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AMEND THE TIJUANA RIVER VALLEY ESTUARY AND BEACH SEWAGE CLEANUP ACT

SEPTEMBER 15, 2004.—Ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

[To accompany H.R. 4794]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 4794) to amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to extend the authorization of appropriations, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE LEGISLATION

The purpose of H.R. 4794 is to amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to reauthorize and update the authority to comprehensively address the treatment of sewage emanating from the Tijuana, Mexico area that flows untreated or partially treated into the United States, causing significant adverse public health and environmental impacts.

BACKGROUND AND NEED FOR LEGISLATION

Tijuana, Mexico is situated on elevated terrain as compared to San Diego, California, and as a result, the Tijuana River flows north across the U.S.-Mexico border into the San Diego area. The wastewater infrastructure in the Tijuana border area is inadequate to protect public health and the environment. Because there is insufficient infrastructure to treat all of the sewage generated in the Tijuana area, untreated or partially treated sewage is released into the Tijuana River and flows into the United States, leading to serious public health and environmental concerns.

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To protect the city of San Diego and surrounding areas from the sewage emanating from Tijuana, Congress authorized, in Public Law 100–4, the "Water Quality Act of 1987," the construction of a wastewater treatment facility in San Diego to provide primary or more advanced treatment of municipal sewage and industrial waste from Mexico, including the city of Tijuana.

Then in 1990, the United States and Mexico approved International Boundary and Water Commission (IBWC) Treaty Minute No. 283 to the Treaty for the "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande," dated February 3, 1944. Under this treaty minute, the United States and Mexico are to design, construct, operate, and maintain a wastewater treatment facility for up to 25 million gallons per day ("MGD") of sewage from Tijuana, Mexico, to be treated to a level that meets the United States' secondary treatment standards under the Clean Water Act. Secondary treatment is defined in Federal regulations as numeric effluent quality levels attainable through physical and biological treatment of wastewaters, and which require greater removal of certain pollutants than primary or advanced primary treatment. To meet this obligation, the IBWC constructed the South Bay International Wastewater Treatment Plant ("IWTP"). However, the IWTP treats sewage only to an advanced primary level of treatment, failing to comply with the Clean Water Act and the Treaty Minute. The secondary treatment module of the IWTP has not been constructed.

In the 106th Congress, the Committee on Transportation and Infrastructure examined the issues surrounding sewage treatment in the San Diego, California-Tijuana, Mexico border region, and concluded that a comprehensive solution was needed to address both the partially treated flows from the existing IWTP and the additional capacity needed to address raw sewage from the Tijuana area in Mexico that is currently untreated. To achieve this goal, Congress enacted Title VIII of Public Law 106–457, the "Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000" (the "Act").

The Act authorizes the United States, acting through the U.S. Section of the IBWC and following conclusion of a new treaty minute or an amendment to Treaty Minute No. 283, to enter into a fee-for-services contract with the owner of a privately financed secondary wastewater treatment facility located in Mexico. Such facility would provide secondary treatment for a total of not more than 50 MGD of both advanced primary effluent pumped from the IWTP and any additional sewage from the Tijuana area in Mexico. The purpose of entering into a fee-for-services contract for wastewater treatment services would be to ensure adequate treatment of wastewater along the United States-Mexico border so that untreated or partially treated sewage from Tijuana, Mexico no longer flows north into the San Diego, California area. Under this approach, the upfront construction costs of a treatment facility are to be borne by a private entity, and the United States is authorized to pay annual contract fees incorporating the costs of developing, financing, constructing, operating, and maintaining the wastewater treatment facility in Mexico over a period of 20 years. The Act authorized to be appropriated a total of $156 million for fiscal years 2001 through 2005 to carry out the title.

On February 20, 2004, the United States and Mexico approved IBWC Treaty Minute No. 311, agreeing to go forward with the new wastewater treatment facility in Mexico authorized by the Act. The new treatment facility is to provide the secondary treatment that originally was to be provided by the IWTP under Treaty Minute No. 283, and is to provide additional capacity to treat raw sewage from the Tijuana area in Mexico. The United States is to pay, subject to the availability of annual appropriations, annual fees for the contracted wastewater treatment services. Treaty Minute No. 311 also specifies numerous other contract terms to be included in the wastewater treatment services contract. However, before it can enter into the contracts necessary to implement Treaty Minute No. 311, the U.S. Section of the IBWC needs an updated authorization.

SUMMARY OF THE LEGISLATION

Section 1. Actions to be taken

Section 1 amends section 804(a) of the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to reflect the passage of IBWC Treaty Minute No. 311.

In addition, Section 1 amends section 804(c), in paragraph (1), to clarify that it is the payment of a fee under a contract that is subject to the availability of appropriations, not the negotiation of the contract itself. This section also amends section 804(c), in paragraph (2), to change the required contract terms to eliminate the requirement that ownership of the Mexican facility transfer to the United States in the case of default and to clarify that competitive procedures governing subcontracts must comply with applicable law, such as applicable Mexican law, as well as be consistent with title III of the Federal Property and Administrative Services Act of 1949.

Section 2. Implementation of new Treaty Minute

Section 2 amends section 805 of the Act to reflect the passage of IBWC Treaty Minute No. 311 and to stress the importance of expediting action on this issue, in light of the continuing threat to the environment and public health and safety within the United States.

Section 3. Authorization of appropriations

Section 3 amends section 806 of the Act to increase the total authorization of appropriations from $156 million to $230 million and to eliminate the expiration of the authorization of funding.

LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

On February 26, 2004, the Water Resources and Environment Subcommittee held a hearing on the budget requests and program priorities of agencies that fall under the jurisdiction of the Subcommittee. At that hearing, the Subcommittee received testimony from the United States Commissioner of the International Boundary and Water Commission on the status of implementation of the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000.

The Water Resources and Environment Subcommittee met on July 15, 2004, to consider H.R. 4794 and other legislation. The Sub-

committee reported the bill without amendment favorably to the Committee on Transportation and Infrastructure, by voice vote. The Committee on Transportation and Infrastructure met in open session on July 21, 2004, and ordered the bill reported, without amendment, to the House by voice vote.

ROLLCALL VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each rollcall vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. There were no recorded votes taken in connection with ordering H.R. 4794 reported. A motion to order H.R. 4794 reported to the House was agreed to by voice vote.

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

COST OF LEGISLATION

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

COMPLIANCE WITH HOUSE RULE XIII

1. With respect to the requirement of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, and 308(a) of the Congressional Budget Act of 1974, the Committee references the report of the Congressional Budget Office included below.

2. With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objective of this legislation are to resolve sanitation and water quality problems in the San Diego, California-Tijuana, Mexico border region by providing for adequate treatment of raw and partially treated sewage from Tijuana, Mexico.

3. With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 4794 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 9, 2004.

Hon. DON YOUNG,
Chairman, Committee on Transportation and Infrastructure, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4794, a bill to amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to extend the authorization of appropriations, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman (for federal costs) and Gregory Waring (for the state and local impact).

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 4794—A bill to amend the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000 to extend the authorization of appropriations, and for other purposes

Summary: The International Boundary and Water Commission (IBWC), composed of a U.S. section and a Mexican section, is responsible for applying the boundary and water treaties between the United States and Mexico and settling any differences that may arise out of such treaties. Enacting H.R. 4794 would indefinitely extend the authority of the U.S. section of the IBWC to enter into a contract to build and operate a wastewater treatment facility in Mexico. Under current law, such authority is available through 2005 and is contingent on the negotiation and conclusion of a new treaty between the governments of the United States and Mexico.

On February 20, 2004, a new treaty between the two governments was negotiated, establishing a framework for the development of the wastewater treatment facility. Under this contract, the plant owner would treat wastewater to certain U.S. standards, and the federal government would make annual payments over a 20-year period to cover the costs of developing, financing, constructing, operating, and maintaining the facility. This new facility would be designed to address the problem of untreated or partially treated sewage flowing over the border from Tijuana, Mexico, to San Diego, California.

H.R. 4794 would authorize the appropriation of $230 million for the wastewater treatment contract. We expect that implementing the contract would constitute a federal lease-purchase of the new treatment facility. CBO estimates, however, that implementing this legislation would require appropriations of $295 million over the 2005–2009 period. In addition, CBO estimates that appropriations of $316 million would be needed after 2009 to cover the costs associated with operating and maintaining the facility through the remainder of the contract period.

Enacting this bill would not affect direct spending or receipts because the IBWC could not enter into a contract to build the plant

until the full amount necessary to implement the contract is provided in advance in an appropriation act.

H.R. 4794 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. The bill would benefit California, the City of San Diego, and other local and tribal governments in that state by reauthorizing and increasing federal support of a wastewater treatment project along the U.S.-Mexico border.

Estimated cost to the Federal Government: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2005 and that the estimated amounts necessary to build and maintain the wastewater treatment plant will be appropriated. Estimated outlays are based on historical spending patterns for other similar construction projects. The estimated budgetary impact of H.R. 4794 is shown in the following table. The costs of this legislation fall within budget function 150 (international affairs).

	By fiscal year, in millions of dollars—					
	2004	2005	2006	2007	2008	2009
SPENDING SUBJECT TO APPROPRIATION						
Spending under current law to build and operate wastewater treatment facility:						
Authorization level [1]	0	0	0	0	0	0
Estimated outlays	0	0	0	0	0	0
Proposed changes:						
Estimated authorization level	0	263	0	0	16	16
Estimated outlays	0	66	118	79	16	16
Spending under H.R. 4794 to build and operate wastewater treatment facility:						
Estimated authorization level	0	263	0	0	16	16
Estimated outlays	0	66	118	79	16	16

[1] Current law authorizes the appropriation of $156 million over the 2001–2005 period. To date no funding has been provided.

Basis of estimate: This cost estimate is based on information from the U.S. section of the IBWC and a firm that is interested in constructing the new facility and has performed limited design work for such a facility. Because a new treaty was agreed to by the governments of Mexico and the United States on February 20, 2004, CBO expects that design of the wastewater treatment facility would begin in 2005. In total, CBO estimates that implementing H.R. 4794 would cost $295 million over the next five years and $316 over the 2010–2025 period. The budgetary treatment of those costs as well as the various components are described below.

Budgetary treatment of lease-purchases

CBO expects that the contract for wastewater treatment services authorized by H.R. 4794 would meet the criteria of a federal lease-purchase contract, meaning that the government is effectively purchasing—not leasing—the wastewater treatment plant. CBO bases this conclusion on the fact that the wastewater treatment plant would be built for the special purpose of the U.S. government, and there would be little or no private-sector market for this particular facility. Furthermore, the 20-year term of the lease would extend through most of the plant's expected economic life, and the lease payments over this period would pay for nearly all of the facility's cost.

Despite the fact that the U.S. federal government would provide the funding to develop, finance, construct, operate, and maintain the facility, the legislation would require the facility to be conveyed to "an appropriate governmental entity" (apparently, a Mexican governmental entity) in the event that either the IBWC or the plant operator fails to meet its contractual obligations to operate the plant. CBO, however, assumes that because the U.S. government would be providing the necessary funding to support the facility, the U.S. government effectively controls the facility and directs its transfer to a Mexican governmental entity at the end of the contract period.

Funds to execute federal lease-purchase contracts receive a special budgetary treatment (see Office of Management and Budget Circular A–11). When the government enters into lease-purchase contracts, the present value of all expected future lease payments (excluding annual operating and maintenance costs) must be provided in an appropriation act in the first year of the contract. Because the cost of a lease-purchase contract that involves substantial financial risk for the government is accounted for over the project's construction period rather than the term of the lease, the outlays associated with the appropriation would follow the three-year construction schedule assumed for the project.

Construction cost

CBO estimates that implementing this bill would require an appropriation of $263 million in 2005. At this estimated level of funding, CBO assumes that the new facility would treat up to about 59 million gallons per day of sewage (which is the capacity level identified in EPA's Master Plan for the Tijuana region), construction of the facility would cost about $159 million in 2005, that the private builder would seek a 15-percent rate of return under the lease terms to cover financing and other costs, and that the present value of the expected future lease payments would be discounted using CBO's projection of Treasury's long-term borrowing rate of 5.43 percent. To the extent that different assumptions are used to estimate the net present value associated with the cost of the proposed project, the estimates for appropriations to support the project could vary.

Operation and maintenance cost

In addition, after construction is completed, funding for operating and maintaining the facility during the remainder of the 20-year contract period could be required. While current law would allow for such costs to be offset by payments the owner of the facility might receive through the sale of treated water, there is no guaranty that such an agreement would be negotiated, according to the firm interested in designing the facility. As a result, CBO estimates that additional appropriations of $16 million annually could be necessary beginning in fiscal year 2008. Adjusting for anticipated inflation, such costs could reach as high as $23 million by 2025.

Total costs

CBO estimates that enacting this legislation would require a total appropriation of $295 million over the next five years and $316 million in subsequent years. This estimated cost would exceed

the amount specifically authorized by the bill by a total of $381 million over the 2005–2025 period. CBO estimates that the amount specifically authorized to be appropriated by the bill would be insufficient to implement the 20-year lease-purchase contract authorized by the legislation.

Intergovernmental and private-sector impact: H.R. 4794 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. The bill would benefit California, the city of San Diego, and other local and tribal governments in the state by reauthorizing and increasing federal support of a wastewater treatment project along the U.S.-Mexico border.

Estimate prepared by: Federal Costs: Susanne S. Mehlman; Impact on State, Local, and Tribal Governments: Gregory Waring; and Impact on the Private Sector: Amina Masood.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause (3)(d)(1) of rule XIII of the Rules of the House of Representatives, committee reports on a bill or joint resolution of a public character shall include a statement citing the specific powers granted to the Congress in the Constitution to enact the measure. The Committee on Transportation and Infrastructure finds that Congress has the authority to enact this measure pursuant to its powers granted under article I, section 8 of the Constitution.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 4794 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TIJUANA RIVER VALLEY ESTUARY AND BEACH SEWAGE CLEANUP ACT OF 2000

TITLE VIII—TIJUANA RIVER VALLEY ESTUARY AND BEACH CLEANUP

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SEC. 804. ACTIONS TO BE TAKEN BY THE COMMISSION AND THE ADMINISTRATOR.

(a) SECONDARY TREATMENT.—

(1) IN GENERAL.—[Subject to the negotiation and conclusion of a new Treaty Minute or the amendment of Treaty Minute 283 under section 1005 of this Act,] *Pursuant to Treaty Minute 311 to the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, dated February 3, 1944,* and notwithstanding section 510(b)(2) of the Water Quality Act of 1987 (101 Stat. 81), the Commission is authorized and directed to provide for the secondary treatment of a total of not more than 50 mgd in Mexico—

(A) * * *

* * * * * * *

(c) CONTRACT.—

(1) IN GENERAL.—[Subject to the availability of appropriations to carry out this subsection and notwithstanding] *Notwithstanding* any provision of Federal procurement law[, upon conclusion of a new Treaty Minute or the amendment of Treaty Minute 283 under section 5,] the Commission may enter into a fee-for-services contract with the owner of a Mexican facility in order to carry out the secondary treatment requirements of subsection (a) and make payments under [such contract.] *such contract, subject to the availability of appropriations for that purpose.*

(2) TERMS.—Any contract under this subsection shall provide, at a minimum, for the following:

(A) * * *

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(J) Provision for the transfer of ownership of the Mexican facility to [the United States] *an appropriate governmental entity*, and provision for a cancellation fee by the United States to the owner of the Mexican facility, if the Commission fails to perform its obligations under the contract. The cancellation fee shall be in amounts declining over the term of the contract anticipated to be sufficient to repay construction debt and other amounts due to the

owner that remain unamortized due to early termination of the contract.

(K) Provision for the transfer of ownership of the Mexican facility to [the United States] *an appropriate governmental entity*, without a cancellation fee, if the owner of the Mexican facility fails to perform the obligations of the owner under the contract.

(L) The use of competitive procedures *under applicable law*, consistent with title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), by the owner of the Mexican facility in the procurement of property or services for the engineering, construction, and operation and maintenance of the Mexican facility.

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SEC. 805. [NEGOTIATION OF] NEW TREATY MINUTE.

(a) * * *

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(c) IMPLEMENTATION.—In light of the continuing threat to the environment and to public health and safety within the United States as a result of the river and ocean pollution in the San Diego-Tijuana border region, the Commission is requested to give the highest priority to the implementation of Treaty Minute 311 to the Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, dated February 3, 1944, which establishes a framework for the siting of a treatment facility in Mexico to provide for the secondary treatment of effluent from the IWTP at the Mexican facility, to provide for additional capacity for advanced primary and secondary treatment of additional sewage emanating from the Tijuana River area, Mexico, and to meet the water quality standards of Mexico, the United States, and the State of California consistent with the provisions of this title, in order that the other provisions of this title to address such pollution may be implemented as soon as possible.

SEC. 806. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated a total of [$156,000,000 for fiscal years 2001 through 2005] *$230,000,000* to carry out this title. Such sums shall remain available until expended.

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