

**Testimony of Carlos Marin  
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**International Boundary and Water Commission  
United States and Mexico**

**Before the  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and the Environment  
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Madame Chairwoman, Members of the Subcommittee, thank you for the opportunity to come before you today. I am pleased to have the opportunity to discuss with you the U.S. Section of the International Boundary and Water Commission's efforts to address the on-going problem of sewage from the Tijuana area of Mexico that flows into the United States causing environmental damage and harm to the public health of this region and in particular our efforts to implement the Tijuana River Valley Estuary and Beach Cleanup Act of 2000 ("Tijuana River Act"), 22 U.S.C. §§ 277d-43 et seq., Title VIII of Pub. L. 106-457 (Nov. 7, 2000).

I was honored to be appointed United States Commissioner to the International Boundary and Water Commission, United States and Mexico, by President Bush in December of 2006. I am a licensed professional engineer and a 27-year career employee of the U.S. Section of the International Boundary and Water Commission (USIBWC). I served as the Acting U.S. IBWC Commissioner for fifteen months prior to my appointment and as Deputy Commissioner and as the Principal Engineer of the Operations Department. Prior to assuming executive level responsibilities, I held a number of positions at USIBWC, but most importantly for the purposes of this hearing, I was the U.S. Project Manager that oversaw the construction of the IBWC's International Wastewater Treatment Plant in Nuevo Laredo, Tamaulipas, Mexico from 1990 to 1994, in which capacity I gained first hand experience in dealing with issues relating to the construction of a wastewater treatment facility in Mexico.

The International Boundary and Water Commission (IBWC) has over a century of experience in bi-national cooperation and partnership. We trace our roots to the temporary boundary commissions established by the Treaty of Guadalupe Hidalgo, the Gadsden Treaty and an 1882 Convention to survey, mark and map the new international boundary between the United States and Mexico. The International Boundary Commission (IBC), our direct predecessor, was established in 1889 to apply rules established by the United States and Mexico for determining the location of their shared boundary when tracts of land were transferred from one bank of the river to the other due to changes in the bed of the Rio Grande and Colorado River and to settle any differences that might arise concerning the

boundary line. The IBC prepared the hydrological studies that formed the basis for the first water allocation treaty between the United States and Mexico in 1906 and the second water allocation treaty in 1944, under which the IBC became known as the IBWC. Today, under various boundary and water treaties in force between the United States and Mexico, the IBWC exercises jurisdiction over the 1,278 miles of Rio Grande and Colorado River water and the 674 miles of land boundary that form the border between the United States and Mexico and over works located upon the common boundary. To clarify one common misperception, it should be noted that each Section of the Commission retains jurisdiction over that portion of shared works that are located within the limits of its respective territory. That means that any bi-national project undertaken by the IBWC that is located in Mexico is under the jurisdiction of the Mexican Section. My authorities stop at the border.

The IBWC is charged with applying U.S.-Mexico boundary and water treaties and the U.S. and Mexican Commissioners are responsible for developing joint recommendations to the two governments for resolution of current and anticipated boundary and water problems. The IBWC is engaged in a number of joint cooperative activities, including: demarcation of the land boundary, ports of entry and international bridges; preservation of the river boundary; operation and maintenance of international flood control projects and associated diversion dams; operation and maintenance of international storage dams and associated hydro-electric power generation plants; determination and accounting for national ownership of the waters of the Rio Grande and Colorado River; construction, operation and maintenance of three wastewater treatment facilities; ownership of three international bridges in the El Paso/Ciudad Juarez area; investigations and studies, including water quality monitoring and data exchange; and approval of all plans for new international bridges, border crossings, and pipe and power lines that cross the international boundary.

Providing timely and efficient secondary treatment level for sewage emanating from the Tijuana River area in Mexico is a top priority for the USIBWC. The IBWC has been addressing the issue of Tijuana sewage flows since the 1930s. At present, untreated sewage that flows north from Tijuana into San Diego is a combination of fugitive sewage flows from unsewered areas of Tijuana and sewage released from the existing Tijuana sewage collection and conveyance system during system breakdowns. Over the past 65 years, as the population of Tijuana has increased from 5,000 residents to over one million people, so has the magnitude and complexity of these transboundary sewage flows. In the 1930s, 1960s and 1980s, the IBWC developed joint cooperation projects for control of untreated sewage from Tijuana, including improvements to the sewage infrastructure in Tijuana and the construction of defensive works in the United States to capture sewage flows or spills from Mexico.

Beginning in 1987, the USIBWC developed a partnership with the City of San Diego, County of San Diego, the State of California and the U.S. Environmental Protection Agency (EPA) that resulted in a determination that this long-standing problem would best be resolved with construction of a treatment plant in San Diego, near the border, that would provide secondary treatment to Tijuana sewage that flows untreated into the United States and at a

cost shared by the U.S. and Mexican Governments. The United States was selected as the location for the plant because Mexico's proposal to build a plant in Mexico in the Rio Alamar area would not provide treatment acceptable to U.S. secondary standards, would not provide defensive works against fugitive raw sewage flows crossing the boundary into the United States, and the effluent from the proposed plant in Mexico would damage the Tijuana Estuarine Sanctuary, a salt water estuary located in the United States, just north of the South Bay location.

On this basis, the United States and Mexico concluded an international agreement in 1990, IBWC Minute No. 283, for the construction of an international treatment plant that would treat an initial 25 million gallons per day (mgd) of sewage from Tijuana to the secondary treatment standards and discharge that effluent in an outfall approximately 3.5 miles into the Pacific Ocean. Under the international agreement, the United States would cover the construction and operations and maintenance costs up-front and Mexico would reimburse the United States in an amount equivalent to what Mexico's costs would have been to construct and operate the proposed Rio Alamar Plant. The United States Government was authorized by the Congress to construct the international plant in Section 510 of the Water Quality Act of 1987, which also authorized the EPA to make grants to the USIBWC and other entities for the construction of the plant and other necessary works to provide treatment of municipal sewage and industrial waste from Mexico.

The United States and Mexico agreed that the construction would be in phases, recognizing that some 13 mgd of untreated Mexican sewage crossing the boundary threatened the health of inhabitants and the beaches in San Diego. Due to the urgent need to provide some level of treatment, a first module was placed in operation in 1997 to provide treatment for up to 25 mgd of Tijuana sewage to the advanced primary level. The United States and Mexico concluded the international agreement for the specific Mexican cost reimbursement in April 16, 1997. The South Bay plant became fully operational in 1999 with treated effluent being discharged through the South Bay Ocean Outfall.

The Government of Mexico contributed \$16.8 million toward construction of the South Bay plant and currently contributes \$1.1 million toward the annual operation and maintenance costs. P.L 102-389 of September 25, 1992 capped funding to EPA for the South Bay facility, the South Bay Ocean Outfall, and related infrastructure at \$239.4 million. Of that amount, \$233.3 million has been obligated to date. \$89.3 million was expended by the City of San Diego and the Corps of Engineers to construct the South Bay Ocean Outfall; \$9.9 million was expended by the Corps of Engineers for environmental work and \$133.1 million was expended by the USIBWC for costs associated with the construction of the South Bay plant, related infrastructure and optimization efforts. Congress has denied requests from the EPA and USIBWC to raise the cap on EPA funding to allow for completion of secondary treatment at the South Bay facility.

Rather, in late 2000 Congress enacted legislation, the Tijuana River Valley Estuary and Beach Cleanup Act of 2000 ("Tijuana River Act"), 22 U.S.C. §§ 277d-43 *et seq.*, Title VIII of Pub. L. 106-457 (Nov. 7, 2000), hereinafter the "Public Law", which requested the Secretary of State to negotiate a new agreement with Mexico to provide for secondary treatment of that effluent in Mexico, if such treatment is not provided in the United States, as well as treatment for additional sewage flows, to be determined by a Comprehensive Plan that would identify Tijuana's long-term treatment needs, under a public-private partnership arrangement.

While the USIBWC was seeking to implement the Public Law, the State of California filed suit in U.S. District Court for the Southern District of California over the failure of the advanced primary plant to meet the standards of the Clean Water Act and its discharge permit. The Court eventually ruled in late 2004 that the USIBWC must come into compliance with the Clean Water Act by no later than September 30, 2008.

The USIBWC reached agreement with its Mexican counterpart on a new Minute, IBWC Minute 311, on February 20, 2004 to achieve the objectives of the Public Law. Minute 311 provided a framework for the construction, operation and maintenance of a 59 mgd secondary wastewater treatment facility in Mexico that incorporates participation by a private service provider under an operating lease contract.

On July 22, 2005 the USIBWC completed a Final Supplemental Environmental Impact Statement and on September 30, 2005 issued a Record of Decision in which it selected the project proposed by Bajagua LLC ("Bajagua") for the construction of secondary wastewater treatment facilities in Mexico. The USIBWC selected the Bajagua Project primarily because it was thought that Bajagua's preliminary planning, studies and site identification would allow for construction of a facility for the treatment of the South Bay effluent consistent with the deadlines set forth in the Court Order. In addition, Bajagua was chosen over alternatives for building secondary facilities in the United States because of funding constraints associated with EPA's appropriation of Section 510 monies. On February 14, 2006, after extensive negotiations, the USIBWC entered into a Development Agreement with Bajagua giving the company exclusive rights to pursue development of the Mexican facility.

The proposed Bajagua project would treat 25 mgd of the advanced primary effluent from the South Bay facility and an additional 34 mgd, which is the volume identified by the Tijuana Master Plan, issued by the Tijuana local utility in 2003, as meeting Tijuana's projected sewage treatment need in 2023. Were the Mexican facility envisioned by the Public Law to come on line in 2008, currently available information indicates that it would only be treating the 25 mgd from the South Bay plant. According to the Tijuana Master Plan, existing Tijuana wastewater facilities and new Mexican plants, if they were to come on line in 2008 as scheduled, would actually provide Mexico with excess capacity.

One of the attractive features of building a wastewater treatment facility in Mexico is the opportunity for reclaimed water and offsetting the costs of the facility through the sale of this water. The United States and Mexico incorporated this feature in IBWC Minute 311, which provides that payments to the service provider would be offset by credits that reflected an agreed upon percentage of payments received by Mexico through the sale of water treated by the facility. Under the Mexican Constitution, all water in Mexico is federally owned and it is the Government of Mexico that would retain ownership of the effluent produced by the Mexican facility. IBWC Minute 311 also provides that the compensation must be mutually agreed upon by the U.S. and Mexican Governments through the IBWC. The Minute states that “in no instance will the service provider be authorized to decide on the fate or use of the Tijuana, Baja California wastewater, treated or untreated. This decision will be made solely by the Government of Mexico.”

It should be noted that this is a highly technical and complicated project that breaks new ground for IBWC in the inclusion of a private partner. Neither Section of the IBWC views its role in this process as being limited to that of a conduit or a pass through for U.S. funding. The IBWC has an international law responsibility through its treaty obligation to ensure that the project is developed in a viable and effective manner and that all elements are consistent with applicable U.S. and Mexican law and regulations. This means that both the U.S. and Mexican Sections of IBWC have devoted extensive amount of staff time and resources to move this project forward.

Under the Development Agreement, Bajagua agreed to pursue required permits, acquisition of rights to real estate and other prerequisites necessary to enter into a construction contract for secondary wastewater treatment facilities in Mexico. Consistent with the Court Order, the Development Agreement required the new treatment facilities to be operating in conformance with the U.S. Clean Water Act requirements by September 30, 2008; it also established interim milestones. Under the Development Agreement, Bajagua agreed to achieve some of those milestones by September 12, 2006 ( i.e.: to obtain all of the rights to purchase real estate in Mexico; to acquire rights-of-way in Mexico and the United States necessary for the project facilities; and to make all reasonable efforts to obtain a new discharge permit from the San Diego Regional Water Quality Control Board for discharge of the effluent from the Mexican facilities into the South Bay Ocean Outfall). The Development Agreement also required Bajagua to meet additional milestones by May 2, 2007 (i.e.: to secure necessary authorization to treat wastewater in Mexico; to secure all debt and equity financing necessary to construct project facilities and ancillary costs with all funds deposited into a trust account; and to execute a design-build-operate subcontract).

A number of tasks remain to be accomplished under the Development Agreement. In February of 2007, Bajagua notified us that it would be unable to meet the May 2, 2007 milestones set forth in the Development Agreement. In response USIBWC requested information so that we could evaluate whether it remained possible to comply with the

September 30, 2008 compliance deadline. On April 25, 2007, Bajagua notified the USIBWC that Bajagua would be unable to complete a facility in Mexico in time to achieve compliance with the Clean Water Act by September 30, 2008, and stated that a five-month extension of the compliance deadline would be necessary. Because USIBWC is without authority to extend the deadline set forth in the Court Order, USIBWC has sought information from Bajagua to support its request for an extension. The Development Agreement entered into with Bajagua provided that any schedule for completion of project facilities, including milestone dates not in conformance with the Court Order would be subject to approval by the Court. On May 8, 2007, the USIBWC notified Bajagua that it was suspending all activities under the Development Agreement until the Court amends its order or grants other relief.

It can not be over emphasized that USIBWC is under a time-line established by the U.S. District Court for the Southern District of California that orders the USIBWC to achieve full compliance of the South Bay facility with the Clean Water Act by September 30, 2008. Under the Court Order, USIBWC was to have commenced construction by September 15, 2006. We are now nine months past that date and not close to beginning construction. In light of the pending litigation, USIBWC faces possible fines and other sanctions.

Fortunately, the Administration adopted a contingency plan for achieving compliance. The President's FY 2008 budget request sought funding for the USIBWC to begin construction of secondary wastewater capability at the existing South Bay facility, which is viewed as a more efficient and less expensive solution. The estimated 20-year cost is \$263 million versus an estimated \$742 million for a 20-year lease-contract to build the facility in Mexico pursuant to P.L. 106-457. Building secondary facilities in the United States would also have the following advantages:

- USIBWC would have direct oversight and control of the project during all phases of construction and operation and maintenance;
- USIBWC owns the land necessary for expansion of the existing plant up to 100 mgd;
- a final design has already been prepared for the option, compatible with the existing treatment process and requiring only minimal updating to current design standards;
- secondary treatment in the United States is provided for in existing IBWC Minute;
- no additional site preparation, environmental mitigation or other permits or approvals are required; and
- construction and operation of a secondary treatment in the United States would not be subject to the laws of another country.

The USIBWC has been trying to achieve compliance with the Clean Water Act for ten years and has been trying to implement the Public Law by undertaking the construction of treatment facilities in Mexico under a public/private partnership for seven years; however, due to a number of factors that are beyond the USIBWC's control, a permanent solution has

proved to be elusive. This agency has worked diligently to carry out the Public Law and invested a significant amount of time and resources to that effort.

Madame Chairwoman and members of the Subcommittee, we know much more today about the complexities of implementing this legislation than when it was passed in 2000. In 2000 we did not know the true cost of the Bajagua project to the American taxpayer and yet today based on a financial analysis conducted by an independent consultant, we know that this project has the potential to approach almost \$1 billion over a twenty-year period of a sole-source contract. We also do not know how long it will take to make this Mexican facility a reality. I can not in all honesty tell you that; nor can Bajagua tell you that. There are many critical steps still pending, which require Mexico's full participation, support and concurrence. One can not predict the alacrity of the Mexican bureaucracy, a bureaucracy we must engage on the Federal, State and local levels and which often changes with each election cycle.

In closing, let me state that our ultimate goals are only to complete what we started in the 1930s, which is to afford the citizens of Southern California protection from renegade Mexican sewage flows, comply with the Court's Order, operate our facility in accordance with U.S. law, enhance the environment shared by two nations, and answer the charge imposed upon the IBWC by the 1944 Water Treaty between the United States and Mexico to give priority attention to border sanitation issues.

Madame Chairwoman, thank you for the opportunity to testify today. I would be pleased to respond to any questions you or other members of the Subcommittee may have.