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21 **UNITED STATES DISTRICT COURT**  
 22 **SOUTHERN DISTRICT OF CALIFORNIA**

23 UNITED STATES OF AMERICA,

24 Plaintiff,

25 v.

26 CALIFORNIA REGIONAL WATER  
 27 QUALITY CONTROL BOARD, SAN DIEGO  
 28 REGION; DAVID W. GIBSON, in his official  
 capacity as Executive Officer of the Regional  
 Water Quality Control Board, San Diego Region;  
 STATE OF CALIFORNIA WATER  
 RESOURCES CONTROL BOARD; and E.

CASE NO. '21CV1749 GPC AGS

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 JOAQUIN ESQUIVEL, in his official capacity as  
2 State Water Resources Control Board Chair,

3 Defendants.

4 Plaintiff, United States of America, through its undersigned attorneys, by the  
5 authority of the Attorney General, and at the request of the Commissioner of the  
6 International Boundary and Water Commission, United States Section  
7 (“USIBWC”), files this Complaint pursuant to 28 U.S.C. §§ 2201–02 and  
8 California Water Code § 13330 to declare the rights and other legal relations of the  
9 United States respecting Order No. R9-2021-0001, NPDES No. CA0108928,  
10 *Waste Discharge Requirements for the United States Section of the International*  
11 *Boundary and Water Commission South Bay International Wastewater Treatment*  
12 *Plant Discharge to the Pacific Ocean through the South Bay Ocean Outfall* (“the  
13 Order,” attached as Exhibit 1), and to set aside or enjoin the enforcement of certain  
14 provisions of the Order identified herein.

15 **INTRODUCTION**

16 1. USIBWC owns and operates the South Bay International Wastewater  
17 Treatment Plant (“the Plant”), which treats to secondary standards 25 million  
18 gallons per day of sewage that enters the United States from the Mexican city of  
19 Tijuana.

20 2. The Plant discharges treated effluent to the Pacific Ocean and is  
21 subject to certain requirements of the Federal Water Pollution Control Act, more  
22 commonly known as the Clean Water Act (“CWA”).

23 3. Pursuant to the CWA, USIBWC must obtain from the California  
24 Regional Water Quality Control Board, San Diego Region (“Regional Board”) a  
25 National Pollutant Discharge Elimination System (“NPDES”) permit to operate the  
26 Plant.

27 4. The Order challenged here is a NPDES permit. Adopted by the  
28 Regional Board on May 12, 2021, the Order sets limits on the quantity and quality

1 of effluent that the Plant is permitted to discharge to the Pacific Ocean. The Order  
2 also contains monitoring and reporting requirements for the Plant’s effluent. The  
3 United States does not contest the Regional Board’s authority to issue these  
4 provisions.

5 5. Beyond these requirements, however, the Order also contains  
6 provisions that improperly: regulate pollutants that flow from Mexico into the  
7 United States through the Tijuana River’s tributaries; treat USIBWC differently  
8 than similarly situated non-federal entities; require USIBWC to take actions in  
9 Mexico; dictate the manner in which the Executive Branch formulates its  
10 diplomatic responses to activity in Mexico; impose certain state law requirements  
11 that are facially inapplicable to USIBWC; and compel certain monitoring and  
12 reporting actions that are unrelated to the operation of the Plant. For the reasons  
13 set forth below, these provisions should be set aside.

14 **PARTIES**

15 6. Plaintiff in this action is the United States of America.

16 7. Defendants in this action are the Regional Board, David W. Gibson in  
17 his official capacity as Executive Officer of the Regional Board, the State of  
18 California Water Resources Control Board (“State Board”), and E. Joaquin  
19 Esquivel, in his official capacity as Chair of the State Board.

20 **JURISDICTION & VENUE**

21 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal  
22 question) and 28 U.S.C. § 1345 (United States as plaintiff).

23 9. Venue is proper in the Southern District of California pursuant to 28  
24 U.S.C. § 1391(b)(1)–(2) because the Regional Board resides in this judicial district,  
25 a substantial part of the events or omissions giving rise to the claims asserted  
26 herein occurred in this judicial district, and the Plant is situated in this judicial  
27 district.

1                   **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

2           10.    On March 25, 2021, USIBWC submitted comments to the Regional  
3 Board on a draft version of the Order.

4           11.    On May 12, 2021, USIBWC participated in a meeting of the Regional  
5 Board. Also on May 12, the Regional Board voted to adopt the Order.

6           12.    On June 11, 2021, USIBWC timely petitioned the State Board for  
7 review of the Order.

8           13.    Because the State Board did not respond to the petition within ninety  
9 days, the petition was deemed dismissed by operation of law on the ninety-first day  
10 following receipt of the petition, September 10, 2021. *See* Cal. Code Regs. tit. 23,  
11 § 2050.5(e).

12          14.    The United States has exhausted all administrative remedies.

13                   **PROTECTIVE STATE COURT ACTION**

14          15.    The United States is concurrently filing a similar action in California  
15 state court in San Diego County. That suit is being filed only out of an abundance  
16 of caution in the event that, for any reason, this action is not adjudicated on the  
17 merits in this Court.

18          16.    The United States filed this action in federal district court to preserve  
19 its choice of a federal forum to resolve its claims, a choice of forum that Congress  
20 established by specifying that “civil actions, suits or proceedings” can be brought  
21 in federal court when the United States acts as a plaintiff. 28 U.S.C. § 1345.

22                   **STATUTORY BACKGROUND**

23          17.    The CWA prohibits the “discharge of any pollutant”—defined as “any  
24 addition of any pollutant to navigable waters from any point source”—except “as  
25 in compliance with” specified provisions of the Act. 33 U.S.C. §§ 1311(a),  
26 1362(12). The term “navigable waters” means “waters of the United States.” *Id.*  
27 § 1362(7).  
28

1           18. Under CWA Section 402, the United States Environmental Protection  
2 Agency (“EPA”), or a state permit program approved by EPA, may issue NPDES  
3 permits authorizing the discharge of pollutants to waters of the United States,  
4 subject to certain restrictions on the types and amounts of pollutants to be  
5 discharged. 33 U.S.C. § 1342(a), (b).

6           19. The violation of a “condition of a [NPDES] permit” is considered a  
7 violation of the CWA and is enforceable by any “person” who has standing to  
8 bring suit. 33 U.S.C. § 1365(a)(1), (f).

9           20. The State Board has been authorized by EPA to administer the  
10 NPDES program for waters within California’s jurisdiction, and “is designated”  
11 under state law, “as the state water pollution control agency for all purposes stated  
12 in the [CWA].” Cal. Water Code § 13160.

13           21. In that role, the State Board is responsible for assuring that the  
14 NPDES program in California is administered in conformance with federal and  
15 state legislation, regulations, and policy.

16           22. NPDES permits may be issued by the State Board or by one of nine  
17 Regional Water Quality Control Boards (including the Regional Board) pursuant to  
18 division 7, chapter 5.5 of the California Water Code.

19           23. NPDES permits issued by the State Board or by a Regional Water  
20 Quality Control Board are also known as Waste Discharge Requirements  
21 (“WDRs”). Cal. Water Code § 13374.

22           24. Agencies and officers of the federal government must comply with  
23 state and local “requirements, administrative authority, and process and sanctions  
24 respecting the control and abatement of water pollution in the same manner, and to  
25 the same extent as any nongovernmental entity.” 33 U.S.C. § 1323(a).

26           25. But the CWA “shall not be construed as . . . affecting or impairing the  
27 provisions of any treaty of the United States.” *Id.* § 1371(a).

1           26. Under California Water Code § 13320, a party aggrieved by a NPDES  
2 permit issued by a Regional Water Quality Control Board may petition the State  
3 Board for administrative review of that permit. Where, as here, the State Board  
4 takes no action on such a petition, the aggrieved party may seek judicial review.  
5 Cal. Water Code § 13330(b).

6           27. Judicial review of NPDES permits issued by Regional Water Quality  
7 Control Boards is governed by California Code of Civil Procedure § 1094.5. Cal.  
8 Water Code § 13330(e). That provision permits a reviewing court to “set aside”  
9 administrative actions taken “without, or in excess of, jurisdiction,” without “a fair  
10 trial,” and where “there was any prejudicial abuse of discretion.” Cal. Code Civ. P.  
11 § 1094.5(b), (f). “Abuse of discretion is established if the respondent has not  
12 proceeded in the manner required by law, the order or decision is not supported by  
13 the findings, or the findings are not supported by the evidence.” *Id.* § 1094.5(b).<sup>1</sup>

## 14                                   **FACTUAL BACKGROUND**

### 15           **I. IBWC, USIBWC, and the 1944 Treaty**

16           28. The International Boundary and Water Commission (“IBWC” or “the  
17 Commission”) is a binational body that consists of an American section—  
18 USIBWC—and a Mexican section, the Comisión Internacional de Límites y Aguas  
19 (“CILA”).

20           29. IBWC was created in its current form by the 1944 Treaty Between the  
21 United States and Mexico Respecting Utilization of the Waters of the Colorado  
22

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23 <sup>1</sup> California Code of Civil Procedure § 1094.5 authorizes petitions for writ of  
24 mandate. Federal Rule of Civil Procedure 81(b) “abolished” writs of mandamus  
25 while allowing that the “[r]elief previously available through” such writs “may be  
26 obtained by appropriate action or motion under these rules.” This action is  
27 therefore styled as a complaint for injunctive relief rather than a petition for writ of  
28 mandamus.

1 and Tijuana Rivers and of the Rio Grande (“the 1944 Treaty”), Feb. 3, 1944, 59  
2 Stat. 1219, T.S. No. 994 (attached as Exhibit 2).

3 30. Through the Commission, USIBWC and CILA act on behalf of their  
4 respective governments in the “exercise of the rights and obligations,” and the  
5 “settlement of all disputes” arising under the 1944 Treaty, among other functions.  
6 1944 Treaty, art. 2.

7 31. Thus, the Commission is empowered, among other functions, to  
8 “carry into execution and prevent the violation of the provisions” of the 1944  
9 Treaty and other relevant treaties and agreements in force between the United  
10 States and Mexico, *id.*, art. 24(c), and to “settle all differences that may arise  
11 between the two Governments with respect to the interpretation or application of  
12 [the 1944] Treaty,” *id.*, art. 24(d).

13 32. Where USIBWC and CILA are unable to settle disputes arising under  
14 the 1944 Treaty, they must “inform their respective governments reporting their  
15 respective opinions and the grounds therefor and the points upon which they differ,  
16 for discussion and adjustment of the difference through diplomatic channels and  
17 for application where proper of the general or special agreements which the two  
18 Governments have concluded for the settlement of controversies.” *Id.*, art. 24(d).

19 33. In executing their duties under the 1944 Treaty, USIBWC and CILA  
20 record their decisions in Minutes—accords that, when approved by the two  
21 governments, become binding agreements. *Id.*, art. 25.

22 34. Article 3 of the 1944 Treaty addresses the cross-border flow of  
23 pollutants and authorizes IBWC to undertake “sanitary measures or works which  
24 may be mutually agreed upon by both governments.”

25 35. Any such works “constructed, acquired or used in fulfillment of the  
26 provisions of this Treaty and located wholly within the territorial limits of either  
27 country, although these works may be international in character, shall remain . . .  
28 under the exclusive jurisdiction and control of the Section of the Commission in



1 whose country the works may be situated.” *Id.*, art 2. Thus, neither USIBWC nor  
 2 CILA may “assume jurisdiction or control over works located within the limits of  
 3 the country of the other without the express consent of the Government of the  
 4 latter.” *Id.*

5 36. Minute 261 (attached as Exhibit 3), which was approved and entered  
 6 into force on October 2, 1979, states that, for each “border sanitation problem,”<sup>2</sup>  
 7 USIBWC and CILA shall “prepare a Minute for the approval of the two  
 8 Governments” outlining the nature of the problem and “the course of action that  
 9 should be followed.” Minute 261 ¶ 4. When “the approved course of action  
 10 provides that a border sanitation problem be jointly corrected by the two  
 11 Governments,” Minute 261 directs USIBWC and CILA to develop and implement  
 12 an agreed-upon “division of work and cost between the two countries.” *Id.* ¶ 6.

## 13 **II. Transboundary pollution in the Tijuana River Valley**

14 37. The Tijuana River Watershed, depicted below in Figure 1,  
 15 encompasses approximately 1,750 square miles. Roughly two-thirds of the  
 16 watershed is in Mexico.

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24 <sup>2</sup> Minute 261 defines a “border sanitation problem” as:

25 [E]ach case in which . . . the waters that cross the border . . . have  
 26 sanitary conditions that present a hazard to the health and well-being  
 27 of the inhabitants of either side of the border or impair the beneficial  
 28 uses of these waters.

Minute 261 ¶ 1.



38. *Figure 1: The Tijuana River Watershed*<sup>3</sup>



39. The Tijuana River flows north, and passes through the Mexican city of Tijuana before entering the United States.

40. Once in the United States, the Tijuana River runs for roughly five miles before emptying into the Tijuana River Estuary and the Pacific Ocean.

41. The Tijuana River Estuary is subject to the ebb and flow of the tide.

42. The approximate boundaries of the United States sections of the Tijuana River and Tijuana River Estuary ecosystems are depicted in the blue shaded area in Figure 2, below.

<sup>3</sup> Figure 1 was reproduced in the Report of Dr. Lyndon Lee (“Lee Report”), which is part of the record in this case because it was submitted by USIBWC to the Regional Board during the public notice and comment period that followed the Regional Board’s release of a draft version of the Order.

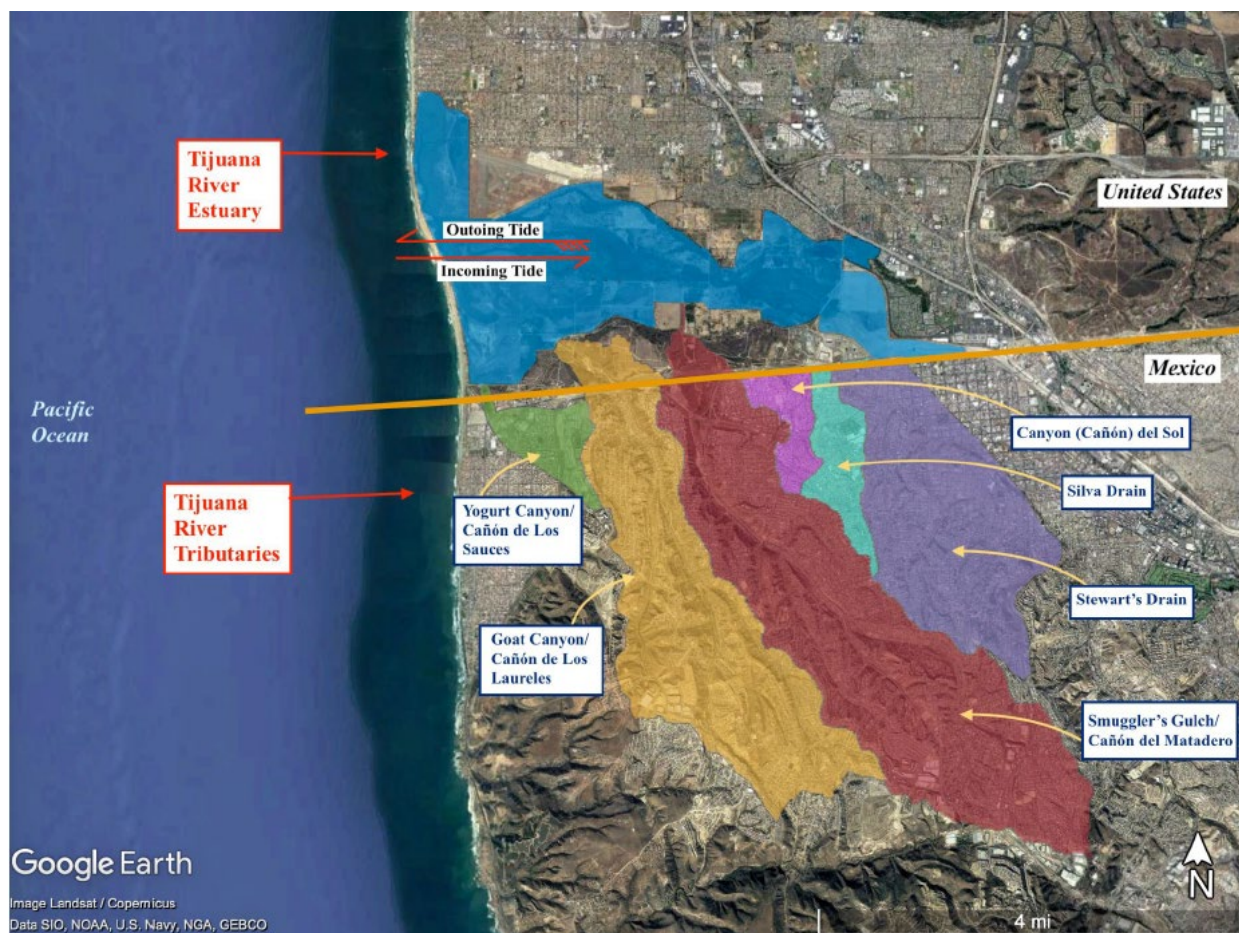
1           43. Several tributaries of the Tijuana River also flow from Mexico into  
2 the United States. These include Yogurt Canyon, Goat Canyon, Smuggler’s Gulch,  
3 Canyon del Sol, Silva Drain, and Stewart’s Drain, depicted in Figure 2.

4           44. Though fragmented to varying degrees by culverts, ditches, roads, and  
5 other development, Goat Canyon, Smuggler’s Gulch, Canyon del Sol, Silva Drain,  
6 and Stewart’s Drain exhibit bed and bank features, and indicators of ordinary high  
7 water marks, such as sediment scour, shelving, deposition of sediment and debris,  
8 and abrupt changes in the plant community structure and composition.

9           45. In typical years, these tributaries have direct hydrologic connections  
10 to the Tijuana River or Estuary. Their flow is seasonal and intermittent, but is not  
11 solely responsive to direct precipitation inputs.

12           46. Alone and in combination, Goat Canyon, Smuggler’s Gulch, Canyon  
13 del Sol, Silva Drain, and Stewart’s Drain contribute significant amounts of water  
14 and other materials that directly impact water quality, and plant and animal  
15 communities, and thus directly impact the overall maintenance of the physical,  
16 chemical and biological integrity of the Tijuana River and Estuary.

1 *Figure 2: Approximate boundary of the Tijuana River/Tijuana Estuary ecosystems*  
 2 *and tributary watersheds*<sup>4</sup>



### 19 **A. The South Bay International Wastewater Treatment Plant**

20 47. For decades, the Tijuana River and its tributaries have carried  
 21 pollutants into the United States from Mexico.

22 48. To address the cross-border flow of wastewater, the governments of  
 23 the United States and Mexico agreed in 1990 to construct a wastewater treatment  
 24 plant in the United States to treat a finite amount of Tijuana's wastewater.

25 49. The terms of that agreement are set forth in Minute 283 (attached as  
 26 Exhibit 4), which also provides, *inter alia*: (1) that Mexico will assure that there

27  
 28 \_\_\_\_\_  
<sup>4</sup> Figure 2 is also reproduced in the Lee Report.



1 are no discharges of treated or untreated wastewaters into flows of the Tijuana  
2 River that cross the international boundary; (2) that Mexico will take measures to  
3 stop any such transboundary flows of wastewater that do occur; and (3) that  
4 Mexico will implement a domestic pretreatment program applicable to industrial  
5 facilities that discharge effluent for treatment in the United States. Minute 283  
6 ¶¶ 12, 16.

7 50. Construction of the Plant began in 1994.

8 51. By 1997, the Plant was treating Mexican sewage to primary standards.  
9 In 2010, the Plant's secondary treatment modules came online.

10 52. The Plant is designed and is permitted to treat an average of 25  
11 million gallons per day of sewage to secondary standards. The Plant has been  
12 operating at capacity since it came online.

13 53. The Plant discharges treated effluent into the Pacific Ocean through  
14 the South Bay Ocean Outfall, which is located roughly three miles offshore.

15 54. The Plant is owned and operated by USIBWC pursuant to terms set  
16 forth in Minute 283 and Minute 296 (attached as Exhibit 5).

17 **B. The canyon collector system**

18 55. The vast majority of the Plant's influent arrives by way of a trans-  
19 border sewer line that connects the City of Tijuana's sewer system to the Plant.

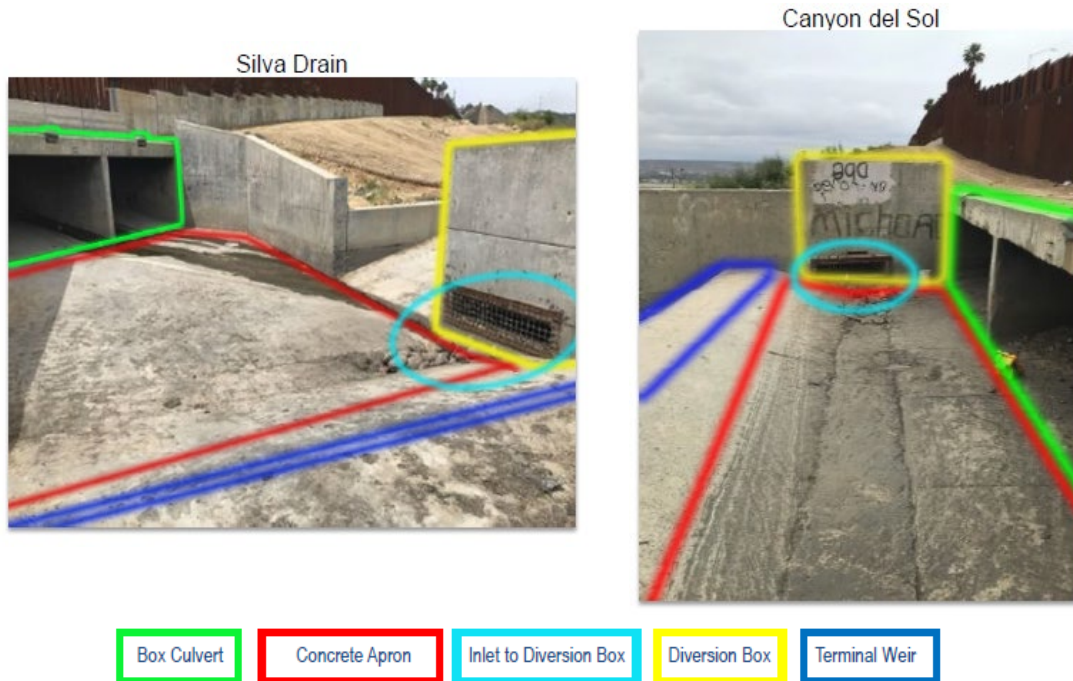
20 56. A small fraction, however, is surface flow that is captured and  
21 diverted to the Plant by way of five USIBWC-owned and operated canyon  
22 collectors.

23 57. The canyon collectors are essentially drains situated close to the  
24 border within Goat Canyon, Smuggler's Gulch, Canyon del Sol, Silva Drain, and  
25 Stewart's Drain.

26 58. Each collector includes, in relevant part, a concrete apron (outlined in  
27 red in Figure 3, below) that slopes to a gradually inclined terminal weir (the crest  
28

1 of which is outlined in dark blue in Figure 3). The canyon collectors end after  
 2 those terminal weirs but the tributaries containing the canyon collectors continue.

3 59. *Figure 3: Annotated photographs of Silva Drain and Canyon del Sol*  
 4 *Canyon Collectors*<sup>5</sup>



16  
17 60. Just before the terminal weir, each canyon collector has an inlet  
 18 (indicated in light blue in Figure 3) that opens into a diversion box (indicated in  
 19 yellow). Each diversion box contains two sub-grade chambers. Water that enters  
 20 the inlet goes into these chambers and then, via a series of pipes and pump stations,  
 21 on to the Plant for treatment.

22 61. The concrete apron and terminal weir of the canyon collectors are  
 23 located entirely within Goat Canyon, Smuggler’s Gulch, Canyon del Sol, Silva  
 24

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25 <sup>5</sup> The annotated photographs in Figure 3 were submitted by USIBWC to the  
 26 Regional Board during the public notice and comment period following the  
 27 Regional Board’s release of the Draft Order. The figure depicts two canyon  
 28 collectors; the components that are highlighted are common to all five collectors.

1 Drain, and Stewart's Drain. In other words, the canyon collectors' concrete aprons  
2 and terminal weirs are engineered sections of the tributaries in which the collectors  
3 are situated.

4 62. The collectors only divert surface flow and do not add pollutants to  
5 the waterways in which they are situated. Pollutants that enter the canyon  
6 collectors first enter Goat Canyon, Smuggler's Gulch, Canyon del Sol, Silva Drain,  
7 and Stewart's Drain upstream of the collectors.

8 63. There are no water collection and diversion systems in the United  
9 States stretches of the Tijuana River itself, or in Yogurt Canyon, a transboundary  
10 tributary of the Tijuana River and Estuary located west of Goat Canyon.

11 64. By design, the canyon collectors capture and divert for treatment only  
12 low-volume flows. The maximum difference in elevation between the low points  
13 on the collectors' concrete aprons and the crest of their sloped terminal weirs is 24  
14 inches. This small, gradual rise helps to direct low-volume transboundary flows  
15 toward the collectors' diversion boxes, while allowing higher-volume flows to pass  
16 downstream.

17 65. The canyon collectors were not designed to, and do not, capture  
18 higher volume flows, like those that follow rain events.

19 66. Transboundary flows may contain sediment or solid waste that can  
20 interfere with the canyon collectors' ability to capture and divert wastewater for  
21 treatment at the Plant. USIBWC inspects all canyon collectors at least once per day  
22 and removes trash and sediment from the collectors for offsite disposal.

### 23 **C. Other infrastructure in the Tijuana River Valley**

24 67. The canyon collectors are not the only engineered sections of the  
25 Tijuana River's and Estuary's tributaries.

26 68. For example, the California State Parks System built and operates a  
27 sediment basin complex situated within Goat Canyon. The complex, which  
28 features a concrete channel with banked sides, begins roughly 1,200 feet from the

1 Goat Canyon canyon collector’s terminal weir and extends roughly 2,200 feet,  
2 ending near Monument Road.

3 69. Another example: the City of San Diego diverted the Canyon del Sol  
4 waterway into an underground culvert that begins roughly 300 feet downstream of  
5 the Canyon del Sol canyon collector’s terminal weir. The culvert extends  
6 underground to a point near Clearwater Way, where it empties into a ditch that  
7 connects with the Tijuana River.

8 70. Neither the Goat Canyon sediment basin, nor the Canyon del Sol  
9 culvert operates under a permit authorizing the discharge of dry weather  
10 transboundary flows.

### 11 **FIRST CLAIM FOR RELIEF**

12 71. The United States realleges and incorporates, as though fully set forth  
13 herein, each and every allegation in paragraphs 1 through 70 of this Complaint.

14 72. Defendants acted without, or in excess of, jurisdiction and  
15 prejudicially abused their discretion by attempting to regulate transboundary flows  
16 through the canyon collectors as discharges of pollutants subject to NPDES  
17 permitting requirements under the CWA.

18 73. Discharge Prohibition 3.1 of the Order states that the “discharge of  
19 waste . . . to a location other than [the South Bay Ocean Outfall], unless  
20 specifically regulated by this Order or separate [NPDES permits], is prohibited.”  
21 Order at 7.

22 74. In response to USIBWC’s repeated requests for clarification, the  
23 Regional Board eventually declared that “Discharge Prohibition 3.1 is  
24 appropriately interpreted to include all dry weather Canyon Collector  
25 Transboundary Flow Events.” Regional Board Response to USIBWC Comments  
26 (“RTC,” attached as Exhibit 6) at 24.

27 75. Thus, Discharge Prohibition 3.1 requires USIBWC to obtain a  
28 separate NPDES permit for all “flow[s] across the U.S.–Mexico international



1 border under dry . . . weather conditions” in Goat Canyon, Smuggler’s Gulch,  
2 Canyon del Sol, Silva Drain, or Stewart’s Drain that are not “captured by the  
3 canyon collector system for treatment at the [Plant].” *See* Order at 23 (defining  
4 “Canyon Collector Transboundary Flow Event”).

5 76. In its response to USIBWC’s comments, the Regional Board  
6 maintained that it had legal authority to issue Discharge Prohibition 3.1 based on  
7 the CWA’s prohibition on the discharge of pollutants to waters of the United  
8 States. RTC at 24.

9 77. But the CWA defines the “discharge of a pollutant” as the “*addition*  
10 of any pollutant” to waters of the United States. 33 U.S.C. § 1362(7), (12)  
11 (emphasis added).

12 78. In the NPDES permitting context, nothing is added, and thus there is  
13 no “discharge of pollutants,” when pollutants that were already present in a  
14 waterway merely move from one part of that waterway to downstream sections of  
15 the same waterway. Absent a discharge of pollutants, no NPDES permit is  
16 required.

17 79. When transboundary flows pass over a canyon collector’s concrete  
18 apron and terminal weir, the collector does not introduce any pollutants to the  
19 waterway in which it is situated. Such transboundary flows, then, are not  
20 discharges of pollutants under the CWA and cannot be subject to NPDES  
21 permitting requirements.

## 22 **SECOND CLAIM FOR RELIEF**

23 80. The United States realleges and incorporates, as though fully set forth  
24 herein, each and every allegation in paragraphs 1 through 79 of this Complaint.

25 81. Defendants acted without, or in excess of, jurisdiction and  
26 prejudicially abused their discretion in attempting to regulate dry weather  
27 transboundary flows under a provision of state law that mirrors the CWA in all  
28 relevant respects.

1           82.    The Order “serve[s] as an NPDES permit” pursuant to “chapter 5.5,  
2 division 7 of the Water Code (commencing with section 13370).” Order at 6.

3           83.    The California Legislature provided: (a) that the term “discharge” as  
4 used in chapter 5.5 “shall have the same meaning” as in the CWA, Cal. Water  
5 Code § 13373; (b) that the provisions of chapter 5.5 “shall prevail over other  
6 provisions” of division 7 “to the extent of any inconsistency,” *id.* § 13372(a); (c)  
7 that the provisions of chapter 5.5 “apply only to actions required under the  
8 [CWA],” *id.*; and (d) that chapter 5.5’s prohibition on the “discharge of pollutants”  
9 “does not apply” if a “permit is not required under the [CWA],” *id.* § 13376.

10          84.    Thus, if an activity is not a discharge subject to NPDES permitting  
11 requirements under the CWA, then it is not a discharge subject to a Waste  
12 Discharge Requirement issued under division 7, chapter 5.5 of the California  
13 Water Code.

14          85.    Transboundary flows through the canyon collectors are not  
15 discharges subject to NPDES permitting requirements. Thus, Defendants acted  
16 without, or in excess of, jurisdiction and prejudicially abused their discretion in  
17 issuing Discharge Prohibition 3.1 to regulate those flows as discharges of  
18 pollutants pursuant to division 7, chapter 5.5 of the California Water Code.

19   **THIRD CLAIM FOR RELIEF**

20          86.    The United States realleges and incorporates, as though fully set forth  
21 herein, each and every allegation in paragraphs 1 through 85 of this Complaint.

22          87.    The doctrine of intergovernmental immunity, which is rooted in the  
23 Supremacy Clause, bars “differential treatment of identical conduct based on the  
24 actor’s status as a federal agen[cy].” *United States v. City of Arcata*, 629 F.3d 986,  
25 991 (9th Cir. 2010).

26          88.    Following USIBWC’s repeated requests that the Regional Board  
27 clarify Discharge Prohibition 3.1’s intended scope and legal justification, the  
28 Regional Board stated for the first time in its Response to Comments that the

1 California Water Code allowed it to regulate anything meeting the dictionary  
2 definition of a “discharge” of waste. RTC at 25. This would include anything  
3 allowing “waste”—broadly defined at California Water Code § 13050—“to flow  
4 out from where it has been confined,” or anything “giv[ing] outlet or vent to,” or  
5 “emit[ting]” waste. *Id.* (internal quotation marks omitted). “Transboundary flows  
6 which overflow or bypass the canyon collectors,” the Regional Board concluded,  
7 “fall within the common sense meaning of discharge and thus constitute discharges  
8 of waste under the Water Code.” *Id.*

9 89. But if transboundary flows are “discharges of waste” under the  
10 California Water Code simply because they “flow out from” the canyon collectors  
11 (RTC at 25), then dry weather transboundary flows are likewise discharges of  
12 waste when they flow out from the Goat Canyon sediment basin complex or the  
13 Canyon del Sol culvert.

14 90. Under the Regional Board’s expansive reading of the California  
15 Water Code, there is no principled reason why the State would regulate dry weather  
16 transboundary flows that pass through the canyon collectors without also regulating  
17 dry weather transboundary flows that pass through works owned by non-federal  
18 actors, such as those described in paragraphs 68 and 69.

19 91. Yet the Order seeks to do just that. Defendants acted without, or in  
20 excess of, jurisdiction and prejudicially abused their discretion in attempting to  
21 regulate transboundary flows only when they pass over USIBWC infrastructure, as  
22 that attempt violates the intergovernmental immunities doctrine.

#### 23 **FOURTH CLAIM FOR RELIEF**

24 92. The United States realleges and incorporates, as though fully set forth  
25 herein, each and every allegation in paragraphs 1 through 91 of this Complaint.

26 93. Because it regulates the federal government more stringently than  
27 similarly situated non-federal actors, Discharge Prohibition 3.1 falls outside the  
28

1 scope of the United States' consent to state regulation and is thus barred by  
2 sovereign immunity.

3 94. The United States has waived sovereign immunity and submitted to  
4 state authority only "in the same manner, and to the same extent" as non-federal  
5 actors. 33 U.S.C. § 1323. The United States thus retains sovereign immunity from  
6 any effort by states to regulate certain activity only when that activity is undertaken  
7 by the federal government.

8 95. Discharge Prohibition 3.1 of the Order prohibits USIBWC from  
9 allowing transboundary flows to pass through the canyon collectors, unless  
10 USIBWC obtains some state approval. But Defendants make no such demand of  
11 non-federal entities that own infrastructure through which dry weather  
12 transboundary flows also pass.

13 96. The United States has not consented to this kind of differential state  
14 regulation. The Order's attempt to regulate transboundary flows only when they  
15 pass over USIBWC-owned infrastructure is thus barred by sovereign immunity.  
16 Defendants therefore acted without, or in excess of, jurisdiction and prejudicially  
17 abused their discretion in attempting to regulate transboundary flows as discharges  
18 of waste only when those flows pass over USIBWC-owned infrastructure.

#### 19 **FIFTH CLAIM FOR RELIEF**

20 97. The United States realleges and incorporates, as though fully set forth  
21 herein, each and every allegation in paragraphs 1 through 96 of this Complaint.

22 98. Defendants acted without, or in excess of, jurisdiction and  
23 prejudicially abused their discretion in issuing conditions in a NPDES permit that  
24 affect or impair the provisions of the 1944 Treaty and related agreements in the  
25 form of IBWC Minutes despite Congress' clear directive that the CWA "shall not  
26 be construed as . . . affecting or impairing the provisions of any treaty of the  
27 United States." 33 U.S.C. § 1371(a).

1           99. As reflected in the 1944 Treaty, USIBWC and CILA do not have  
2 jurisdiction outside of their respective countries. Consistent with that limitation,  
3 IBWC’s Minutes require Mexico to ensure the quality of influent that it sends to  
4 the Plant.

5           100. For example, Paragraph 12 of Minute 283 states that the “Government  
6 of Mexico, in accordance with laws in force in that country, in order to assure  
7 efficient treatment of Tijuana sewage in the international plant, will require all  
8 industries to provide appropriate pre-treatment of wastewaters.” Similarly,  
9 Paragraph 10 of Minute 296 states that “the Commission will monitor inflows at  
10 the international boundary for potential exceedances and provide the information  
11 to the Government of Mexico so that the proper authorities in Mexico can apply  
12 those limits in applying appropriate pretreatment laws.”

13           101. Yet Section 6.3.5.3.1 of the Order states that *USIBWC* “shall comply”  
14 with certain limitations on the quantity and quality of pollutants in the influent that  
15 arrive at the Plant from Mexico.

16           102. In the event of an influent exceedance, moreover, the Order requires  
17 USIBWC to “formally elevate the matter” by requesting in writing that the State  
18 Department give it “elevate[d] diplomatic attention,” Order at 43, and that “within  
19 24 hours of becoming aware of [an] exceedance,” USIBWC write to the State  
20 Department and EPA requesting that “measures be taken to immediately cease  
21 such exceedance,” *id.* at 46. USIBWC must then submit to the Regional Board its  
22 written communications to EPA and the State Department and any responses that it  
23 receives. *Id.* at 43, 46.

24           103. To “ensure . . . that influent limitations will be met,” the Order also  
25 imposes “Source Control Requirements” (*Id.* at 47–48) that compel USIBWC to,  
26 for example, “limit the pollutants in the influent to the Facility,” and “take all  
27 appropriate actions to *prevent the discharge* of untreated industrial wastewater into  
28 the Facility,” *id.* at 47 (emphasis added). And the Order likewise requires (upon

1 certain triggering conditions) that USIBWC adopt a Pollutant Minimization Plan  
2 “to reduce all potential *sources* of pollutants through pollutant minimization  
3 (control) strategies, including pollution prevention measures as appropriate.” *Id.* at  
4 39 (emphasis added).

5 104. These provisions of the Order at the very least affect or impair the  
6 provisions of the 1944 Treaty and its Minutes. They do this by holding USIBWC  
7 responsible for addressing activities in Mexico that result in influent exceedances,  
8 which, pursuant to the 1944 Treaty and Minutes, are Mexico’s responsibility to  
9 address. The Order also impairs or affects treaty provisions by compelling  
10 USIBWC to resolve an issue already addressed under the 1944 Treaty and  
11 Minutes—Mexico’s compliance with pretreatment obligations—through the State  
12 Department and EPA, rather than through the Commission, as expressly  
13 contemplated in the treaty and its implementing Minutes.

14 105. Congress made clear that the CWA “shall not be construed as . . .  
15 affecting or impairing the provisions of any treaty of the United States.” 33 U.S.C.  
16 § 1371(a). NPDES permit conditions that make USIBWC responsible for  
17 preventing influent exceedances, and that dictate the process by which USIBWC  
18 seeks to remedy influent exceedances, violate that prohibition.

#### 19 **SIXTH CLAIM FOR RELIEF**

20 106. The United States realleges and incorporates, as though fully set forth  
21 herein, each and every allegation in paragraphs 1 through 105 of this Complaint.

22 107. To the extent that Defendants rely on state law authority to compel  
23 USIBWC to take actions in Mexico, or to direct the manner in which the United  
24 States government resolves issues regarding cross-border pollution, they are  
25 preempted from doing so.

26 108. Where a state law “stands as an obstacle to the accomplishment and  
27 execution of the full purposes and objectives of” federal law or policy, it fails  
28 under the doctrine of conflict preemption. *Von Saher v. Norton Simon Museum of*

1 *Art at Pasadena*, 592 F.3d 954, 961 (9th Cir. 2010) (internal quotation marks  
2 omitted).

3 109. A state law also fails under the doctrine of foreign affairs field  
4 preemption if that law “(1) has no serious claim to be addressing a traditional state  
5 responsibility and (2) intrudes on the federal government’s foreign affairs power.”  
6 *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012). A  
7 state law with more than “some incidental or indirect effect in foreign countries”  
8 is considered to infringe on the field of foreign affairs, which is the exclusive  
9 province of the federal government. *Zschernig v. Miller*, 389 U.S. 429, 433 (1968)  
10 (internal quotation marks omitted).

11 110. The 1944 Treaty and related Minutes expressly reflect that  
12 USIBWC’s and CILA’s jurisdiction is limited to matters within their national  
13 borders (absent consent of the other), 1944 Treaty, art. 2, and identify Mexico as  
14 the entity responsible for implementing a program to ensure that influent to the  
15 Plant meets relevant standards, Minute 283 ¶ 12; Minute 296 ¶ 10.

16 111. The 1944 Treaty and Minutes also authorize the Commission to  
17 “exercise of the rights and obligations,” and “settle[] . . . all disputes” arising  
18 under the 1944 Treaty and international agreements, 1944 Treaty art. 2, 24,  
19 including those concerning “border sanitation issues,” Minute 261 ¶¶ 1, 6.

20 112. Provisions of the Order that compel USIBWC to limit pollutants in  
21 influent from Mexico necessarily require USIBWC to take actions in Mexico and  
22 thus directly conflict with the limited territorial jurisdiction reflected in the 1944  
23 Treaty and Minutes. These include Sections 6.3.3, 6.3.5.3.1, 6.3.5.3.3.1, and  
24 6.3.5.3.3.2.

25 113. Provisions of the Order that compel USIBWC to address influent  
26 exceedances by working through the State Department and EPA, rather than  
27 through the Commission, differ from the approach reflected in the Treaty and  
28 Minutes and undermine the federal government’s prerogative to decide how it will



1 comply with its international commitments. These include Sections 6.3.5.3.1.1 and  
2 6.3.5.3.2.2.

3 114. Provisions of the Order that compel USIBWC to regulate conduct in a  
4 foreign nation, or dictate the manner in which the Executive Branch conducts U.S.  
5 foreign relations or formulates its diplomatic response to actions in a foreign nation,  
6 have a more than indirect effect on foreign affairs. These provisions also do not  
7 address an area of traditional state responsibility.

8 115. Thus, provisions of the Order that make USIBWC responsible for  
9 preventing influent exceedances, and that dictate the process by which USIBWC  
10 seeks to remedy influent exceedances, are preempted. In issuing these provisions,  
11 Defendants acted without, or in excess of, jurisdiction and prejudicially abused  
12 their discretion.

### 13 SEVENTH CLAIM FOR RELIEF

14 116. The United States realleges and incorporates, as though fully set forth  
15 herein, each and every allegation in paragraphs 1 through 115 of this Complaint.

16 117. The deliberative communications of the Executive Branch are  
17 shielded from disclosure by the constitutional doctrine of executive privilege.

18 118. “That privilege safeguards the public interest in candid, confidential  
19 deliberations within the Executive Branch; it is ‘fundamental to the operation of  
20 Government.’” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020)  
21 (quoting *United States v. Nixon*, 418 U.S. 708 (1974)). Thus, federal inter-agency  
22 and intra-agency deliberative documents are not subject to civil discovery or  
23 disclosure under the Freedom of Information Act. *See* 5 U.S.C. § 552(b)(5).

24 119. Sections 6.3.5.3.1.1, 6.3.2.2.3, 6.3.5.3.2.2 and Attachment E, Table  
25 E-11, of the Order attempt to compel USIBWC to disclose communications  
26 between USIBWC, the State Department, and EPA regarding the potential courses  
27 of action to be taken in the event of an influent limitation exceedance or  
28 transboundary flow. *See* Order at 32, 43, 46, Table E-11.

1           120. Specifically, Section 6.3.5.3.1.1 states that in the event of an influent  
2 exceedance, USIBWC must “formally elevate the matter in writing to the U.S.  
3 Department of State and U.S. Environmental Protection Agency regarding the  
4 reasons for lack of progress and offer strategies for addressing the difficulties[,]”  
5 “request elevate[d] diplomatic attention[,]” from the State Department, and submit  
6 a copy of the request to the Regional Board. Order at 43.

7           121. Similarly, Section 6.3.5.3.2.2 requires USIBWC to “notify the U.S.  
8 Department of State and U.S. Environmental Protection Agency, in writing within  
9 24 hours of becoming aware of [an influent limitation] exceedance, and request  
10 measures be taken to immediately cease such exceedance of the influent  
11 limitation,” and then submit the inter-agency correspondence to the Regional  
12 Board. Order at 46.

13           122. And in the event of a dry weather transboundary flow event, Section  
14 6.3.2.2.3 requires USIBWC to “notify” the State Department and EPA “in writing  
15 that such a discharge has occurred and request that measures be taken to  
16 immediately stop such discharges[,]” and again submit the correspondence to the  
17 Regional Board. Order at 32.

18           123. Documents reflecting internal deliberations within the Executive  
19 Branch about the proper course of action in response to events that take place in a  
20 foreign country fall squarely within the constitutional doctrine of executive  
21 privilege and are therefore protected from disclosure.

22           124. Disclosure of such deliberative communications is compelled under  
23 Sections 6.3.5.3.1.1, 6.3.2.2.3, 6.3.5.3.2.2 and Attachment E, Table E-11.  
24 Defendants thus acted without, or in excess of, jurisdiction and prejudicially  
25 abused their discretion in issuing these provisions.

### 26                                   **EIGHTH CLAIM FOR RELIEF**

27           125. The United States realleges and incorporates, as though fully set forth  
28 herein, each and every allegation in paragraphs 1 through 124 of this Complaint.

1           126. Defendants acted without, or in excess of, jurisdiction and  
2 prejudicially abused their discretion by purporting to compel USIBWC’s  
3 compliance with requirements of state law that are facially inapplicable to  
4 USIBWC.

5           127. Discharge Prohibition 3.2 states that USIBWC “must comply with  
6 Discharge Prohibitions contained in the Water Quality Control Plan for Ocean  
7 Waters of California, California Ocean Plan (Ocean Plan), incorporated into this  
8 Order as if fully set forth herein.” Order at 7.

9           128. The Ocean Plan provides, *inter alia*, that “[t]he discharge of trash to  
10 surface waters of the State or the deposition of trash where it may be discharged  
11 into surface waters of the State is prohibited.” Ocean Plan at 32.<sup>6</sup>

12           129. But the Ocean Plan also provides that “Dischargers with NPDES  
13 permits, WDRs, or waivers of WDRs that do not contain *specific requirements for*  
14 *the control of Trash\** are exempt from these Trash Provisions\*.” *Id.* (emphasis  
15 added).

16           130. There are no “specific requirements for the control of trash” in the  
17 Order, so the Ocean Plan’s prohibition on the discharge of trash does not apply to  
18 USIBWC.

19           131. Similarly, Discharge Prohibition 3.3 states that USIBWC “must  
20 comply with Discharge Prohibitions contained in chapter 4 of the Water Quality  
21 Control Plan for the San Diego Basin (Basin Plan), incorporated into this Order as  
22 if fully set forth herein.” Order at 7.

23           132. But the Basin Plan’s discharge prohibitions are applicable to a  
24 “person, as defined by section 13050(c) of the Water Code, who is a citizen,  
25

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26  
27 <sup>6</sup> The California Ocean Plan is available on the State Board’s website:  
28 [https://www.waterboards.ca.gov/water\\_issues/programs/ocean/docs/oceanplan2019.pdf](https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/oceanplan2019.pdf)

1 domiciliary, or political agency or entity of California whose activities in  
2 California could affect the quality of waters of the state within the boundaries of  
3 the San Diego Region.” Basin Plan at 4-18.<sup>7</sup>

4 133. USIBWC is not “a citizen, domiciliary, or political agency of  
5 California.” The Basin Plan’s Discharge Prohibitions therefore do not apply to  
6 USIBWC.

7 134. USIBWC is not required to abide by provisions of the Basin Plan and  
8 Ocean Plan that are incorporated into the Order as if fully set forth therein if those  
9 provisions are facially inapplicable to USIBWC.

10 **NINTH CLAIM FOR RELIEF**

11 135. The United States realleges and incorporates, as though fully set forth  
12 herein, each and every allegation in paragraphs 1 through 134 of this Complaint.

13 136. Defendants acted without, or in excess of, jurisdiction and  
14 prejudicially abused their discretion by compelling USIBWC to complete a report  
15 that is only required under state law when the benefits of the report exceed the  
16 costs, which is not the case here.

17 137. Section 6.3.5.2 of the Order states that “[f]our years prior to reaching  
18 the [Plant] design capacity,” USIBWC “shall” submit to the Regional Board “a  
19 Treatment Plant Capacity Report . . . showing how flow volumes will be prevented  
20 from exceeding existing capacity or how capacity will be increased.” Order at 42.

21 138. The Order explains that Section 6.3.5.2 is intended to implement title  
22 23, division 3, chapter 9, section 2232 of the California Code of Regulations  
23 (C.C.R.). Order at F-50. That regulation, in turn, provides that a Regional Board  
24 must notify the operator of a “publicly owned wastewater treatment plant” that

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25  
26 <sup>7</sup> The Basin Plan is available on the Regional Board’s website:  
27 [https://www.waterboards.ca.gov/sandiego/water\\_issues/programs/basin\\_plan/docs/  
28 R9\\_Basin\\_Plan.pdf](https://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/docs/R9_Basin_Plan.pdf)

1 “will reach capacity within four years,” that the Regional Board “will consider  
2 adopting a time schedule order . . . or other enforcement order unless the  
3 discharger can demonstrate” by way of a “technical report,” “that adequate steps  
4 are being taken to address the capacity problem.” 23 C.C.R. § 2232(a).

5 139. Under § 2232, however, a “technical report need not be required” if  
6 the “burden of preparing the report does not bear a reasonable relationship to its  
7 need and to the benefits of the report.” *Id.* § 2232(e). And “[i]f a discharger  
8 questions that the cost of preparing the technical report bears a reasonable  
9 relationship to the need for such a report or the benefits to be obtained therefrom,  
10 the discharger may appeal to the regional board for relief within 30 days of the date  
11 of the notice.” *Id.*

12 140. As drafted, Section 6.3.5.2 deprives USIBWC of its ability to contest  
13 the Regional Board’s determination that the benefits of a treatment capacity  
14 planning report outweigh the costs of its preparation.

15 141. In fact, the costs of preparing a treatment capacity report for the Plant  
16 far outweigh any benefits of such a report. The Plant is and has been operating at  
17 capacity for many years, and was never intended to treat all of Tijuana’s  
18 wastewater. Unlike other plant operators, moreover, “the area served” by the Plant  
19 (Order at F-50) extends into a foreign country. USIBWC cannot compel actions in  
20 Tijuana that might reduce wastewater at its source and cannot treat additional  
21 volumes of Tijuana’s wastewater without the government of Mexico’s consent.  
22 *See, e.g.*, 1944 Treaty, art. 2, 25; Minute 261 ¶¶ 4, 6.

23 142. Nor can the Regional Board compel the United States and Mexico to  
24 negotiate or conclude a new agreement by issuing “a time schedule order . . . or  
25 other enforcement order” if the Regional Board is unsatisfied by the findings of  
26 USIBWC’s “technical report.” 23 C.C.R. § 2232(a).

27 143. In all events, a report by USIBWC showing “how capacity will be  
28 increased,” Order at 42, is redundant since, as Defendants know, EPA is currently

1 undertaking a public process to select and design additional wastewater treatment  
2 capacity using funds allocated through the United States-Mexico-Canada Trade  
3 Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

4 144. For all of these reasons, the benefits of a Treatment Plant Capacity  
5 Report by USIBWC are negligible at best. Defendants therefore acted without, or  
6 in excess of, jurisdiction and prejudicially abused their discretion by issuing  
7 Section 6.3.5.2 of the Order.

#### 8 **TENTH CLAIM FOR RELIEF**

9 145. The United States realleges and incorporates, as though fully set forth  
10 herein, each and every allegation in paragraphs 1 through 144 of this Complaint.

11 146. Defendants acted without, or in excess of, jurisdiction and  
12 prejudicially abused their discretion by compelling USIBWC to perform certain  
13 monitoring and reporting actions on transboundary flows that are unrelated to  
14 USIBWC's operation of the Plant or canyon collectors.

15 147. Various provisions of the Order require USIBWC to report and  
16 document "Transboundary Flow Events," defined as "flows that cross the  
17 international border from Mexico into the U.S.A.," Order at A-14, including all  
18 wet or dry weather flows in waterways that contain canyon collectors, in the  
19 Tijuana River, or in "any transboundary canyon that is not equipped with a canyon  
20 collector system." Order at 23.

21 148. For example, Sections 6.3.2.1.2.9–6.3.2.1.2.10 and 6.3.2.3–6.3.2.3.10  
22 require USIBWC to promptly notify certain parties whenever there is a  
23 "Transboundary Flow Event" and to document for each Transboundary Flow  
24 Event, *inter alia*, the "exact dates and times for when the event started," and the  
25 "volume" of water in the flow. Order at 28–29, 33–37; *see also* Section E-4.2.5.1,  
26 Order at E-60 (requiring that "[a]ll transboundary flow events"—during both wet  
27 and dry weather—"be tabulated on a monthly basis and summarized" in a report  
28 to the Regional Board).

1           149. Sections E-4.2.1.1–E-4.2.1.2.3 also require USIBWC to sample and  
2 perform laboratory testing on wet and dry weather transboundary flows in  
3 waterways that contain canyon collectors and in the Tijuana River itself, and to  
4 report the test results to the Regional Board. Order at E-53–56.

5           150. Thus, the Order requires USIBWC to measure and report—and in  
6 some cases sample and test—transboundary flows that were not intended to, and  
7 are not, treated at the Plant. Such flows include wet weather flows at the canyon  
8 collectors, which do not operate in wet weather, and wet and dry weather flows in  
9 the Tijuana River and trans-border canyons that contain no USIBWC-operated  
10 wastewater diversion or treatment infrastructure.

11           151. The Regional Board provides no legal justification under the CWA or  
12 California Water Code for imposing requirements on USIBWC that are unrelated  
13 to USIBWC’s operation of the facilities that are subject to the Order and none  
14 exists.

15   **PRAYER FOR RELIEF**

16           WHEREFORE, the United States respectfully requests that this Court grant  
17 the following relief:

- 18           1. FOR CLAIM ONE:
  - 19               a. Declare that Defendants exceeded their authority under the CWA by  
20 issuing Discharge Prohibition 3.1 to regulate all dry weather transboundary flows  
21 through the canyon collectors as discharges of pollutants.
  - 22               b. Order that Discharge Prohibition 3.1 be set aside, or enjoin  
23 enforcement actions under the CWA for alleged violations of Discharge  
24 Prohibition 3.1.

- 25           2. FOR CLAIM TWO:
  - 26               a. Declare that Defendants exceeded their authority under division 7,  
27 chapter 5.5 of the California Water Code by issuing Discharge Prohibition 3.1 to  
28



1 regulate all dry weather transboundary flows through the canyon collectors as  
2 discharges of pollutants.

3 b. Order that Discharge Prohibition 3.1 be set aside, or enjoin  
4 enforcement actions under the CWA for alleged violations of Discharge  
5 Prohibition 3.1.

6 3. FOR CLAIM THREE:

7 a. Declare that Defendants violated the intergovernmental immunities  
8 doctrine by attempting to regulate transboundary flows as discharges of waste when  
9 those flow pass through USIBWC's canyon collectors, but not when those flows  
10 pass through infrastructure owned by non-federal actors.

11 b. Order that Discharge Prohibition 3.1 be set aside or enjoin  
12 enforcement of Discharge Prohibition 3.1.

13 4. FOR CLAIM FOUR:

14 a. Declare that the United States retains sovereign immunity from any  
15 attempt by Defendants to use Discharge Prohibition 3.1 to regulate transboundary  
16 flows as discharges of waste when those flows pass through USIBWC's canyon  
17 collectors, but not when those flows pass through infrastructure owned by non-  
18 federal actors.

19 b. Order that Discharge Prohibition 3.1 be set aside or enjoin  
20 enforcement of Discharge Prohibition 3.1.

21 5. FOR CLAIM FIVE:

22 a. Declare that the Order affects or impairs the provisions of the 1944  
23 Treaty and its Minutes by making USIBWC responsible for preventing influent  
24 exceedances and by dictating the process by which USIBWC seeks to remedy  
25 influent exceedances.

26 b. Order set aside, or enjoin actions to enforce, Sections 6.3.5.3.1.1,  
27 6.3.5.3.2.2, 6.3.3, 6.3.5.3.1, 6.3.5.3.3.1, and 6.3.5.3.3.2 of the Order.

28 6. FOR CLAIM SIX:

1 a. Declare that the Order is preempted by federal law and policy to the  
2 extent that it makes USIBWC responsible for preventing influent exceedances and  
3 dictates the process by which USIBWC seeks to remedy influent exceedances.

4 b. Order set aside, or enjoin actions to enforce, Sections 6.3.5.3.1.1,  
5 6.3.5.3.2.2, 6.3.3, 6.3.5.3.1, 6.3.5.3.3.1, and 6.3.5.3.3.2 of the Order.

6 7. FOR CLAIM SEVEN: Order set aside, or enjoin actions to enforce,  
7 Sections 6.3.5.3.1.1., 6.3.2.2.3., 6.3.5.3.2.2. and Attachment E, Table E-11 of the  
8 Order.

9 8. FOR CLAIM EIGHT:

10 a. Declare that the Basin Plan's discharge prohibitions, and the Ocean  
11 Plan's prohibition on discharges of trash, are facially inapplicable to USIBWC and  
12 declare that USIBWC is not obligated to comply with provisions of the Basin Plan  
13 and Ocean Plan that are incorporated into the Order as if fully set forth therein if  
14 those provisions do not apply to USIBWC.

15 b. Order set aside, or enjoin actions to enforce, Discharge Prohibition 3.2  
16 and 3.3 to the extent that those provisions apply requirements that are facially  
17 inapplicable to USIBWC.

18 9. FOR CLAIM NINE:

19 a. Declare that Defendants acted without, or in excess of, jurisdiction  
20 and prejudicially abused their discretion by attempting to compel USIBWC to  
21 complete a Treatment Plant Capacity Report.

22 b. Order set aside, or enjoin actions to enforce, Section 6.3.5.2.

23 10. FOR CLAIM TEN:

24 a. Declare that Defendants acted without, or in excess of, jurisdiction  
25 and prejudicially abused their discretion by requiring USIBWC to monitor and  
26 report on wet weather transboundary flows, and on dry weather transboundary  
27 flows in the Tijuana River and in transboundary canyons that have no canyon  
28 collector.

1           b. Order set aside, or enjoin enforcement of the following sections, to the  
2 extent that they require USIBWC to monitor and report on wet weather  
3 transboundary flows and dry weather transboundary flows in the Tijuana River and  
4 in transboundary canyons that have no canyon collector: Sections 6.3.2.1.2.9–  
5 6.3.2.1.2.10; 6.3.2.3–6.3.2.3.10; E-4.2.1.1–E-4.2.1.2.3; and E-4.2.5.1.

6           11. FOR ALL CLAIMS: Grant such further relief as this Court deems  
7 appropriate.

8  
9 Dated:           October 8, 2021                      Respectfully Submitted,

10  
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13    Environment & Natural Resources Division  
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