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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SURFRIDER FOUNDATION,
Plaintiff,
v.
INTERNATIONAL BOUNDARY AND
WATER COMMISSION, UNITED
STATES SECTION,
Defendant.

Case No.: 18cv1621 JM (JMA)

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

Defendant the International Boundary and Water Commission, United States Section (“USIBWC”) moves the court to dismiss Plaintiff Surfrider Foundation’s second cause of action on sovereign immunity grounds. (Doc. No. 13.) Plaintiff opposes. (Doc. No. 17.) Having carefully considered the matters presented, the court record, and the arguments of counsel, the court denies USIBWC’s motion.

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1 **BACKGROUND¹**

2 This case arises out of the management and operation of facilities in the Tijuana
3 River Valley intended to direct and treat water flowing from Mexico across the
4 international border into the United States. On July 17, 2018, Plaintiff filed this action
5 alleging (1) discharge of pollutants from the USIBWC canyon collector facilities violates
6 the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f); and
7 (2) discharge of pollutants from the USIBWC flood conveyance structure without a
8 National Pollutant Discharge Elimination System (“NPDES”) permit violates the CWA,
9 33 U.S.C. § 1311(a). (Doc. No. 1, (“Compl.”).)

10 **I. The Parties**

11 Plaintiff Surfrider Foundation (“Surfrider”) is a grassroots environmental non-profit
12 organization with 1,680 members located in San Diego County. USIBWC is an agency
13 and instrumentality of the United States government charged with addressing
14 transboundary issues arising out of agreements between the United States and Mexico,
15 including the Treaty of February 3, 1944, for the Utilization of Waters of the Colorado and
16 Tijuana Rivers and of the Rio Grande (“1944 Treaty”).

17 **II. The International Boundary and Water Commission**

18 The International Boundary and Water Commission (“Commission”) is a bi-national
19 body comprised of the USIBWC and the Comisión Internacional de Límites y Aguas
20 (“CILA”) in Mexico. Both sections of the Commission exercise the rights and obligations
21 of their governments under the 1944 Treaty. Under the 1944 Treaty,

22 Neither Section [the USIBWC or CILA] shall assume jurisdiction or control over
23 works located within the limits of the country of the other without the express
24 consent of the Government of the latter. The works constructed, acquired or used in
25 fulfillment of the provisions of this Treaty and located wholly within the territorial
26 limits of either country, although these works may be international in character, shall
remain, except as herein otherwise specifically provided, under the exclusive

27 ¹ The facts in this section are drawn from the complaint and submissions from the parties,
28 and, at this stage, are taken as true to the extent they are well pled.

1 jurisdiction and control of the Section of the Commission in whose country the
2 works may be situated.
(Doc. No. 13-2 (“1944 Treaty”) Art. 2.)

3 **III. South Bay Plant**

4 Decisions of the Commission are recorded in Minutes. In 1990, the Commission
5 entered into an agreement known as Minute 283 to address the border sanitation problem
6 in San Diego, California, and Tijuana, Baja California. Among other things, Minute 283
7 led to the construction of the South Bay International Wastewater Treatment Plant (“South
8 Bay Plant”).

9 The South Bay Plant is located in the Tijuana River Valley in the City of San Diego,
10 San Diego County, California. The South Bay Plant was designed “to capture and treat
11 Tijuana wastewater, which would otherwise flow into the U.S. through the Tijuana River
12 and canyons, to secondary standards for discharge into the Pacific Ocean.” (Compl. ¶ 65.)
13 It is permitted to treat up to 25 million gallons of wastewater per day. USIBWC owns the
14 South Bay Plant. The South Bay Plant and its associated facilities are subject to the terms
15 of NPDES permit No. CA0108929 (the “NPDES Permit”). The NPDES Permit authorizes
16 discharges of pollutants at the South Bay Ocean Outfall only, and only after such pollutants
17 have gone through secondary treatment at the South Bay Plant. All other discharges are
18 prohibited.

19 **A. Canyon Collectors**

20 USIBWC operates five canyon collectors: Goat Canyon, Smuggler’s Gulch, Canyon
21 Del Sol, Silva Drain, and Stewart’s Drain. The canyon collectors are designed to capture
22 and divert sewage and runoff that crosses the border into the United States from Mexico
23 west of the flood control conveyance. The canyon collectors detain and direct wastewater
24 into a shallow detention basin. Wastewater in the detention basin is then directed to a
25 screened drain inlet (“collector inlet”) regulated by a valve. When open, the water in the
26 detention basin is accepted into a pipe system and conveyed to the South Bay Plant for
27 treatment and eventual discharge at the South Bay Ocean Outfall. When closed or
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1 malfunctioning, the water cannot drain into the treatment system, and instead overflows
2 the detention basin and travels into the downstream drainages. The canyon collectors are
3 subject to the NPDES permit.

4 **IV. Flood Control Conveyance**

5 In 1978, USIBWC constructed a flood control conveyance designed to capture as
6 much as 135,000 cubic feet of water per second from the Tijuana River as it crosses the
7 border from Mexico into the United States. The flood control conveyance is a concrete-
8 lined channel with banked sides that begins at the United States border with Mexico. It
9 directs water, sewage, and other wastes into an area of the Tijuana River Valley west of
10 the historical course of the Tijuana River, in which the Tijuana River had not previously
11 flowed.

12 The flood control conveyance is not subject to the NPDES Permit. Plaintiff alleges
13 that USIBWC routinely discharges pollutants and solid and/or hazardous waste, captured
14 from the Mexican portion of the Tijuana River, out of the flood control conveyance.

15 **LEGAL STANDARDS**

16 Federal courts are courts of limited jurisdiction. “Without jurisdiction the court
17 cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it
18 ceases to exist, the only function remaining to the court is that of announcing the fact and
19 dismissing the cause.” Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94
20 (1998). As the party asserting claims, Plaintiff bears the burden of establishing jurisdiction.
21 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

22 “Absent a waiver, sovereign immunity shields the Federal Government and its
23 agencies from suit.” F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). The absence of consent
24 deprives the court of jurisdiction to hear the case. Id. A “waiver of sovereign immunity
25 must be ‘unequivocally expressed’ in statutory text.” F.A.A. v. Cooper, 566 U.S. 284, 290
26 (2012). “Any ambiguities in the statutory language are to be construed in favor of
27 immunity, so that the Government’s consent to be sued is never enlarged beyond what a
28 fair reading of the text requires.” Id. (internal citation omitted). Ambiguity exists “if there

1 is a plausible interpretation of the statute” that would not result in waiver of sovereign
2 immunity. *Id.* at 290-91. This canon of construction is a tool for interpreting statutes that
3 should be applied in addition to other traditional statutory interpretation tools. *Id.* at 291.

4 DISCUSSION

5 Plaintiff alleges that USIBWC discharges pollutants without an NPDES permit and
6 in violation of the CWA when wastewater exits the flood control conveyance into the
7 Tijuana River. USIBWC argues that this claim is barred by sovereign immunity.
8 Application of the CWA to the flood control conveyance, USIBWC argues, will affect or
9 impair the 1944 Treaty. USIBWC does not argue that Plaintiff’s other claim—alleging
10 that Defendants’ discharges from the canyon collectors violate the NPDES permit—is
11 barred by sovereign immunity.

12 I. Scope of Waiver of Sovereign Immunity

13 Congress unequivocally consented to suit under the CWA. Section 505(a)(1) of the
14 CWA allows “any citizen” to file suit against a person alleged to be in violation of an
15 effluent standard or limitation under that chapter “including . . . the United States . . .”
16 33 U.S.C. § 1365(a). Plaintiff alleges that USIBWC is in violation of an effluent standard
17 or limitation provided by the CWA. Thus, the question is the scope of this waiver.

18 Section 511(a) of the CWA provides that the Act—

19 shall not be construed as (1) limiting the authority or functions of any officer or
20 agency of the United States under any other law or regulation not inconsistent with
21 this chapter; (2) affecting or impairing the authority of the Secretary of the Army
22 (A) to maintain navigation . . . , or (3) affecting or impairing the provisions of any
treaty of the United States.

23 33 U.S.C. § 1371(a) (emphasis added). This section is a general provision applicable to
24 the entirety of the CWA. *See id.*

25 The court is not aware of any other case involving the interplay of § 511(a) and the
26 sovereign immunity waiver of § 505(a)(1). A number of courts, however, have concluded
27 that the parallel language of § 511(a)(2) provides a limitation on the sovereign immunity
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1 waiver provided in § 313 of the CWA.² Sovereign immunity bars suits “affecting or
2 impairing the authority of the Secretary of the Army (A) to maintain navigation . . .” See,
3 e.g., In re Operation of Missouri River Sys. Litig., 418 F.3d 915 (8th Cir. 2005) (finding
4 § 511(a)(2) unambiguously limits the partial sovereign immunity waiver provided by
5 § 313); North Dakota v. U.S. Army Corps of Engineers, 270 F. Supp. 2d 1115, 1123
6 (D.N.D. 2003) (“While there is no question that Section 313 of the Clean Water Act [33
7 U.S.C. § 1323] constitutes a partial waiver of sovereign immunity, there is also no question
8 that Section 511 [33 U.S.C. § 1371] provides sovereign immunity protection for the Corps
9 of Engineers when compliance with the Clean Water Act may ‘affect or impair’ the
10 authority of the Corps of Engineers to “maintain navigation.”). The same reasoning
11 applies to § 511(a)(3) in this case.

12 Section 511(a)(3) unambiguously limits the partial waiver of sovereign immunity
13 provided by § 505(a)(1). See id. Section 511 is a general provision applicable to the
14 entirety of the CWA. It provides that the CWA shall not be construed as affecting or
15 impairing the provisions of any treaty. This directive applies to construction of the waiver
16 of sovereign immunity in § 505(a)(1) allowing for citizen suits. Cf. Daniel v. Nat’l Park
17 Serv., 891 F.3d 762, 769 (9th Cir. 2018) (“We begin with the principle that our duty is to
18 construe statutes, not isolated provisions.”) (internal quotation and citation omitted). The
19 United States consented to suit under the CWA citizen suit provision, but only to the extent
20 that it does not affect or impair a treaty.

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24 ² Section 313 provides in relevant part: “Each department, agency, or instrumentality of
25 the executive, legislative, and judicial branches of the Federal Government (1) having
26 jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which
27 may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with,
28 all Federal, State, interstate, and local requirements, administrative authority, and process
and sanctions respecting the control and abatement of water pollution in the same manner,
and to the same extent as any nongovernmental entity . . .” 33 U.S.C. § 1323(a).

II. Whether the 1944 Treaty Is Affected or Impaired

“A Rule 12(b)(1) jurisdictional attack may be facial or factual.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” Id. A “jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action.” Id. (internal quotations and citation omitted). “The question of jurisdiction and the merits of an action are intertwined where a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff’s substantive claim for relief.” Id. (internal quotations and citation omitted).

The question is whether Plaintiff’s claim requires USIBWC to take action “affecting or impairing” the 1944 Treaty. The CWA does not define the phrase “affecting or impairing.” Black’s Law Dictionary defines “affect” as “[m]ost generally, to produce an effect on; to influence in some way.” Black’s Law Dictionary (10th ed. 2014). Black’s Law Dictionary defines “impair” as “to diminish the value of.” Id. Absent application of any other canon of construction, “affect” and “impair” should be construed broadly in favor of the sovereign. See Cooper, 566 U.S. at 291.³

³ Plaintiff cites to Save Our Sound Fisheries Ass’n v. Callaway, 387 F. Supp. 292 (D.R.I. 1974) for the proposition that the “affect or impair” language of § 511(a) should not be read broadly and only bars suit “where a treaty necessarily conflicts with the [CWA].” (Doc. No. 17 at 10.) This case held that the “requirement of obtaining a permit under 33 U.S.C. § 1344 for the discharge of dredged material into navigable waters, after notice and opportunity for public hearings, cannot be said to ‘affect or impair’ the authority of the Secretary of the Army to maintain navigation.” Id. at 305. The court declined to read § 511(a) as a broad exemption from permitting requirements, as defendants urged. But the court did not hold that the “affect or impair” language of § 511(a) was limited to situations where the obligation would “conflict” with the ability to maintain navigation. Furthermore,

1 USIBWC argues that its negotiating position with Mexico under the 1944 Treaty
2 and Minutes will be impaired or affected if the flood control conveyance is subject to the
3 CWA. If required to operate the flood control conveyance under an NPDES permit,
4 USIBWC argues, it will be “legally responsible for ensuring the water quality of any
5 transboundary flows that pass through the flood control conveyance.” (Doc. No. 19 at 7.)
6 This “new, open-ended obligation,” (*id.*), will “compel USIBWC to develop a unilateral,
7 domestic solution to the international problem of pollution in the Tijuana River.” (Doc.
8 No. 13-1 at 8.)

9 USIBWC concedes that operating the canyon collectors in compliance with its
10 current NPDES permit does not affect or impair the 1944 Treaty. This is because,
11 USIBWC argues, the United States and Mexico already negotiated an agreement to address
12 the problem of transboundary flows through the Tijuana tributary canyons—Minute 283.⁴
13 USIBWC argues that Minute 283 assumes that works within the United States are subject
14 to CWA regulation. See Conceptual Plan for the International Solution to the Border
15 Sanitation Problem in San Diego, California/Tijuana, Baja California, Minute 283 at 4,
16 available at <https://www.ibwc.gov/Files/Minutes/Minute283.pdf>, (“Because water quality
17 standards are more strict in the United States, the construction, operation and maintenance
18 of the land and deep ocean outfalls would be financed by the United States in recognition
19 of the potential benefits to the Tijuana River Estuary and United States Beaches in San
20 Diego County, California.”). Unlike the canyon collectors, USIBWC argues, the
21 Commission has not agreed on a Minute to address the border sanitation problem presented
22 by discharges from the flood control conveyance.

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26 the court was not deciding whether this provision affected the scope of a waiver of
sovereign immunity, as is at issue here.

27 ⁴ As discussed above, the Commission entered into an agreement known as Minute 283 to
28 address the border sanitation problem. Among other things, Minute 283 led to the
construction of the South Bay Plant and canyon collectors.

1 Plaintiff argues that application of the CWA to the flood control conveyance will not
2 affect or impair the 1944 Treaty. Plaintiff argues that the Treaty already requires the United
3 States to comply with domestic water quality standards, including the CWA. The 1944
4 Treaty provides that works within the United States remain under the exclusive jurisdiction
5 and control of USIBWC, 1944 Treaty, Art. 2, and that the United States “shall assume
6 responsibility for and adjust exclusively in accordance with its own laws all claims arising
7 within its territory in connection with the construction, operation, or maintenance” of the
8 works agreed upon under the Treaty. *Id.* at Art. 20. Minute 261, relating to “border
9 sanitation problems,” recognizes “that each country in dealing with its sanitation problems
10 has its own quality standards, determined by the authorities responsible for safeguarding
11 public health and well-being of its inhabitants.” Minute 261 at 1.⁵

12 Whether Plaintiff’s claim will affect or impair the 1944 Treaty is a question of fact
13 that cannot be answered by the pleadings or evidence before the court. It is possible that
14 requiring USIBWC to comply with the CWA for discharges from the flood control
15 conveyance will affect or impair the 1944 Treaty and Minutes. But the Complaint does
16 not indicate whether compliance with the CWA will affect or impair the 1944 Treaty. Nor
17 do the Treaty or Minutes. USIBWC mounts a “factual attack” against Plaintiff’s claim.
18 See Safe Air for Everyone, 373 F.3d at 1039. The court would need to make factual
19 findings outside of the pleadings to reach a conclusion on this question. And USIBWC
20 fails to present sufficient evidence to support any such finding. First, USIBWC fails to
21 identify what compliance with the CWA would require. USIBWC itself refers to the “new,
22 open-ended obligation” that application of the CWA would create, without defining this
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25 ⁵ Plaintiff also argues that a NPDES permit would not affect or impair the 1944 Treaty as
26 it would only regulate the quality of domestic water discharged from the flood control
27 conveyance, not what enters the conveyance. This distinction is unpersuasive. The
28 Complaint alleges that the flood control conveyance was designed to capture water from
Mexico at the precise moment that it crosses the international border into the United States
and that it was built pursuant to a bi-national agreement.

1 obligation. Even if Plaintiff succeeds on its second claim and USIBWC is required to
2 obtain an NPDES permit, the terms of the permit are unknown. Second, the Complaint
3 and 1944 Treaty do not indicate how USIBWC's new (undefined) obligation will affect or
4 impair the Treaty. USIBWC presents no evidence on this issue. USIBWC concedes that
5 operating the canyon collectors under the constraints of an NPDES permit does not affect
6 or impair the 1944 Treaty, but argues that requiring a permit at the flood control
7 conveyance will affect the Treaty. At oral argument, USIBWC argued that the terms of an
8 NPDES permit regulating discharges from the flood control conveyance would impose a
9 much broader obligation than that imposed by the NPDES permit regulating the canyon
10 collectors. USIBWC supports its argument with hypotheticals, but no evidence.

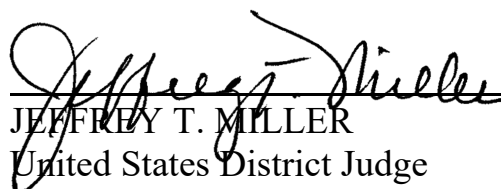
11 USIBWC fails to present sufficient evidence for the court to find that compliance
12 with the CWA would affect or impair the 1944 Treaty. USIBWC's motion to dismiss
13 Plaintiff's second claim on sovereign immunity grounds is denied.

14 **CONCLUSION**

15 For the reasons discussed above, USIBWC's motion to dismiss on sovereign
16 immunity grounds is denied.

17 IT IS SO ORDERED.

18 DATED: December 11, 2018

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20 JEFFREY T. MILLER
21 United States District Judge
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