bajagua project, LLC

February 25, 2005

Via Second-Day USPS Mail

Mr. Daniel Borunda
Environmental Protection Specialist
Compliance Section USIBWC
4171 North Mesa Street C-100
El Paso, Texas 79902

Re: Comments on Draft Supplemental Environmental Impact Statement

Dear Mr. Borunda:

As a principal of Bajagua Project LLC ("Bajagua"), I write on Bajagua's behalf to comment on the United States Section, International Boundary and Water Commission's ("IBWC") Draft Supplemental Environmental Impact Statement ("DSEIS"), published on December 30, 2004. For the sake of brevity, Bajagua incorporates by reference its comments on the notice of intent to prepare the DSEIS, submitted to IBWC on December 22, 2003, including its discussion of the factual background of this matter as set forth in those comments. A copy of these prior comments is enclosed for ease of reference.

I. Selection Of The Bajagua Project As The Preferred Alternative Best Meets IBWC's And USEPA's Goals

Bajagua is pleased that after a thorough analysis of the alternatives, including an exhaustive review of potential environmental consequences, IBWC and the U.S. Environmental Protection Agency ("USEPA") conclude that the Bajagua Project is the preferred alternative. *See* DSEIS at ES-5 to ES-6, 2-52 to 2-57. In the DSEIS, the Bajagua Project, identified as Alternative 4, Treatment Option C, Discharge Option I, would provide for secondary treatment in Mexico at a facility that is constructed and operated by Bajagua, with treated effluent discharged in the United States via the South Bay Ocean Outfall.

In concluding that the Bajagua Project is the preferred alternative, IBWC based its decision on over a decade of legislative, legal, technical, and environmental studies that show that the Bajagua Project best meets the IBWC's and USEPA's goals of timely compliance with treatment standards applicable to the cross-border sewage flowing from Tijuana, Mexico into the South Bay of San Diego, California. As discussed in detail in the enclosed prior comments and in the DSEIS, these standards include the following: (1) secondary treatment as required under the Clean Water Act; (2) treatment obligations incurred as part of international treaties between the United States and Mexico; (3) the congressional mandates of the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, Pub. L. 106-457, Title VIII, 114 Stat. 1981 (Nov. 7, 2000), codified at 22 U.S.C. §§ 277d-43 – 277d-46 ("Tijuana River Act"), which require consideration of a facility sited

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in Mexico; and (4) meeting the deadlines in the compliance schedule, recently agreed to by IBWC and filed with the federal court in San Diego (*see* Appendix G to DSEIS (Order Setting Compliance Schedule) (referred to hereafter as "Compliance Schedule")). Only the Bajagua Project can assist IBWC and USEPA in achieving, and, in fact, exceeding, these complex and overlapping goals.

A. Only Bajagua Ensures IBWC's Timely Compliance With The Clean Water Act

First, the Bajagua Project would bring IBWC's South Bay International Wastewater Treatment Plant ("SBIWTP") into compliance with Clean Water Act by providing IBWC with sufficient secondary treatment capacity -- 25 million gallons per day ("mgd"). Bajagua actually exceeds this goal in providing for an additional amount of treated wastewater, up to 34 mgd, that can be re-used in Mexico to assist the local economy and environment.

B. Only Bajagua Satisfies IBWC's And USEPA's Obligations Under International Treaties And The Tijuana River Act

In part based on this additional reclamation capacity, the Bajagua Project is the only alternative that provides IBWC and USEPA with the means of complying with its international treaty obligations owed to Mexico, and the congressional mandates of the Tijuana River Valley Estuary and Beach Cleanup Act of 2000 ("Tijuana River Act"),[1] which requires consideration of a facility sited in Mexico. This fact was already recognized by both the United States and Mexican governments.

First, on or about February 23, 2003, as required under the Tijuana River Act and related international treaty obligations, the Mexican Commission of Public Services in Tijuana (known by its Spanish acronym as "CESPT") and USEPA completed the Potable Water and Wastewater Master Plan for Tijuana and Playas de Rosarito or the Tijuana Master Plan for Water and Wastewater Infrastructure ("Tijuana Master Plan").[2] In the Tijuana Master Plan, Mexico and USEPA selected the Bajagua Project (referred to therein as the "Public Law Facility") as the alternative that best met the long-term water and wastewater needs of the San Diego and Tijuana regions.

Second, on or about February 20, 2004, the United States and Mexican Sections of the IBWC signed Minute Number 311, "Recommendations for secondary treatment in Mexico of sewage emanating from Tijuana River area in Baja California, Mexico"

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[1] Pub. L. 106-457, Title VIII, 114 Stat. 1981 (Nov. 7, 2000), codified at 22 U.S.C. §§ 277d-43 – 277d-46.

[2] *See* USEPA's website at http://www.epa.gov/docs/region09/water/tijuana/ for more information on and copies of the Tijuana Master Plan.

("Treaty Minute 311"), which endorses and sets forth a plan to develop the Mexican facility—a secondary treatment facility in Mexico—as required in the Tijuana River Act.[3]

As recognized in both the Tijuana Master Plan and Treaty Minute 311, the Bajagua Project provides the opportunity for Mexico to expand its wastewater treatment infrastructure and capacity by as much as 34 mgd, and to reduce or eliminate entirely raw sewage flows into the United States. Through its reclamation potential, Bajagua will promote re-use opportunities in Tijuana and thus reduce Mexico's reliance on Lower Colorado River water supplies and other water sources. Significantly, the Bajagua Project promotes the enhancement of CESPT's institutional financial capability because the project will be paid in full at the conclusion of the proposed 20 year contractual period at no expense to Mexico. This will allow CESPT to allocate scarce capital resources to other critical infrastructure needs. The increased flows of wastewater in Tijuana, based on demographic projections, clearly indicates that the Bajagua Project is indeed the best long term approach for meeting the wastewater treatment needs of the region. Thus, IBWC's choice of Bajagua as the preferred alternative is consistent with the prior decisions of both the United States and Mexican governments.

C. The Bajagua Project Is The Only Alternative That Will Allow IBWC To Meet Its Deadlines Under The Compliance Schedule

Finally, the Bajagua Project is the only alternative that will allow IBWC to meet the deadlines in the Compliance Schedule. *See* Appendix G to DSEIS. In addition to many other interim milestones, the Compliance Schedule requires IBWC to have achieved secondary treatment by September 30, 2008. Only Bajagua has prepared a complete conceptual design and budget that could achieve this goal. *See* DSEIS at 2-25 to 2-34, Appendix F pp. F-7 to F-8; pp. F-26 to F-30.

It is worthy of emphasis, however, that both the project design and the cost estimates in the DSEIS are merely conceptual at this time, and the final design and costs are contingent on IBWC and USEPA working cooperatively and expeditiously with the Bajagua Project to commence and complete necessary preliminary designs and plans. In order to achieve the September 30, 2008 compliance deadline, Bajagua intends to employ a design-build-operate acquisition process that will involve a two step selection methodology (i.e., issuance of a request for qualifications followed by a request for proposals). The design-build process takes advantage of the inherent technical and economical innovations that may be expected from the most qualified bidders. The "best value" concept that will be utilized will consider a myriad of qualifications when determining the best bidder (for example, technical and financial qualifications, technical feasibility and reliability, ability to meet applicable performance and permit standards, ability to timely implement the project, etc.). Final designs cannot be completed until

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[3] *See* IBWC's website at http://www.ibwc.state.gov/ for more information and copies of Treaty Minute 311.

this procurement process has ended, and Bajagua estimates the design and construction will take 16 months to complete once a contract is consummated with the successful bidder. Because this procurement process has not yet commenced, the design concept is still a work in progress, as are the related cost estimates.

Similarly, the cost estimates for alternatives in the DSEIS reflect capital and operation and maintenance costs based on Bajagua's current conceptual design. These too are a work in progress. Enclosed for your reference is a copy of the latest Capital and Operations Costs for the Bajagua Project that were accepted by the U.S. Office of Management and Budget for inclusion in the federal fiscal year 2005 budget.

Bajagua is ready and eager to commence preliminary work with IBWC and USEPA to complete the conceptual design for the project and the related cost estimates, and views the DSEIS as a positive step toward resolution of the cross-border sewage crisis.

II. Summary

For all the foregoing reasons, Bajagua is pleased with IBWC's DSEIS and its selection of the Bajagua Project as the preferred alternative. Bajagua looks forward to working cooperatively with IBWC, USEPA, and Mexico to accelerate the process to complete the record of decision in the shortest possible time frame. Bajagua is prepared to begin project execution in a timely manner in order to assist the IBWC in meeting the its strict deadlines under the Compliance Schedule.

Bajagua appreciates the opportunity to provide these comments, and looks forward to working with IBWC, its contractors, and EPA to develop a solution that is acceptable to all interested parties, especially the citizens of our community. Please feel free to contact me, if you have any questions.

Sincerely yours,

Jim Simmons

Enclosures

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December 22, 2003

Via Hand Delivery

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Re: Comments on Notice of Intent to Prepare a Draft Supplemental Environmental Impact Statement

Dear Mr. Fischer:

We are writing on behalf of Bajagua Project LLC ("Bajagua") to comment on the United States Section, International Boundary and Water Commission's ("IBWC") Notice of Intent ("NOI") to Prepare a Draft Supplemental Environmental Impact Statement ("SEIS") in coordination with the United States Environmental Protection Agency ("EPA"), published on October 22, 2003.

I. Introduction

In summary, Bajagua is concerned that IBWC's proposed environmental review will needlessly prolong resolution of the emergency conditions facing the South Bay region as a result of the transborder sewage problem. IBWC's proposed schedule for this study will take at least 18 months to complete. Bajagua believes that a thorough environmental review can be completed within six months via adoption of an environmental assessment and finding of no significant impact, or, at a minimum, a more narrowly focused SEIS. Because most of IBWC's proposed alternatives have either already been exhaustively studied or are not reasonable and thus do not justify further analysis, significant time can be taken off the proposed schedule by incorporating prior environmental study and focusing only on reasonable alternatives—most prominently, the Bajagua Project. The Bajagua Project should be the preferred alternative and the focus of this study because it is the only alternative with public and congressional support, and funding. A more focused environmental review is in the best interests of the South Bay region as it would shorten the timeframe necessary to achieve resolution of the transborder sewage problem and to bring IBWC into compliance with federal and state water quality law.

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II. Background

A. History of the Transborder Sewage Problem

Since the 1930s, the City of Tijuana, Mexico's rapid population, economic, and industrial growth have exceeded Tijuana's limited sewer and wastewater treatment systems and resulted in the discharge of untreated wastewater into the Tijuana River Basin, and ultimately the Pacific Ocean. The untreated sewage discharges to the Tijuana River Basin have caused contamination to shoreline and near-shore areas of the Pacific Ocean within the United States and specifically in the San Diego Region. *See* Treaty Minute No. 270 at 1-2, cited in *Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California*, Minute No. 283 (July 2, 1990) ("Treaty Minute No. 283").

More specifically, over 55 million gallons per day ("mgd") of Mexican sewage receives only partial or no treatment at the San Antonio de los Buenos Treatment Plant, the relevant Mexican wastewater treatment facility, and at IBWC's International Wastewater Treatment Plant ("IWTP"). Much of this sewage enters the Tijuana River Valley and United States coastal waters in the South Bay. By the Regional Board's own records, over 220 cumulative beach closure days occurred in calendar years 2000 through 2002 directly attributable to the cross border sewage pollution.[1]

To address these and other border-related water issues, in 1944, Mexico and the United States entered into the *Treaty of February 3, 1944 for the Utilitization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande* ("Water Treaty of 1944"). *See The IBWC, It's Mission, Organization and Procedures for Solution of Boundary and Water Problems* (undated) ("IBWC's Mission Statement") at 2-3 (located at www.ibwc.state.gov/ organiza/about_us.htm). The Water Treaty of 1944 established IBWC's goals for resolution of the inter-border sanitation problem. *Id.*

In 1990, officials from Mexico and the United States entered into Treaty Minute No. 283,[2] which amended the Water Treaty of 1944 and required the United States (through

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[1] *See* County of San Diego, Department of Environmental Health, 2000 & 2001 San Diego County Beach Closures and Advisories Reports (available at http://www.co.san-diego.ca.us/cnty/cntydepts/landuse/env_health). The City of San Diego has declared the discharge of Tijuana sewage a local emergency since 1993. *See* City of San Diego's Manager Report (Jan. 16, 2002); City of San Diego Resolution No. R-295986 (Jan. 22, 2002); Letter from Mayor Dick Murphy, City of San Diego, to Commissioner Carlos Ramirez, IBWC (Feb. 27, 2002), attached collectively as Ex. 1.

[2] Subsequent treaty amendments or modifications entered into between the two countries in furtherance of the treaty and which deal with specific projects and issues are referred to as "Treaty Minutes." *See* IBWC's Mission Statement at 4.

the IBWC) to provide primary and secondary treatment for 25 million gallons per day ("mgd") of sewage generated in Tijuana, Mexico. *See* Treaty Minute No. 283. To date, these requirements have not been met.

B. Congressional Support for a "Mexican Facility"—the Bajagua Project

Although Congress initially authorized funding for the development of the IWTP site, it imposed a statutory spending cap of $239.4 million on funding for IWTP's primary and secondary treatment facilities. *See* H.R. Rep. No. 842, 106 Cong. 2d Sess., pt. 1 (Sept. 12, 2000) ("House Report No. 842") at 4, attached at Ex. 2; Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. 102-389, 106 Stat. 1571, 1599 (Oct. 6, 1992) at 1599 (imposing the spending cap), attached as Ex. 3. By 1998, IBWC spent $229.4 million, developing an advanced primary treatment facility with a capacity of 25 mgd, which it has operated on an interim basis since.

Since 1990, IBWC has lobbied Congress for additional funding to complete the IWTP. Despite extensive lobbying efforts by IBWC, Congress has refused to "lift the cap" or to authorize additional funding to finance the completion of the IWTP to secondary treatment. *See* 145 Cong. Rec. H4866-H4867 (June 21, 2000) (statement of Rep. Walsh), attached as Ex. 4.

Instead, Congress endorsed the more expedient and reasonable solution presented by the Bajagua Project with the enactment of the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, Pub. L. 106-457, Title VIII, 114 Stat. 1981 (Nov. 7, 2000), codified at 22 U.S.C. §§ 277d-43 – 277d-46 ("Tijuana River Act"), attached as Ex. 5. The Tijuana River Act authorizes the IBWC to enter into a fee-for-services contract with a private owner of a secondary treatment facility, constructed with private financing, in Mexico. Legislative history shows that in passing the Tijuana River Act, Congress contemplated that the development of a privately-financed facility in Mexico, defined in the act as the "Mexican facility," would replace IBWC's efforts to achieve secondary treatment in the United States. *See* House Report No. 842 at 4-5. In enacting the Tijuana River Act, Congress emphasized the urgent need to commence construction and operation of the Mexican facility in order to more expediently resolve San Diego's transboundary sewage problem, expressly instructing the responsible government agencies, including IBWC "to give the highest priority" to implementation of the Tijuana River Act. 22 U.S.C. § 277d-45(a).

C. California's Clean Water Act Litigation Against IBWC

On February 15, 2001, the State of California Department of Justice, acting on behalf of the California Regional Water Quality Control Board, San Diego Region ("Regional Board"), filed a citizen's suit, which was consolidated with a similar action filed by the Surfrider Foundation ("Surfrider"), to ensure entry of a "decree ordering [IBWC] to comply with a schedule to be established by the Court which will ensure completion of secondary treatment facilities and elimination of IBWC's discharges of inadequately treated sewage effluent by January 23, 2003." State's First Amended Compl. for

Violations of the Clean Water Act and Related State Law Claims at 11 (Jul. 27, 2001), originally filed Feb. 15, 2001, attached as Ex. 6.

On or about December 4, 2003, the federal district court in San Diego entered an order finding that IBWC's discharge from the IWTP was in violation of the Clean Water Act as it did not meet the state or federal secondary treatment standards and, in fact, had been in continuous violation since it commenced operation. *See* Order Granting Pl.'s Motion for Summary Judgment, filed December 4, 2003, attached as Ex. 7. This action is scheduled to proceed to trial in May 2004 in order to determine the appropriate remedy. IBWC's NOI could provide resolution to these on-going violations of the Clean Water Act and thus time is of the essence in completing the requisite NEPA review.

D. IBWC's NOI

Shortly before the court issued its ruling, on October 22, 2003, IBWC published its NOI to prepare a draft SEIS that would analyze the alternatives for treatment of sewage flows from Tijuana, Mexico that cross into the United States. IBWC proposes to study the following eight alternatives to the current primary treatment of 25 mdg of sewage at IBWC's IWTP:

1. No action;

2. Construction of a United States-funded, privately constructed secondary treatment system in Mexico, *i.e.*, the Bajagua Project, also referred to as the "public law option" in reference to its enabling authority, the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, Pub. L. 106-457, Title VIII, 114 Stat. 1981 (Nov. 7, 2000) ("Tijuana River Act");

3. Operation of IWTP with primary treated flows returned to Mexico and discharged to the Pacifiic Ocean at Punta Bandera;

4. Operation of IWTP with primary treated flows returned to Mexico and discharged to the Pacifiic Ocean south of Punta Bandera;

5. Operation of IWTP with a connection to the City of San Diego's secondary treatment system to allow secondary treatment of 10 mdg of sewage by the City and discharge through the City's outfall;

6. Operation of IWTP with a connection to the City of San Diego's secondary treatment system to allow secondary treatment of 5 mdg of sewage by the City and discharge through the City's outfall, with the remaining 10 mgd being returned to Mexico and discharged to the Pacifiic Ocean at Punta Bandera;

7. Completion of the completely mixed aeration ("CMA") ponds at the IWTP; and

8. Closure of IWTP.

However, most of the proposed alternatives have either already been exhaustively studied or are not reasonable, for the reasons set forth below.

E. Comprehensive Prior Environmental Review of Transborder Sewage Issues

As set forth in the NOI, IBWC has been conducting an on-going environmental review of the transborder sewage problem since at least 1990.

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As part of this administrative process, IBWC issued a final EIS and record of decision ("ROD") in 1994. In 1998, IBWC prepared a subsequent draft SEIS ("Draft SEIS"). Based on this study, in 1999, IBWC issued a final SEIS and ROD.[3]

As part of its comments on the 1998 Draft SEIS, Bajagua voluntarily prepared an Environmental Information Document ("EID") on its proposal to construct and operate a plant to treat 50 mgd at a location in Mexico that demonstrated that there would be no significant environmental impacts in the United States resulting from development of the Bajagua Project. *See* EID at S-6, 1-13, 1-33. Specifically, IBWC and EPA studied the Bajagua Project alternative and Final EID as part of its 1998 draft SEIS. *See* 1998 DEIS at 1-45, 1-46.

Most recently, EPA, coordinating with relevant Mexican agencies, participated in the preparation of the Tijuana Master Plan for Water and Wastewater Infrastructure, published in April 2003. (For copies of the relevant environmental documents, see http://www.epa.gov/region09/water/tijuana/#master.) The Tijuana Master Plan is the long-term plan that investigates alternatives for meeting water and wastewater needs for the Tijuana region. In preparing the Tijuana Master Plan, Mexico and EPA conducted an environmental review of potential impacts resulting from the construction of a wastewater facility in Mexico, using the specifications of the Bajagua Project. *See* Tijuana Master Plan at § 13. EPA prepared an environmental assessment ("EA") and issued a finding of no significant impact ("FONSI"), concluding that implementation of the Tijuna Master Plan, including the development of a Bajagua Project-like, Mexican wastewater treatment facility, did not require preparation of an EIS because it "is not predicted to have a significant effect on U.S. environmental resources." *See id.* at 13-5; EA on Tijuana Master Plan at 2-25; FONSI on Tijuana Master Plan at 2. This same process and rationale should be applied to the current study proposed in IBWC's NOI.

III. Discussion

As part of this on-going environmental review, IBWC already exhaustively studied of most of the alternatives and potential environmental impacts that IBWC proposed to re-

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[3] Bajagua incorporates by reference the cited prior administrative records.

study in its current NOI. Moreover, most of the proposed alternatives are wholly unreasonable and do not warrant further consideration.

A. IBWC Should Narrow the Scope of its Proposed Environmental Review and Study Only Reasonable Alternatives

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NEPA requires that federal agencies evaluate "all reasonable alternatives," including the alternative of taking no action. 40 C.F.R. § 1502.14(a). However, federal agencies should apply the "common sense" when determining what alternatives are reasonable and are not required to "include every alternative device and thought conceivable by the mind of man." *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 522 (1978).

In *Vermont Yankee*, the United States Supreme Court held that in conducting its environmental review of a proposed licensing of a nuclear power plant, the Nuclear Regulatory Commission did not need to consider the endless alternatives related to energy conservation. 435 U.S. 519 (1978). In reaching this holding, the Court reasoned that:

> Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

435 U.S. 519, 522. The Court held that selection of alternatives for study must be bounded "by some notion of feasibility," and that federal agencies are not required to study alternatives that are "only remote and speculative possibilities." *Id.* at 551 (citing *Nat'l Resources Defense Council v. Morton*, 458 F. 2d 827, 838 (D.C. Cir. 1972)).

Moreover, NEPA does not require federal agencies to re-evaluate alternatives (and their potential environmental impacts) already studied in prior environmental reviews. For example, in *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174 (9th Cir. 1990), the Ninth Circuit Court of Appeal held that the Bureau of Land Management was not required to prepare a SEIS where prior reviews adequately assessed potential impacts. In *Headwaters*, the Bureau had already done a comprehensive EIS on the impacts of regional timber sales that already addressed impacts on spotted owl habitat. *Id.* at 1176, 1180. Opponents challenged the Bureau's decision to prepare an EA rather than another SEIS for a site-specific timber sale, citing to recent sighting of spotted owls as new information warranting further study. *Id.* The Ninth Circuit disagreed, and held the Bureau's prior analysis of impacts on the spotted owl, coupled with the EA, sufficiently satisfied the agency's NEPA requirements.

Similarly, here, the alternatives that IBWC proposed to study have either already been exhaustively studied or are not at all feasible and thus do not warrant further study. This is especially true in light of the pressure IBWC is under from both Congress and the federal judiciary to implement a resolution to the transborder sewage problem as expeditiously as possible. IBWC's plan to unnecessarily study duplicative or

unreasonable alternatives flies in the face of congressional and judicial intent, is wasteful of taxpayer resources, and will only further delay secondary treatment and IBWC's compliance with federal and state water quality law.

1. Alternative No. 1: No Action

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Although IBWC is required to consider a "no action" alternative, this alternative should be easily and swiftly eliminated. This alternative will allow the plant to continue to operate in violation of the federal Clean Water Act, California State Ocean Plan, IWTP's NPDES permit, and Treaty Minute No. 283.

Operation of the IWTP as an advanced primary plant without any plan for secondary treatment facilities is, as the federal district court recently ruled, in blatant violation of federal and state water quality laws which require secondary treatment. Federal and state law require secondary treatment of this sewage and thus continued illegal operation of IWTP is not a viable alternative.

For over 70 years sewage from the Republic of Mexico has flowed unabated into the United States plaguing the residents of the South Bay region. This flow is a serious threat to the region, creating health hazards, forcing closure of beaches and impacting local businesses. The current lawsuit by the State of California against IBWC and the court's recent ruling in that action are an indication of the frustration of the citizens of California who are simply no longer tolerant of the "no action" alternative. Moreover, Congress enacted the Tijuana River Act in 2000 to facilitate an end to status quo illegal operation of IWTP and to direct IBWC to implement a facility for secondary treatment in Mexico. The no action alternative flies in the face of this clear congressional mandate.

2. Alternative No. 2: Secondary Treatment Facilities in Mexico Pursuant to the Congressional Direction in the Tijuana River Act

IBWC should list Alternative No. 2 as the preferred alternative. As mentioned above, this alternative—treatment via a facility constructed in Mexico—was previously analyzed by IBWC and EPA in the 1998 Draft SEIS. However, at that time, the Bajagua Project was eliminated from further consideration because the United States did not have legal authority to construct a facility in Mexico and IBWC believed that Mexican support for the facility was "not clear." Both of these concerns have been soundly addressed and resolved since the 1998 Draft SEIS was published.

First, in passing the Tijuana River Act in November 2000, Congress provided IBWC with the necessary authority to build in Mexico, and directed IBWC to pursue the Bajagua Project alternative.

Second, the Tijuana River Act required the development and publication of a 20-year Master Plan for water and wastewater infrastructure for the Tijuana region. *See* 22 U.S.C. § 277d-44(b). The Tijuana Master Plan, published earlier this year by relevant Mexican agencies and EPA, selected the Mexican facility to be constructed as a regional wastewater treatment plant in the Rio Alamar Valley as the preferred alternative of the

many alternative configurations studied by the cognizant Mexican agencies. Adoption of the Bajagua Project alternative as the preferred alternative in the Tijuana Master Plan demonstrates Mexico's clear support for this option, dispelling IBWC's concerns, as set forth in the 1998 Draft SEIS, that Mexico did not favor this option.

Finally, in public remarks to the San Diego Metropolitan Sewage Commission on November 6, 2003 (remarks attached as Ex. 8), IBWC Acting Commissioner Debra Little stated that it was her goal to implement the Tijuana River Act by completing a Treaty Minute to modify Minute No. 283. She further stated that she believed it highly likely that the Minute would be approved by the United States and Mexico within the next 30 days. Thus, any further environmental study should be limited to the environmental effects in the United States created by the construction of the Mexican facility provided for in the Tijuana River Act.[4]

3. Alternative No. 3: Operate the IWTP with Treated Flows Returned to Mexico for Discharge to the Pacific Ocean at Punta Bandera

Under Alternative No. 3, IBWC proposes increasing the discharge of partially-treated or untreated effluent directly into the Pacific Ocean at a location in Mexico.

As a preliminary matter, this alternative appears to be aimed at circumventing or avoiding federal and state water quality laws by discharging untreated or partially treated sewage in Mexican territory. Clearly, such intentions are improper and in violation of NEPA and the entire spirit of Treaty Minute No. 283 under which the United States acknowledged its responsibility for treatment of these renegade sewage flows.

Additionally, this alternative ignores the costs and feasibility issues related to how these flows would be moved from IWTP to Punta Bandera or any other location in Mexico. Returning these flows to Mexico for discharge would require elaborate infrastructure and planning, making this option highly infeasible.

Also, if IBWC were to adopt this alternative, it would be abandoning the investment of over $168 million made at IWTP with the construction of the South Bay Ocean Outfall.

Finally, this alternative was already studied by IBWC and EPA, and previously eliminated from further consideration for good reason. In the 1998 Draft SEIS, IBWC and EPA already resoundingly rejected alternatives that included discharge of effluent at

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[4] Mexico is currently reviewing the concession application submitted by Bajagua on September 7, 2002. It should be noted that Bajagua is the only company that has submitted a concession application and thus is the only private company being considered by the Government of Mexico. Bajagua anticipates a favorable action on the concession application in the near future.

Punta Bandera in Mexico, similar to those being proposed in this alternative. *See* 1998 Draft SEIS at 1-46, 1-47. IBWC and EPA reasoned that discharge of partially treated effluent at Punta Bandera would migrate northerly into the United States and violate the City of San Diego's and the United States' coliform and other water quality standards. *Id.* at 1-47.

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Additionally at the SEIS Public Hearing on November 12, 2003, CILA Engineer Roberto Espinosa commented that this alternative would not allow Mexico to utilize its parallel pumping and conveyance system and still provide adequate maintenance due to the increased flows that would have to be accommodated in the system. It would also hydraulically overload the Mexican plant at San Antonio de los Buenos causing raw sewage to be discharged directly to the ocean. Engineer Espinosa stated this alternative would set back the border environmental conditions to those that existed 15 years ago.

Knowing this alternative is not in compliance with the existing Treaty Minute No. 283, the new Treaty Minute, as described by IBWC, the Tijuana River Act, and applicable federal and state water quality law, IBWC and EPA should eliminate it from further consideration. Although IBWC, like other federal agencies, is entitled to consider alternatives that are "not within the jurisdiction of the lead agency" (*see* 40 C.F.R. § 1502.14(c)), this does not mean that agencies should consider alternatives that blatantly violate federal environmental law and the purpose of the federal action. To the contrary, NEPA and, more specifically, Section 1502.14(c) of the Council for Environmental Quality regulations encourage federal agencies to consider alternatives that may require further legislative action or action by other agencies or jurisdictions *in the interests of reducing impacts on the environment. See, e.g., Nat'l Resources Defense Council v. Morton*, 458 F. 2d 827, 838 (D.C. Cir. 1972) (encouraging federal agencies to consider alternatives that may require further legislative implementation as part of the NEPA process). However, where the proposed alternatives clearly *increase harmful environmental impacts*, as in the present case, further analysis is inappropriate.

4. Alternative No. 4: Operate the IWTP with Treated Flows Returned to Mexico for Discharge to the Pacific Ocean South of Punta Bandera

Alternative No. 4 similarly calls for return partially treated or untreated flows back to Mexico and discharging them directly to the Pacific Ocean, under this alternative discharge is south of Punta Bandera, rather than directly from Punta Bandera. This alternative should be rejected for the same reasons set forth above regarding Alternative No. 3. Additionally, as IBWC described, at the November 12, 2003 hearing, the discharge would be six miles south of Punta Bandera which would be in an urban coastal setting. Thus, movement of the discharge south of Punta Bandera does not lessen the harmful environmental effects and may in fact exacerbate them because of the closer proximity to urban populations. As such, this is not a reasonable alternative and does not warrant further review.

5. Alternative No. 5: Operate the IWTP with City of San Diego Connection

Alternative No. 5 should be rejected outright because the City of San Diego has on numerous occasions stated that the use of the South Bay Water Reclamation Plant and the Point Loma Wastewater Treatment plant would pose unacceptable liabilities for the City's NPDES permits which the IBWC is unwilling to resolve. Additionally the City is unwilling to waive the estimated annual costs of such services (approximately $17 to 20 million) for capacity and service fees which are beyond the current fiscal resources of the IBWC to pay. At best, this alternative is a remote and speculative possibility (*see Vermont Yankee*, 435 U.S. 519, 551), and thus does not warrant further review.

6. Alternative No. 6: Operate the IWTP with Treated Flows to Sent to Mexico and SBWRP.

Alternative No. 6 similarly requires the use of the City of San Diego's facilities, but also adds to this proposal the return of some portion of the sewage to Mexico for discharge directly to the Pacific Ocean. Alternative No. 6 should be rejected outright for the same reasons set forth above regarding Alternative Nos. 3 to 5. As such, this is not a reasonable alternative and does not warrant further review.

7. Alternative No. 7: Completely Mixed Aeration ("CMA") Ponds at the IWTP

This alternative is inconsistent with the Tijuana River Act. Congress has repeatedly rejected the IBWC requests fund construction of the CMA ponds. Instead, Congress elected to utilize private sector funding under a public private partnership fee-for-services funding model as set forth in the Tijuana River Act. Additionally, impacted public stakeholders have resoundingly opposed the development of the CMA ponds. The nearby residents of the Coral Gate Community will undoubtedly strongly oppose the prospect of constructing over 30 acres of open ponds due to the odors concerns such a facility would have on their homes. This alternative should be rejected without further study.

8. Alternative No. 8: IWTP Closure/Shutdown

This alternative would actually impose increased environmental harm. Although IWTP is currently not operating in accordance with its NPDES permit (since expired) and is in violation of the federal Clean Water Act, it has in fact materially improved the cross border sewage problem by at least treating 25 mgd of sewage to advanced primary levels and discharging the effluent 3.5 miles to sea. This alternative would essentially shut down over $300 million of U.S. taxpayer-funded facilities and further overload a completely overburdened wastewater conveyance and treatment system in Mexico.

Again, this alternative is not reasonable in that it is a blatant violation of Treaty Minute No. 283, the new Treaty Minute, as described by IBWC, the Tijuana River Act, and

federal and state water quality laws. As such, this alternative should be rejected without further study.

9. Summary Regarding IBWC's Proposed Alternatives

In summary, although Bajagua recognized IBWC's desire to conduct a thorough analysis of all reasonable alternatives, the proposed alternatives are simply not reasonable—other than the Bajagua Project. To conduct any further study of these infeasible alternatives would be a waste of taxpayer money and would only needlessly lengthen the timeline for achieving resolution of the transborder sewage problem.

B. IBWC Should Conduct a More Timely, Thorough Review Based on an EA and FONSI; Another Duplicative SEIS is Not Warranted or Required

Given the exhaustive administrative record already compiled on this matter and few reasonable alternatives worthy of further study, IBWC should limit its NEPA review to the development of an EA and FONSI, a process which could take a little as six months, rather than another SEIS.

An EA and FONSI will satisfy IBWC's NEPA requirements because the proposed project will not have any new significant impacts in the United States. 40 C.F.R. §§ (FONSI required when EA reveals no need for an EIS), 1505.2 (ROD required when an EIS has been prepared), 1508.13 (Contents of FONSI). An SEIS is required under NEPA only where there (1) have been "substantial changes in the proposed action that are relevant to environmental concerns," or (2) "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9. This does not require that an SEIS be performed each time any new information is obtained, but only if the new information presents potentially significant environmental impacts.

The Supreme Court in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) directly considered this issue, and held that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. *Id.* at 373. Rather, "the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance. . . ." *Id.* at 374. If the new action will significantly affect the quality of the human environment in a manner or extent not already considered, then a Supplemental EIS should be prepared. *Id.* If not, then the agency may properly undertake less detailed or even no further environmental review, depending on the circumstances. *Id.* The *Marsh* court upheld the Corps of Engineers' conclusion in a Supplemental Information Report ("SIR") that further environmental review was not required of a dam construction project in light of new information.

Marsh has been applied to uphold the agency's decision to prepare an EA followed by a FONSI in response to project changes or new information. In *Churchwell v. Robertson*, 748 F. Supp. 768 (D. Idaho 1990), the Forest Service issued a programmatic EIS for management of the Challis National Forest. Later, the agency prepared three supplemental EA's to analyze whether supplemental EIS's were needed for specific

timber sales within the forest, each of which resulted in a FONSI. Citing *Marsh*, the court explained:

> If an agency is unsure whether a project requires an initial *or supplemental* EIS, federal regulations . . . direct the agency to prepare an [EA] on which it may then base its decision. . . . A supplemental EIS is required in the event new information, information not available or considered when the original EIS was prepared, is brought to the attention of the federal agency, or in the event of changed circumstances. The new information or changed circumstances, in order to mandate a supplemental EIS, must be significant.
> *Id.* at 778-9 (emphasis added).

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The court upheld the decision to issue EA's and FONSI's rather than supplemental EIS's, finding that Forest Service did not act in an arbitrary and capricious manner in concluding that changed circumstances for the timber sales had not created significant, unanalyzed environmental impacts. *Id.* at 782-783; *see also Bosco v. Beck*, 475 F. Supp. 1029, 1039 (D. N.J. 1979) (upholding EPA decision not to prepare an EIS for the proposed construction of a wastewater treatment plant); *Pokorny v. Costle*, 464 F. Supp. 1273, 1280-1281 (same); *Mid-Shiawassee County Concerned Citizens v. Train*, 408 F. Supp. 650, 659 (same).

The only new information obtained since issuance of the 1999 ROD is the passage of the Tijuana River Act in 2000 and publication of the Tijuana Master Plan in 2003, both of which endorse the development of the Bajagua Project. Although authorization to develop the Bajagua Project is procedurally and legally significant new information, no new significant environmental impacts in the United States will result from development of the Bajagua Project and all potential impacts were already studied in the prior environmental review, as recognized in EPA's EA and FONSI performed as part of the Tijuana Master Plan. Thus, IBWC should adopt the EID and other prior environmental review done on the Bajagua Project as an EA that will support a FONSI, instead of performing another unnecessary and duplicative SEIS that will only further delay treatment of the renegade Mexican sewage.

C. IBWC's Time Schedule for this Environmental Review is Excessive

IBWC's proposed 18 month schedule for this environmental review is too excessive, especially in light of the heightened congressional, judicial, and public pressure being placed on IBWC's timely compliance with federal and state water quality laws. On September 22, 2003, IBWC awarded Parsons Engineering Science ("Parsons") Contract No. IBM02D0002 , in the amount of $951,967.00, to begin the environmental review at issue in IBWC's current NOI. Under this contract, IBWC authorizes Parsons to conduct this review on an 18 month schedule. *See* Figure 1 Preliminary Project Schedule for Task

Order No. 18. As set forth in detail above, most of the proposed alternatives have either already been exhaustively studied or are not at all feasible and should be eliminated from further consideration. By focusing the current environmental review on those items that present feasible options and incorporating prior environmental study, IBWC could substantially shorten the time necessary for this NEPA evaluation. By Bajagua's estimate, a thorough NEPA review of IBWC's proposed action could be conducted in as few as six months. Bajagua requests that IBWC reassess and narrow the list of alternatives to those that are truly viable options and shorten the timeframe required to issue a record of decision on the preferred alternative.

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D. IBWC and Its Contractors Should Consider Bajagua's Environmental Documents and Work with Its Technical Staff to Assist with the Preliminary Design and Plans for the Bajagua Project

Pursuant to contract with IBWC, Parsons has been requested to review Bajagua's EID, dated July 1999. However, this EID already been the subject of IBWC's environmental review. Moreover, Bajagua has produced numerous technical documents since July 1999 and has repeatedly requested that IBWC review these documents. Bajagua hereby reiterates its request that these documents be considered as part of the administrative records in this matter. Bajagua also requests that IBWC consider Bajagua's updated environmental studies and allow Bajagua to meet with Parsons technical staff so there is full and complete understanding of the technical, environmental, and financial aspects of the Bajagua Project. These briefings should be coordinated through the Bajagua Director of Operations, Dave Schlesinger, who may be reached at (619) 232-5797.

IV. Summary

For all the foregoing reasons, Bajagua respectfully requests that IBWC limit the scope of its review to consideration of the no action and Bajagua Project alternatives. Bajagua also requests that this environmental review be completed via an EA and FONSI, and not a further SEIS. Finally, Bajagua requests that its environmental studies since July 1999 be considered part of the administrative record, and that Bajagua be allowed to meet with IBWC and Parsons to discuss its preliminary studies, design, and plan for the Bajagua Project.

Bajagua appreciates the opportunity to provide these comments, and looks forward to working with IBWC, its contractors, and EPA to develop a solution that is acceptable to all interested parties, especially the citizens of our community. Please feel free to contact me or Mr. Schlesinger if you have any questions.

Sincerely yours,

James J. Dragna – ows

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Enclosures

cc: Mr. David Schlesinger, Bajagua
Mr. Mario Lewis, IBWC
Mary Neumayr, Esq., U.S. Department of Justice
Carole Squires, Esq., State of California Department of Justice
Mr. Scott Tulloch, City of San Diego Metropolitan Wastewater Department
Mr. Marco Gonzalez, Surfrider Foundation

October 21, 2004

Estimated Bajagua Project Annual Fee for Service Cost

Capital Cost ($1000)

Land Cost Estimate (234 AC)	20,000.0
Preliminary Expenses	17,015.6
Wastewater Treatment Plant	45,212.9
IWTP Effluent Pump Station (25 MGD)	6,715.4
Raw Sewage Pump Station (34 MGD)	5,736.7
Influent Pipelines (2)	23,408.6
Effluent Pipeline	24,186.5
Engineering, Const Mgmt, Legal, Admin	10,330.9
Subtotal Direct Costs	**152,606.5**
Construction Interest	5,806.7
Bank Fees	1,093.9
Working Capital	607.7
Debt Service Reserve	5,043.9
Subtotal Indirect Costs	**12,552.2**
Contingency	3,038.5
Permits and Fees	3,038.5
Bond Insurance	4,800.0
Developer Fee @ 10%	17,603.6
Total Capital Costs	**193,639.3**

Operation and Maintenance Cost ($1000)

Pump Stations and Pipelines	
Power	2,022.4
Labor	60.8
Parts and Materials	28.7
Cleaning and Repair of Pipelines	182.3
Right of Way Lease Fee	1,000.0
Subtotal	**3,294.2**
Treatment Plant	
Power	5,163.5
Labor	753.0
Parts and Materials	114.7
Chemicals	222.3
Equipment Replacement Fund	408.8
Testing and Monitoring	243.1
Subtotal	**6,905.4**

Total Operations and Maintenance Cost **10,199.6**

Assumptions Associated with Capital and O&M Cost Estimates

1. Project is assumed to be a 59 MGD secondary treatment plant utilizing extended aeration activated sludge technology. Ancillary facilities (administration building, laboratory, power substation, sludge de-watering, odor control systems etc) based on discussions with Mexican agencies but final approval is contingent upon joint IBWC/CILA technical review panel established by Treaty Minute 311 (February 2004).
2. Project site is assumed to be Rio Alamar Site #2 as described in Bajagua Environmental Information Document (March 2004). Final approval and re-zoning of site is dependent upon Municipality of Tijuana and National Water Authority (CNA). Final mitigation projects will not be identified until approval of concession application which was submitted by Bajagua LLC in September 2002.
3. Project conveyance lines have been oversized to accommodate an eventual flow of 75 MGD (Tijuana Master Plan for Water and Wastewater Infrastructure Feb 2003)
4. Midpoint of construction is assumed to be May 2006
5. Land costs are based on a preliminary estimate of fair market property values based on Municipality of Tijuana real estate tax records (2001)
6. Right of way lease for pipeline conveyance based on informal discussions with local officials. Final cost will be subject to formal negotiations with cognizant Mexican agencies.
7. No allowance has been made for sludge disposal costs (trucking, composting, landfilling, incineration, etc). Sludge disposal will be subject to a follow on negotiation of the Treaty Minute that implements framework Minute 311.
8. Average power costs assumed to be $.08/kw-hr
9. Testing and monitoring is for influent and effluent only. No allowance has been made for ocean monitoring in order to comply with the California State Ocean Plan. IBWC is currently paying these charges.
10. No allowance has been made for utilization of the South Bay Ocean Outfall. IBWC currently owns adequate capacity in the Outfall to accept 100% of Bajagua treated effluent. It is assumed that the follow on Treaty Minute will result in no cost implications for discharge of Bajagua effluent to the ocean.
11. The treatment plant will be fully staffed 12 hours per day 7 days per week. A minimal operations only watch will be maintained the remaining 12 hours per day.
12. It is assumed the plant will achieve initial operational capability in February 2007 and will be certified by IBWC in March 2007

Derivation of First Year Fee for Service Cost

		Annual Payment
Project Cost	$193,639.3	
Discount Rate	6%	
Interest Rate	5%	
Return on Equity	15%	
Term in Years	20	
Treatment Fee	18.5%	
Debt (80%)	$154,911.4	$12,430.4
Equity (20%)	$38,727.9	$ 6,151.4
O&M		$10,199.6*
Treatment Fee		$ 5,324.6
Total Annual Payment		**$ 23,906.4**

- O&M costs are not included in the derivation of the annual fee for service payment.

Discounted Present Value (PV) **$274,200.1**

Outlays for Lease Purchase (3 year outlay)

Year	%	$/Yr	O&M
1	25	68,550.0	
2	45	123,390.1	
3	30	82,260.0	
4			10,199.6
5			10,199.6
	100	274,200.1	