discharger's expenditures or managing its budget, but merely requiring the Discharger to identify and prioritize asset and maintenance operations.

Compliance with the Tentative Order is a reasonable and necessary expense. (See Exec. Order No. 12088*, supra*, 43 Fed.Reg. at p. 47708 ["The head of each Executive agency shall ensure that sufficient funds for compliance with

applicable pollution control standards are requested in the agency budget."], superseded in part by Exec. Order No. 13148, 65 Fed.Reg. 24595 (Apr. 26, 2000).) The San Diego Water Board's mission is to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses. This Tentative Order furthers that mission by requiring the Discharger to plan for proper operations and maintenance of its Facility. The costs of compliance with this provision of the Tentative Order are reasonable given the need for proper operations and maintenance of the Facility and compliance with applicable permit requirements for the protection of water quality and beneficial uses. How the Discharger chooses to use its funds to comply with the Tentative Order remains vested in its discretion.

Regarding the method of compliance, please refer to Response to Comment No. 1.18.

Action Taken

Sections 6.3.2.6 – 6.3.2.6.3 of the Tentative Order have been revised. Please refer to the redline/strikeout text in the revised Tentative Order.

1.49. Comment

The Discharger's Suggested Revisions also included revisions to Tentative Order section 6.3.5.4.1.

Response

Section 6.3.5.4.1 of the Tentative Order is titled, General Requirements Applicable to Sludge (biosolids) Disposal in the U.S. The provisions for sludge (biosolids) disposal only apply to disposal sites and activities in the U.S., as stated in the section's title. Therefore, the Discharger's suggested revision is duplicative of the title and unnecessary.

Action Taken

None.

1.50. Comment

The Discharger's Suggested Revisions also included revisions to Tentative Order section 6.3.5.5.

Response

Section 6.3.5.5 of the Tentative Order was removed because it is duplicative of other requirements in the Order.

Action Taken

Section 6.3.5.5 of the Tentative Order was removed.

1.51. Comment

The Discharger's Suggested Revisions also included revisions to the definition of "initial dilution" in Attachment A.

Response

The definition of "initial dilution" is from the Ocean Plan. (Ocean Plan, Appendix I, Definition of Terms.) The definition of "initial dilution" is appropriate because the Discharger discharges to the Pacific Ocean.

Action Taken

None.

1.52. Comment

The Discharger's Suggested Revisions also included revisions to the definition of "wet weather" in Attachment A and made the comment that "Rain may fall in other parts of the watershed and not be detected at Goat Canyon and still provide significant stormwater flow to the lower watershed."

Response

The Discharger may use other rain gauges in the Tijuana River Watershed that effect the stormwater flow. The Goat Canyon Pump Station rain gauge shall be maintained. The Goat Canyon rain gauge shall be used as a basis for determining wet weather if no better rain gauge data is available. Information from other rain gauges may be provided for additional context.

Action Taken

Part 2 of Attachment A of the Tentative Order has been revised as follows:

Wet Weather

Wet weather is the period of time when a storm event produces 0.1 inches or greater within a 24-hour period plus 72 hours after, based on the Goat Canyon Pump Station rain gauge, unless otherwise defined by another regulatory mechanism (e.g., a TMDL). Other rain gauges in the Tijuana River watershed may be provided for the San Diego Water Board to assess if transboundary flows in the Tijuana River main channel are attributable to wet weather.

1.53. Comment

The Discharger's Suggested Revisions also included revisions to portions of Attachment D.

Response

Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

Action Taken

None.

1.54. Comment

The Discharger's Suggested Revisions also included revisions to section 3.1 of the MRP.

Response

The San Diego Water Board has removed question numbers 2 and 3 in section 3.1 of the MRP (Attachment E of the Tentative Order) in response to the Discharger's comment. The San Diego Water Board does not agree that question number 6 needs to be modified. Influent monitoring is used to determine compliance with influent and percent removal limitations. Compliance with these limitations is a permit condition.

Action Taken

Attachment E, section 3.1 of the Tentative Order has been revised as follow:

Influent monitoring of a wastewater stream prior to entering the treatment plant is necessary to address the following questions:

(1) Is the source control program effectively controlling pollutant loads from industrial facilities?

~~(2) Is the source control program effectively controlling illicit discharges into canyons and the Tijuana River?~~

~~(3) What is the frequency of illicit discharges into canyons and the Tijuana River which can cause or contribute to an upset in the wastewater process?~~

1.55. Comment

The Discharger's Suggested Revisions also included revisions to MRP section 5.2.

Response

Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

Action Taken

None.

1.56. Comment

The Discharger's Suggested Revisions also included revisions to Fact Sheet section 7.1.1.

Response

Section 7.1.1 of the Fact Sheet has been revised to remove the reference to Mexico.

Action Taken

<u>Section 7.1.1 of the Fact Sheet has been revised as follows:</u>

Influent monitoring is required to assist with source control investigations ~~in Mexico~~, to assess the performance of the treatment facility, and to evaluate compliance with influent and effluent limitations. Influent monitoring requirements have been carried over from Order No. R9-2014-0009.

1.57. Comment

The Discharger's Suggested Revisions also included revisions to Fact Sheet section 7.4.

Response

The San Diego Water Board may direct the Discharger to participate in new regional monitoring efforts. Impacts from discharges through ocean outfalls are not isolated around the outfall. Ocean currents can transport pollutants throughout the Southern California Bight. Regional monitoring programs evaluate impacts on a larger scale and can be used to provide context to the monitoring near the outfall. Regarding compliance with state laws, please refer to Response to Comment No. 1.35.

Action Taken

None.

1.58. Comment

The Discharger's Suggested Revisions also included revisions to Fact Sheet section 3.3.4., Anti-Backsliding Requirements.

Response

The Discharger's suggested revision is not necessary for the explanation of anti-backsliding.

Action Taken

None.

2. City of San Diego

The City of San Diego (City) noted that the following comments also apply to the Tentative Order as the City and USIBWC conduct a joint ocean receiving water monitoring program. References to City can be interpreted as the City and USIBWC.

2.1. Comment

Provide References for TCDD Toxicity Equivalence Table (Page A-14 of Attachment A)

We have been unable to find references to the numbers used in this table, which are not consistent with the most recent United States Environmental Protection

Agency (USEPA) guidance that we have (2010). Please provide a reference for these equivalencies.

Response

The TCDD toxicity equivalence factors on page A-15 of Attachment A of the Tentative Order are from page 71 of the *Water Quality Control Plan for Ocean Waters of California, California Ocean Plan* (Ocean Plan).

Action Taken

None.

2.2. Comment

Modify Monitoring Provision on Minimum Levels (Section 1.9 of Attachment E)

The passages do not seem to align. Please revise the General Monitoring Provisions in section 1.9 so they are consistent with Note 6 of Table E-3.

Response

Attachment E, section 1.9 and Table E-3, Footnote 6 of the Tentative Order has been revised as requested.

Action Taken

The following sections of the Tentative Order have been revised as follows:

Section 1.9 of the MRP:

The Discharger shall ensure that analytical procedures used to evaluate compliance with effluent limitations or performance goals established in this Order use minimum levels (MLs) no greater than the applicable effluent limitations or performance goals and are consistent with the ~~requirements of 40 CFR part 136 and/or~~ MLs specified in Appendix II of the Ocean Plan, or otherwise approved by USEPA and authorized by the San Diego Water Board. If no authorized ML value is below the effluent limitation or performance goal, then the ~~method must achieve an ML no greater than the lowest ML value provided in 40 CFR part 136 and/or the Ocean Plan.~~ Discharger shall select the lowest ML value and its associated analytical method, which may be above the effluent limitation or performance goal. If the Ocean Plan does not include an ML for a parameter, the Discharger shall ensure the method detection limit (MDL) is consistent with the MDL provided in the method approved under 40 CFR part 136.

Table E-3, Footnote 6 of the MRP:

6. ~~As required under~~ Analytical test methods shall be consistent with the requirements of 40 CFR part 136. The analytical test methods for compliance determinations shall use MLs specified in Appendix II of the Ocean Plan. The Discharger shall select the MLs that are below the effluent limitation or performance goal. If no ML value is below the effluent limitation or performance

goal, the Discharger shall select the lowest ML value and its associated analytical method, which may be above the effluent limitation or performance goal. If the Ocean Plan does not include an ML for a parameter, the Discharger shall ensure the MDL is consistent with the MDL provided in the method approved under 40 CFR part 136.

2.3. Comment

Correct latitude/Longitude Coordinates (Table E-1 of Attachment E)

The lat/long for SD-17 in the table is incorrect and should be 32°31.918N 117°11.280W.

Response

The San Diego Water Board has made this change.

Action Taken

Table E-1 of the MRP has been revised as follows:

Discharge Point Name	Monitoring Location Name	Type of Monitoring Location	Monitoring Location Description [1]
--	SD-17	Trawl Station	Latitude: 32°~~32~~31.~~200~~918'N; Longitude: 117°11.~~430~~280'W; Depth: 99 ft (30 m)

2.4. Comment

Change "Dissolved Iron" to "Total Iron" (**Table E-3 of Attachment E)**

The lab does not routinely analyze for **dissolved metal constituents, which adds additional steps in the lab procedure. Please update to Total Iron instead of Dissolved Iron.**

Response

While monitoring to total iron is acceptable as long as a relationship between total and dissolved iron can be estimated, monitoring for dissolved iron is preferred. The Discharger did not comment on the requirement to monitor for dissolved iron; therefore, the San Diego Water Board is retaining the requirement to monitor for dissolved iron.

Action Taken

None.

2.5. Comment

Clarify Frequency of Reference Toxicant Testing (Section 3.3.5.4 of Attachment E)

"Monthly" reference toxicant testing should be changed to "quarterly" to match testing frequency, unless this means that a reference toxicant test ran within the same month as the effluent test is sufficient? Please clarify.

Response

Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to West Coast Marine and Estuarine Organisms (EPA/600/R-95/136, 1995) requires at least monthly reference toxicant testing if the laboratory maintains breeding cultures of the test organisms and concurrent reference toxicant testing if the laboratory receives the test organisms from outside the test laboratory. Generally, concurrent reference toxicant testing is required for most west coast marine species. The San Diego Water Board has modified the Tentative Order to clarify that reference toxicant testing shall be in accordance with the method.

Action Taken

Section 3.3.5.4 of the MRP has been revised as follows:

~~Monthly r~~Reference toxicant testing ~~is sufficient if~~ shall be conducted in accordance with *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to West Coast Marine and Estuarine Organisms* (EPA/600/R-95/136, 1995). All reference toxicant test results should be reviewed and reported using the effects concentration at 25 percent (EC_{25}).

2.6. Comment

Delete Repeated Words (Section 3.3.9.4 of Attachment E)

Remove the fourth sentence "The final TRE/TIE report." In the fifth sentence, pleases confirm that this is intended to state toxicity reduction evaluation (TRE) only or change to "TRE/TIE" if that is the intent.

Response

The repeated “The final TRE/TIE” is not included in the Tentative Order.

Action Taken

None.

2.7. Comment

Section 4 of Attachment E

In the third paragraph, in the last sentence, "rational" should be changed to " rationale".

Response

The San Diego Water Board has made this correction.

Action Taken

Section 4 of the MRP has been revised as follows:

…The Discharger may also submit a list of proposed changes with supporting rationale to these monitoring requirements that it considers to be appropriate to the San Diego Water Board for approval....

2.8. Comment

Offshore Water Quality Monitoring for Phosphorus (Table E-5 of Attachment E)

While the City currently conducts a plume tracking program, the City would like to point out that some analytical methods for phosphorus in saltwater generate hazardous waste and, if this were to be required to be analyzed in the future, the City and USIBWC would likely outsource this analysis because of the nature of the hazardous waste produced.

Response

To save on potential monitoring costs, the San Diego Water Board has modified the Tentative Order to remove the requirement to monitor for total phosphorus in the receiving water entirely.

Action Taken

The following sections of the Tentative Order have been revised as follows:

Table E-5 of the MRP:

Parameter	Units	Sample Type	Offshore Sampling Frequency[2]	Kelp/Nearshore Sampling Frequency[2]
~~Phosphorus, Total (as P)[7]~~	~~mg/L~~	~~Grab or Profile[8]~~	~~1/Quarter~~	~~1/Quarter~~

Section 7.2.1.2.3 of the Fact Sheet, Attachment F:

This Order requires monitoring for ammonia (as N)~~,~~ and total nitrogen~~, and total phosphorus (as P)~~ at the offshore and kelp/nearshore monitoring locations to evaluate compliance with receiving water limitations and to assist with identification of the wastewater plume discharged from the SBOO.

2.9. Comment

Clarify Human Marker HF183 Monitoring Requirement (Section 4.2.2 of Attachment E [Attachment E, section 4.1.2.2 of the Tentative Order for the SBIWTP])

Please clarify the statement "more than 50% of the time". Does this mean over a month, a rolling year, or some other timeframe?

Response

HF183 monitoring is triggered if a single station exceeds the bacteria receiving water limitations more than 50 percent of the time within a rolling one-year period for offshore monitoring locations and a rolling quarterly period for kelp/nearshore stations. [VRR BOOKMARK]

Action Taken

The following sections of the Tentative Order have been revised as follows:

Table E-3, Footnote 8 of the MRP:

8. Monitoring is only required if the overall compliance rate with the receiving water limitations for bacterial characteristics at section 5.1.1 of the Order is below 90% within a rolling one-year period or a single monitoring location exceeds the bacteria receiving water limitations more than 50% of the time within a rolling one-year period for offshore monitoring locations and a rolling quarterly period for ~~at the offshore and~~ kelp/nearshore monitoring locations, and the source of the exceedances is unknown. If required, the Discharger shall monitor the effluent the same day as the parameter is monitored in the receiving water.

Table E-5, Footnote 11 of the MRP:

11. Human Marker HF183 monitoring is required only if the overall compliance rate with the receiving water limitations for bacterial characteristics at section 5.1.1 of this Order is below 90% within a rolling one-year period or a single monitoring location exceeds the bacteria receiving water limitations more than 50% of the time within a rolling one-year period for offshore monitoring locations and a rolling quarterly period for ~~at the offshore and~~ kelp/nearshore monitoring locations, and the source of the receiving water limitation exceedances is unknown.

Section 4.1.2.2 of the MRP:

The Human Marker HF183 (HF183) monitoring requirements specified below is required if the overall compliance rate with the receiving water limitations for bacterial characteristics at section 5.1.1 of this Order is below 90% within a rolling one-year period or a single monitoring location exceeds the bacteria receiving water limitations more than 50% of the time within a rolling one-year period for offshore monitoring locations and within a rolling quarterly period for ~~at the offshore and~~ kelp/nearshore monitoring locations ~~designated at I-3, I-5, 1-7 to I-14, I-16, I-18 to I-26, I-30, I-32, I-33, and I-36 to I-40~~, and the source of the exceedances is unknown…..

Section 7.1.2.1 of the Fact Sheet, Attachment F:

This Order requires monitoring the effluent for fecal coliform and enterococci if the overall compliance rate with the receiving water limitations for bacterial characteristics at section 5.1.1 of this Order is below 90% within a rolling one-year period or a single monitoring location exceeds the bacteria receiving water

limitations more than 50% of the time within a rolling one-year period for offshore monitoring locations and a rolling quarterly period for ~~at the offshore and/or~~ kelp/nearshore monitoring locations and the source of the receiving water exceedances is unknown….

Section 7.2.1.2.2 of the Fact Sheet, Attachment F:

This Order requires the Discharger to monitor for the Human Marker HF183 if the overall compliance rate with the receiving water limitations for bacterial characteristics at section 5.1.1 of this Order is below 90% within a rolling one-year period or a single monitoring location exceeds the bacteria receiving water limitations more than 50% of the time within a rolling one-year period for offshore monitoring locations and a rolling quarterly period for ~~at the offshore and~~ kelp/nearshore monitoring locations, and the source of the exceedances is unknown….

2.10. Comment

Human Marker HF183 Monitoring Requirements (Section 4.2.2 of Attachment E [Attachment E, section 4.1.2.2 of the Tentative Order for the SBIWTP])

HF183 identifies human waste but doesn't distinguish where that waste came from. Requiring HF183 monitoring to determine a specific source, when there are multiple point and non-point sources that exist for the SBOO monitoring region, seems to be of limited informational value compared to the potential cost, particularly since the correlation between the risk to public and/or environmental health and the presence of HF183 has not yet been fully assessed.

Response

Comment noted. The San Diego Water Board agrees that there are other sources of HF183 in the vicinity of the SBOO, particularly the Tijuana River. As stated in the Fact Sheet, section 7.2.1.2.2, HF183 monitoring would not be required if the Discharger demonstrates that the Tijuana River or some other source is likely the cause of the elevated bacteria results.

Action Taken

No changes were made to the Tentative Order as a result of this comment.

2.11. Comment

Clarify Spectrophotometric pH Monitoring Requirements (Section 4.2.3 of Attachment E [Attachment E, section 4.1.2.3 of the Tentative Order for the SBIWTP])

It is unclear from the wording in this section if the requirement is to re-calibrate all pH data, and for which reports. Important for the San Diego Water Board to be aware that 1) we will not be able to re-calibrate pH data from kelp stations sampled weekly during non-quarterly months (which is fine with us, as these data are not used for biennial report assessments) and 2) there will likely be a delay in

the availability of pH/TA data from bottle samples sent to Dickson Lab for analysis, resulting in difficulties reporting adjusted pH values via California Environmental Data Exchange Network (CEDEN), monthly water quality reports, possibly even Interim/Biennial reports.

Response

The San Diego Water Board modified the text to clarify that pH calibration and aragonite saturation calculations are only required during the quarterly sampling events. The San Diego Water Board acknowledges that reporting of calibrated pH results and calculations of aragonite saturation state may be delayed due to laboratory analyses outside of the City's control.

Action Taken

The following sections of the Tentative Order have been revised as follows:

Section 4.1.2.3.2 of the MRP:

…. The Discharger shall use the spectrophotometric pH and total alkalinity results to calibrate and adjust the pH samples collected quarterly by CTD and calculate the aragonite saturation state. Calibration of pH and calculation of aragonite saturation state is only required for the kelp/nearshore monitoring locations once per quarter. Results for alkalinity, the calibrated pH, and aragonite saturation state shall be reported in the interim and biennial receiving water monitoring reports described in section 4.1.5 of this MRP. Due to laboratory delays, the results for the last quarter in the monitoring period may be excluded from the interim and/or biennial receiving water monitoring reports if the data are not available. If the results are not included in the interim and/or biennial receiving water monitoring report, the Discharger shall submit the results by email to SanDiego@waterboards.ca.gov.

Section 4.1.5.1.1 of the MRP:

…These reports are described below under sections 4.1.5.1.2 and 4.1.5.1.3 and cover the following monitoring requirements:

> Shoreline, kelp/nearshore, and offshore water quality, if available (sections 4.1.1 and 4.1.2 of this MRP);

Section 4.3 of the MRP:

In addition to submitting SMRs, the Discharger shall also ensure that all the receiving water monitoring results are submitted to CEDEN no later than 120 days after ~~analyses have been completed~~ reports are received. If the receiving water monitoring is conducted jointly with other dischargers to the SBOO, the Discharger shall coordinate the submittal of the receiving water monitoring results with other agencies discharging through the SBOO to ensure data is not duplicated in CEDEN….

2.12. Comment

Clarify Fish Tissue and Sediment Monitoring Parameters (Tables E-6 and E-7, Attachment E)

Please make the target analyte list for fish tissue consistent with the analyte list in sediments, as it will significantly facilitate lab work if there is the same analyte list for both. Also, for clarity, please list out all polychlorinated biphenyls (PCBs).

Response

The San Diego Water Board has made this change.

Action Taken

Table E-7 has been revised to be consistent with Table E-6, and list of PCB analytes have been added to Table E-7.

Section 7.2.1.4 of the Fact Sheet, Attachment F has been revised as follows:

…Fish and invertebrate monitoring requirements have been carried over from the previous Order, Order No. R9-2013-0006, except this Order makes the parameters monitored in fish tissue consistent with the parameters monitored in sediment.

2.13. Comment

Use Consistent Chemical Name for Trimethylnaphatalene (Tables E-6 and E-7, Attachment E)

Please use the same parameter name for consistency. It is currently listed as 1,6,7-trimethylnaphthalene in sediment chemistry and 2,3,5-trimethylnaphthalene in fish tissues.

Response

The San Diego Water Board has made this change.

Action Taken

1,6,7-trimethylnapthalene is now used in Tables E-6 and E-7 in the MRP (Attachment E).

2.14. Comment

Correct Typographical Error (Table E-6, Attachment E)

In the Notes below Table E-6, in Note 2, "… (PBDEs or BDEs) may delayed until …" should be changed to "… (PBDEs or BDEs) may be delayed until …".

Response

The San Diego Water Board has made this change.

Action Taken

Table E-6, Footnote 6 of the MRP has been revised as follows:

6. Monitoring for polybrominated diphenyl ethers (PBDEs or BDEs) may be delayed until January 2022 to allow the Discharger's laboratory sufficient time to validate the analytical method.

2.15. Comment

Correct Number of Locations (Section 4.4.1 of Attachment E [Attachment E, section 4.1.4.1 of the Tentative Order for the SBIWTP)

In the last sentence, "… SD-18), two areas up coast of …" should be changed to "… SD-18), three areas up coast of …"

Response

The San Diego Water Board has made this change.

Action Taken

Section 4.1.4.1.1 of the MRP has been revised as follows:

…These monitoring locations represent two areas near Discharge Point No. 001 (i.e., monitoring locations SD-17 and SD-18), ~~two~~ three areas up coast of Discharge Point No. 001 (i.e., monitoring locations SD-19, SD-20, and SD-21), and two areas down coast of Discharge Point No. 001 (i.e., monitoring locations SD-15 and SD-16).

2.16. Comment

Clarify Southern California Bight Monitoring Requirements (Section 5.2 of Attachment E)

"When feasible, the Discharger shall reference the results and conclusions of the Southern California Bight Regional Monitoring Program to provide comparison and perspective on the results of the receiving water monitoring conducted by the Discharger. This analysis and comparison shall be reported in the receiving water monitoring reports described in section 4.6.1 of this MRP." We already put our results into context with Bight survey results in the discussion/summaries of each relevant chapter, but we do not include analyses directly comparing our data to Bight data. Please confirm that our current method of reporting is sufficient for this purpose.

Response

The current method of referencing the Southern California Bight Regional Monitoring Program is sufficient.

Action Taken

None.

2.17. Comment

Change Submittal Date (Section 6.3 of Attachment E)

Please change the date we submit recommendations to the San Diego Water Board to October 31, 2022, so that we have sufficient time to renew the contract and include updated work that may be needed if the recommendation is to continue the study at that time.

Response

The San Diego Water Board has made this change.

Action Taken

The following sections of the Tentative Order have been revised as follows:

Section 6.3 of the MRP:

…After completion of the study, by ~~December 1, 2023~~ October 31, 2022, the Discharger shall submit to the San Diego Water Board recommendations for whether the study should be extended.

Table E-11 of the MRP:

Report	Location of requirement	Due Date
Coastal Remote Sensing Study Recommendations Report	Section 6.3 of this MRP	No later than ~~December 1, 2023~~ October 31, 2022

2.18. Comment

Clarify Quarterly Reporting Requirement (Table E-8, Attachment E [Table E-10, Attachment E of the Tentative Order for the SBIWTP])

Please clarify that analytical data for quarterly monitoring can be added to the closest monthly reports and are not required as separate reports.

Response

Receiving water monitoring results for offshore monitoring locations may be included in the monthly self-monitoring reports. All other results for quarterly analyses must be included in the quarterly monitoring report.

Action Taken

None.

2.19. Comment

Clarify Annual Reporting Requirement (Table E-8, Attachment E) (Table E-8, Attachment E [Table E-10, Attachment E of the Tentative Order for the SBIWTP])

Annual reporting for Operations and laboratory data has been discontinued since 2015. Please clarify what reporting the annual reporting applies to here.

Response

Table E-10 of the MRP (Attachment E of the Tentative Order) provides both the monitoring period and reporting frequency. There are several annual monitoring requirements in the Tentative Order (e.g., wet weather transboundary flow monitoring and fish tissue monitoring); therefore, Table E-10 must include the annual monitoring period. However, this data is submitted in other reports. This comment is also applicable to the semiannual monitoring period. The San Diego Water Board has modified Table E-10 of the MRP to make the self-monitoring report due date "not applicable" for the semiannual and annual sampling frequencies.

Action Taken

Table E-10 of the MRP has been revised as follows:

Sampling Frequency	Monitoring Period Begins On…	Monitoring Period	SMR Due Date
Semiannually	Closest of January 1 or July 1 following (or on) permit effective date	January 1 through June 30 July 1 through December 31	~~August 1~~ ~~February 1~~ Not Applicable
Annually	January 1 following (or on) the permit effective date.	January 1 through December 31	Not Applicable ~~March 1~~

3. City of Imperial Beach

3.1. Comment

The updated provisions in the Tentative Order provides an important and necessary update to the current discharge permit and adds new monitoring requirements that supports IBWC in its mission to provide binational coordination on transboundary pollution issues. The updated provisions in the Tentative Order provides an important and necessary update to the current discharge permit and adds new monitoring requirements that supports IBWC in its mission to provide binational coordination on transboundary pollution issues.

This Tentative Order includes many of the important elements the City discussed with Regional Board staff. The City of Imperial Beach strongly supports the drafted tentative order where the modifications and additions to the permit improve the management of operations at the ITP, establish an open and transparent process for reporting, improve the management of transboundary pollution issues more effectively, and fill water quality monitoring data gaps for the receiving waters in the Tijuana River Valley.

The proposed Tijuana River Valley Receiving Water Monitoring Program is a vital component of the new provisions in the tentative order. Understanding the extent

of impacts from transboundary pollution for the receiving waters in the U.S. will help IBWC coordinate more effective wastewater and pollution control programs with their counter parts in Mexico. Monitoring receiving water quality is critical to understanding what pollutants are and are not coming from the canyon collectors, particularly Smugglers Gulch and Goat Canyon; how pollutants from the eastern canyon collectors mix with flows from the IBWC flood control channel; and how combined flows impact downstream receiving waters.

Response

Comment noted. The San Diego Water Board reduced the Tijuana River Valley Monitoring Program requirements as several other entities, including the City of Imperial Beach, are conducting monitoring that is useful for evaluating impacts of transboundary flows. The San Diego Water Board encourages that the Discharger collaborate with the City of Imperial Beach and other entities monitoring in the Tijuana River. See Response to Comment No. 1.31.

Action Taken

None.

3.2. Comment

One recommended improvement to the receiving water monitoring program is to include more frequent monitoring at Dairy Mart Bridge (TRV-2 location) whenever transboundary flows occur. During the last permit cycle, IBWC temporarily added Dairy Mart Bridge to their list of weekly Shoreline Water Quality Monitoring Program and collected bacterial samples whenever flow was present in the river. This weekly data proved to be extremely valuable in getting Mexico to restart Pump Station CILA after wet weather events by providing conclusive monitoring data that showed the level of contamination of transboundary flows. As soon as IBWC stopped collecting this bacteria data at Dairy Mart Bridge, we lost leverage over prioritizing the operation of Pump Station CILA. Furthermore, the Officials in Mexico used this lack of data to challenge the facts about sewage contamination within transboundary flows. As a practical matter, water quality monitoring for the purpose of documenting the level of pollution in transboundary flows must be a component of Attachment E to specifically address misinformation about the presence or absence of pollution.

Response

The San Diego Water Board has retained the requirement to conduct water quality monitoring at Dairy Mart Bridge; however, the Tentative Order reduced the frequency from monthly to quarterly for the water quality monitoring parameters in Table E-8. This frequency is acceptable due to the monitoring conducted by other entities in the Tijuana River Valley. In response to increasing frequency of bacteria monitoring at Dairy Mart Bridge, the San Diego Water Board included a recommendation that the Discharger monitor for bacteria weekly.

Action Taken

Attachment E, section 4.2.1.2.2 of the Tentative Order has been revised as follows:

The Discharger shall conduct water quality monitoring at ~~the control, downstream, and lateral stations~~ Dairy Mart Bridge and the Tijuana River mouth (i.e., monitoring locations TRV-1 ~~through TRV-4,~~ and ~~TRV-10 through~~ TRV-7, respectively~~13~~) for the parameters groups listed in Table E-8 as follows: 1) once per month quarter during dry weather. The Discharger shall monitor when there is a transboundary flow event at Stewart's Drain. If there are no transboundary flows at Stewart's Drain during the quarterly monitoring period, the Discharger shall monitor when there is a transboundary flow at the Tijuana River main channel, if possible. To evaluate the impact of transboundary flows on public health and beneficial uses, the San Diego Water Board recommends the Discharger conduct weekly monitoring for *E. coli* and fecal coliform at Dairy Mart Bridge; and 2) once per year during wet weather.

4. WILDCOAST

4.1. Comment

The updated provisions in the Tentative Order provides an important and necessary update to the current discharge permit and adds new monitoring requirements that supports IBWC in its mission to provide binational coordination on transboundary pollution issues.

This Tentative Order includes many important elements WILDCOAST strongly supports. The drafted tentative order improves the management of operations at the ITP, establishes an open and transparent process for reporting, improves the management of transboundary pollution issues more effectively, and fills water quality monitoring data gaps for the receiving waters in the Tijuana River Valley.

The more data we have the better because officials in Mexico used lack of data to challenge the facts about sewage contamination within transboundary flows. As a practical matter, water quality monitoring for the purpose of documenting the level of pollution in transboundary flows must be a component of Attachment E to specifically address misinformation about the presence or absence of pollution.

The proposed Tijuana River Valley Receiving Water Monitoring Program is a vital component of the new provisions in the tentative order. Understanding the extent of impacts from transboundary pollution for the receiving waters in the U.S. will help IBWC coordinate more effective wastewater and pollution control programs with their counterparts in Mexico. Monitoring receiving water quality is critical to understanding what pollutants are and are not coming from the canyon collectors, particularly Smugglers Gulch and Goat Canyon; how pollutants from the eastern canyon collectors mix with flows from the IBWC flood control channel; and how combined flows impact downstream receiving waters.

Response

Comment noted. The San Diego Water Board reduced the Tijuana River Valley Monitoring Program requirements as several other entities are conducting monitoring that is useful for evaluating impacts of transboundary flows. See Response to Comment No. 1.31.

Action Taken

None.

5. San Diego Unified Port District

5.1. Comment

The District is supportive of the Regional Board's efforts to incorporate updated and new provisions to the existing permit in Tentative Order No. R9-2021-0001 with the goal of improving management of and reducing transboundary pollution discharges at the ITP. The modifications and additional measures provide important and necessary improvements in the Tentative Order such as updates focused on improving IBWC's management of ITP operations and their capability to respond to spills and transboundary flow events, enhancing transparency through updated notification and reporting requirements, and new requirements for information sharing and coordination with the government of Mexico. In addition, the Tentative Order adds new water quality monitoring requirements that will help fill data gaps and improve knowledge of receiving water conditions and sources of pollutants to the Tijuana River Valley within the United States. The proposed monitoring provisions will also support binational coordination efforts on transboundary pollution issues and will provide the necessary supporting data to be used when advocating for more effective wastewater and pollution control programs on both sides of the border.

Response

Comment noted. The San Diego Water Board reduced the Tijuana River Valley Monitoring Program requirements as several other entities are conducting monitoring in the Tijuana River Valley that is useful for evaluating impacts of transboundary flows. See Response to Comment No. 1.31.

Action Taken

None.

6. Surfrider Foundation, San Diego County

6.1. Comment

In 2019 the Tijuana Slough shoreline was closed 243 days and Imperial Beach was closed 82 days due to sewage contaminated run-off. Still, in 2020 the Tijuana Slough shoreline was closed 295 days and Imperial Beach was closed 160 days due to sewage contaminated run-off—demonstrating a disturbing,

increasing trend of more pollution and impact to the Tijuana River Valley and coastal regions.

We have reviewed the proposed update to the NPDES permit held by the USIBWC and we overwhelmingly support the proposed changes. We are pleased that the Tentative Order involves more stringent oversight by the San Diego Waterboard of (and imposes increased accountability on) the USIBWC and its facilities under the NPDES permit. Specifically, the following proposed requirements are among those that we believe will have the most meaningful impact:

1. that the USIBWC conduct a valid and reliable trash assessment in years two and four of the permit term at various monitoring locations (4.2.3);
2. that the USIBWC promote the discussion of binational interests and accordingly develop and improve binational prevention, response, and notification procedures of spills and transboundary flows (6.3.2.2);
3. that the USIBWC prepare an Asset Management Plan, including for critical assets valued over $5,000, to address inventory and maintenance (6.3.2.6);
4. the integration of a Pollutant Minimization Program (6.3.3.1); and
5. that the USIBWC report and monitor dry and wet weather flows at the canyon collectors located in Smugglers Gulch, Goat Canyon, Canyon del Sol, Stewart's Drain and Silva Drain ("Canyon Collectors") (7.2).

Response

Comment noted.

Action Taken

None.

6.2. Comment

Surfrider would like to take this opportunity to make an additional suggestion. In commenting on previous amendments to the USIBWC NPDES permit, Surfrider has previously recommended that the San Diego Waterboard update and modernize ocean monitoring in a way that represents current oceanographic knowledge of the region using state of the art tools. As you are aware, currently sewage spill notifications are not made by USIBWC until after the event—after a significant volume of sewage has been spilled, and often only after some time period has passed.

To address this notification and data gap, Surfrider continues to recommend the implementation of a real-time prediction and reporting model for the South San Diego ocean region, including the South Bay Ocean Outfall, Tijuana River Estuary, related receiving ocean waters, coastal waters, and beaches. We further believe that increased real-time monitoring in the Tijuana River and at the Canyon Collectors is necessary.

Such efforts in the Pacific Ocean and the Tijuana River Estuary will help USIBWC and stakeholders plan for future changes in outfall capacity and respond to potential spills and other events as they happen—instead of only belatedly, if at all, after the event. There are numerous valuable natural and community resources in this area, and so many potential sources of pollution addressable by the NPDES permit in the near-shore environment. Accordingly, as stewards of this area, the community and stakeholders need to have as much data in real time as possible to not only provide notice to beach and water users, but perhaps even more importantly, to track and hopefully curtail the most problematic sources and breakdowns.

Response

Comment noted. While the San Diego Water Board supports the development of a real-time prediction and reporting model for the South San Diego ocean region, such a requirement is outside the scope of this Tentative Order. The model would be better addressed through regional monitoring efforts. Interested stakeholders are encouraged to approach and collaborate with the San Diego Water Board and the Discharger to develop such modeling efforts. The Tentative Order contains a reopener clause to modify the monitoring program as necessary to require the Discharger to participate in the development, refinement, implementation, and/or coordination of a regional monitoring program if the modeling effort moves forward (see section 6.3.1.2 and Attachment E, section 5 of the Tentative Order). It should be noted that the City of San Diego and the Discharger have a real-time mooring system at the SBOO and conduct plume tracking to assess the dispersion and fate of the wastewater plume discharged through the SBOO (see Attachment E of the Tentative Order, § 6.2).

Action Taken

None.

7. Other Revisions to the Tentative Order

7.1 Changes to Table 2

The instantaneous maximum concentration-based effluent limitations for oil and grease and settleable solids shown below are carried over from the existing permit for the Facility and are based on Table 4 of the Ocean Plan. These concentration-based limitations were included in Table F-9 of the Fact Sheet (Attachment F) but were inadvertently missing in Table 2. The instantaneous maximum mass-based effluent limitation for oil and grease was recalculated to be 15,638 lbs/day based on a flow rate of 25 MGD and is less stringent than the 15,012 lbs/day limitation in the current permit which was mistakenly calculated based on a flow rate of 24 MGD. The San Diego Water Board has determined that a less stringent effluent limitation is appropriate under the exception described in section 402(o)(2)(B)(ii) of the CWA and 40 CFR 122.44(l)(2) because the current limitation is based on a technical mistake.

Action Taken

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

Parameter [1][2]	Units [3]	Six-Month Median	Average Monthly	Average Weekly	Maximum Daily	Instantaneous Minimum	Instantaneous Maximum
Oil and Grease	mg/L	--	25	40	--	--	75
Oil and Grease	lbs/day	--	5,213	8,340	--	--	15,638
Settleable Solids	milliliter per liter (ml/L)	--	1.0	1.5	--	--	3.0
Turbidity	nephelometric turbidity unit (NTU)	--	75	100	--	--	225

Section 4.4.1 of the Fact Sheet of the Tentative Order has been revised as follows:

4.4.1. Satisfaction of Anti-Backsliding Requirements

NPDES permits must conform with Anti-backsliding requirements discussed in section 3.3.5 of this Fact Sheet. These Anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. This permit complies with all applicable federal and State Anti-backsliding regulations.

Effluent limitations for zinc, acute toxicity, tributyltin, and chlorodibromomethane have been removed based on the results of an RPA performed as specified in the Ocean Plan. Pursuant to State Water Board Order WQO-2003-0012, the elimination of a WQBEL when there is no reasonable potential is not backsliding. Alternatively, elimination of the WQBELs is based on new information and thus falls within the exception to the anti-backsliding in section 402(o)(2)(B)(i) of the Clean Water Act and 40 CFR 122.44(l)(2)(i)(B)(1).

The instantaneous maximum mass-based effluent limitation for oil and grease was recalculated to be 15,638 lbs/day based on a flow rate of 25 MGD and is less stringent than the 15,012 lbs/day limitation in Order No. R9-2014-0009 which was mistakenly calculated based on a flow rate of 24 MGD. The San Diego Water Board has determined that a less stringent effluent limitation is

appropriate under the exception described in section 1342(o)(2)(B)(ii) of the CWA and 40 CFR 122.44(l)(2) because the limitation in Order No. R9-2014-0009 is based on a technical mistake.