

THE POLITICS OF CONTRACTING:

Bajagua's No-Bid Deal

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Forward

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Executive Summary

The outrage over government contracting practices that frequently reward a few well-connected, large companies with lucrative sole-source contracts may have reached a crescendo after the Hurricane Katrina disaster. However, many government contractors had become experts in cultivating and using political influence to boost their revenues long before the hurricane struck.

The Project On Government Oversight (POGO) has investigated one case study of sole-source government contracting to examine the various influences that can be tapped to skew the process in favor of a single company. The story of the Bajagua Wastewater Treatment Plant is illustrative, not because it is unusual, but indeed because it represents business-as-usual in government contracting.

The coastal areas along the U.S. border between San Diego, California, and Tijuana, Mexico have been subjected to pollution from raw sewage for decades. The International Boundary and Water Commission (Commission), which handles bi-national water agreements and border sanitation issues, arrived at an agreement to construct and maintain a water treatment plant in the United States, in part to ensure adherence to strict environmental standards and also because Mexico lacked funding for the plant.

However, in 1996, a private company, the Bajagua Project LLC, proposed building and operating a wastewater treatment plant in Mexico. The U.S. section of the Commission and the Environmental Protection Agency (EPA) rejected the proposal for several reasons.

Representatives Brian Bilbray (R-CA) and Bob Filner (D-CA) introduced legislation that became law, facilitating the construction and operation of a wastewater treatment plant in Mexico, although the Mexican government had not yet agreed to let the plant be built in their country.

POGO has found that since 1996, when Bajagua proposed building the wastewater treatment plant, the principals of the company, their family members, and one of the company's attorneys have given thousands of dollars in campaign contributions to Members of Congress. These contributions have primarily gone to the local San Diego congressional delegation, which engineered the deal for Bajagua, however, not all the recipients of Bajagua contributions were involved in the treatment plant deal that POGO can determine.

Another avenue the company utilized was the revolving door. The company hired former policymakers and government officials to lobby for the legislation. These include a former U.S. Ambassador to Mexico, a State Department official who had also worked for the White House, a retired director of the San Diego Metropolitan Wastewater Department, and even former Representative Brian Bilbray. A meeting between representatives of Bajagua and Vice President Dick Cheney appears to have resulted in the lifting of federal opposition to the Bajagua project.

In the end, possible alternative bidders for this project were unnecessarily prevented from competing for the contract. Unless competition is opened up at least for a short time, a sole source contract will be signed worth hundreds of millions of taxpayer dollars, yet the public can not be assured the funds will be going to the most qualified bidder.

Introduction

Government contracting is big business: the government awarded nearly \$350 billion in government contracts in fiscal year 2004. The more a contractor can tap into the politics of contracting, the more likely it is to receive some of that business. Contractors do so by hiring through the revolving door,¹ making campaign contributions, and lobbying. It's done every day, by almost every company that wants a contract from the government. It's business as usual.

But the business-as-usual politics of contracting tends to result in raw deals for citizens. The recent machinations of MZM Inc. and Representative Randy "Duke" Cunningham (R-CA) highlight how vulnerable the federal contracting system is to manipulation by political pressure from Congress and other governmental institutions. Some businesses have skewed the contracting system in their favor by allying themselves with Members of Congress who circumvent competition. Some Members of Congress draft legislation to deliver contracts and taxpayer dollars to favored companies, and inappropriately use their status as representatives of the people to assist private interests seeking to profit at the public's expense. One such case of political interference in government contracting is the sole-source contract awarded to Bajagua Project, LLC (Bajagua).²

Bajagua had come up with a proposal to build and operate a wastewater treatment plant in Mexico. There were numerous legal and diplomatic obstacles in the way of the proposal, however, and Bajagua needed to overcome those obstacles before it could proceed. So the company worked the standard avenues of influence by making campaign contributions and hiring former government officials to lobby on the company's behalf.

In the end, working the system worked out for Bajagua. The company has got much of what it wanted: legislation and the political support to push its deal through. The company's allies in Congress helped to deliver to Bajagua a potentially lucrative sole-source contract for the project. Legislation was passed – Title VIII of Public Law 106-457 – instructing the little-known U.S. section of the International Boundary and Water Commission (USIBWC)³ to enter into a contract with a company to build and operate a plant in Mexico to treat wastewater. The legislation's sponsors, Representative Bob Filner (D-CA) and then-Representative Brian Bilbray (R-CA) – who later went to work as a lobbyist for Bajagua – designed the bill so that Bajagua would be the owner of that plant. This was quite a coup for the company, whose *only* project is the proposed wastewater

¹ The move from government service to lobbying or to working for a government contractor, and the move in the other direction, is known as the revolving door.

² The term "Bajagua" was originally the name for Agua Clara, LLC's, proposal to build a wastewater treatment plant in Mexico. However, Bajagua eventually became its own Limited Liability Corporation. POGO refers to the company as Bajagua throughout the report.

³ By international treaty the International Boundary and Water Commission is a bi-national organization with a U.S. and Mexican section. The Mexican section of the Commission is known in Spanish as the Comisión Internacional de Límites y Aguas (CILA). The U.S. section is a largely autonomous component of the State Department and is headquartered in El Paso, Texas.

treatment plant.

But the deal is flush with problems. Competition for the contract was waived;⁴ the project, which will be built on Mexican soil, was approved by the U.S. Congress before Mexico had agreed to it; and a solution that would have significantly mitigated the sewage problem in the region was allowed to die. Other problems include the additional time, effort, and bureaucracy necessary for the U.S. to fund a project in Mexico, as well as the questions of favoritism raised by drafting and passing legislation specifically designed to give a contract to a company without competitive bidding.

The Bajagua proposal is not the only option, however. While Title VIII was designed to facilitate the selection of that proposal, the law doesn't actually mandate its selection. In fact, the law does not require that the treatment facility be built in Mexico; it does not require that sole-source contracting be used; and it does not require that Bajagua be awarded the contract.

What has made Bajagua's proposal the selected alternative has been the political finagling: letters written from Members of Congress to USIBWC telling them that Bajagua's proposal should be chosen; meetings with the Vice President; extensive lobbying by influential former government employees; and the refusal by Congress to fund an upgrade to the existing wastewater treatment facility, despite the availability of those funds.

Had the USIBWC and CILA (the Mexican section of the International Boundary and Water Commission) not been pressured to award the contract to Bajagua without competition, they would have been able to examine alternatives for both sides of the border and then to solicit bids from numerous contractors. In fact, at least one contractor had indicated interest in bidding for the project, and others were well-qualified to compete for the work as well. Bajagua's proposal may or may not have been considered best.

If the deal is finalized, American taxpayers will subsidize – to the tune of an estimated \$600 million⁵ to \$1 billion⁶ – a private company's plan to profit from selling recycled Mexican wastewater back to Mexico. However, the final contract has not been signed, nor have taxpayer dollars flowed to Bajagua yet. There is still time to re-evaluate the deal before a contract is signed.

⁴ Public Law 106-457 does require that any subcontracting on the project be put up for competitive bidding.

⁵ "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." 9 September 2004. Congressional Budget Office. Downloaded 16 February 2006. <<http://www.cbo.gov/showdoc.cfm?index=5799&sequence=0>>.

⁶ Rother, Caitlin. "Border sewage pact done, but debate isn't." *San Diego Union-Tribune*. 26 February 2006. <<http://www.signonsandiego.com/news/mexico/tijuana/20060226-9999-1n26bajagua.html>>.

Background

For decades, sewage from Tijuana, Mexico, has created problems on the coasts of both San Diego and Tijuana. As the population, development, and trade in this border region have exploded, the sewage problem has grown as well. Beach closures are common because of the threat posed by bacteria and toxins in the sewage. During the 1980s, the United States suggested “an international water treatment plant (IWTP) and a deep ocean outfall that would carry the treated sewage of the IWTP out to sea.”⁷

The International Boundary and Water Commission (Commission), an organization with a section in both the U.S. and Mexico,⁸ is tasked with implementing bi-national water agreements, allocating water rights, dealing with water-related emergencies such as droughts and floods, and working on border sanitation problems. The Commission conducts its international activities through Minutes, which “typically are short documents having the force of law when the governments of both countries provide written notification of approval through their respective sections of the IBWC.”⁹

In 1990, the Commission arrived at an international agreement regarding the treatment plant. The agreement, known as Minute 283, provided for the construction, operation, and maintenance of an international wastewater treatment plant to treat Tijuana’s wastewater to both primary and secondary standards.¹⁰ The Minute limited the location of the plant to the U.S. because of the more stringent environmental standards in the U.S., lack of Mexican funding, and a perception that Mexico would not employ the correct technologies to solve the sewage problem.¹¹

Because of funding constraints, the USIBWC and the Environmental Protection Agency (EPA) scheduled the plant, called the South Bay International Wastewater Treatment Plant (SBIWTP), to be built in two stages. The first stage was built as an advanced primary treatment plant to stop raw

⁷ Fischhendler, Itay. “Escaping the ‘Polluter Pays’ Trap: Financing Wastewater Treatment on the Tijuana-San Diego Border.” Paper submitted to the 45th Congress of the European Regional Science Association, 23-27 August 2005. <http://www.feweb.vu.nl/ersa2005/final_papers/26.pdf>.

⁸ By international treaty, the International Boundary and Water Commission is a bi-national organization with a U.S. and Mexican section. The Mexican section of the Commission is known by its Spanish name – Comisión Internacional de Límites y Aguas (CILA). The U.S. section is a largely autonomous component of the State Department and is headquartered in El Paso, Texas.

⁹ Minan, John H. “Recent Developments in Wastewater Management in the Coastal Regions at the United States-Mexico Border,” 3 San Diego International Law Journal 51, 2002.

¹⁰ Primary treatment is a physical process to remove organic and inorganic solids. Secondary treatment is a higher standard of treatment and is a biological process to remove fine, suspended, dispersed, and dissolved solids.

¹¹ Fischhendler, Itay. “Escaping the ‘Polluter Pays’ Trap: Financing Wastewater Treatment on the Tijuana-San Diego Border.” Paper submitted to the 45th Congress of the European Regional Science Association, 23-27 August 2005. <http://www.feweb.vu.nl/ersa2005/final_papers/26.pdf>.

sewage flows, which was completed in 1997. The second stage of secondary treatment has never been implemented, despite the requirement by Minute 283 and U.S. and California law.¹²

In 1996, Bajagua submitted a proposal for a privately-owned and operated secondary treatment plant in Mexico and began recruiting the support of Members of Congress and lobbyists to push its proposal forward within the government. In 1999, the proposal was turned down by USIBWC and EPA because it was considered infeasible: it called for the plant to be built in Mexico, contrary to the international agreement's requirement that the plant be built in the U.S.; it would take longer to build a Mexican facility, as proposed by Bajagua, than to build a U.S.-based one, as called for by Minute 283; it was only conceptual and not detailed enough; and it did not have the support of the Mexican government.¹³

In 2000, Representatives Brian Bilbray (R-CA) and Bob Filner (D-CA) introduced H.R. 3378, the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000. It was attached to a larger omnibus bill, which passed into law as Public Law 106-457 later that year. The law instructs the USIBWC to enter into a fee-for-services contract with a company to build and operate a plant in Mexico to treat wastewater, in addition or in place of the planned upgrade to the wastewater treatment facility.

Public Law 106-457 provided for the construction of a treatment plant inside Mexico before the Mexican government agreed to having the facility built on its soil. As a result, the Commission had to negotiate a new Minute to allow the plant to be built in Mexico. In February 2004, over three years after Public Law 106-457 was passed, Minute 311 was signed by both the U.S. and Mexican sections of the Commission. Despite that agreement, Mexico sent several letters in 2005 objecting to the unilateral decisions made by the U.S. to award a contract for the construction and operation of a facility in Mexico (Appendix E). A non-binding development agreement between the USIBWC and Bajagua was signed on February 15, 2006. That agreement sets March 31, 2006, as the deadline for signing the fee-for-services contract.

Drawing on Congressional Influence

Since 1996, when Bajagua started the push for its proposal, the company's principals, their family members, and one of Bajagua's lawyers have showered Members of Congress, particularly the politicians in the San Diego district where Bajagua is located, with thousands of dollars in campaign contributions. (It is important to note that not all of those receiving contributions assisted Bajagua in any way that POGO could determine.) Since Bajagua began to promote its plan, the members of

¹² The Federal Water Pollution Control Act of 1972 (Clean Water Act) (33 USC 1311(b)(1)(B)) mandates "effluent limitations based upon secondary treatment." The California Porter-Cologne Water Quality Act (Cal. Water Code 13020-13389).

¹³ "Final Supplemental Environmental Impact Statement for the International Boundary and Water Commission South Bay International Wastewater Treatment Plant Long Term Treatment Options." International Boundary and Water Commission and the Environmental Protection Agency. March 1999. pp 3-8-3-9.

the San Diego delegation in the House have been Representatives Filner; Bilbray; Cunningham; Darrell Issa (R-CA); Duncan Hunter (R-CA); and Susan Davis (D-CA), who won Representative Bilbray's seat. All but Representative Cunningham have received campaign contributions from Bajagua. The company's James D. Simmons, Irwin Heller, Enrique Landa and his family have all contributed money to politicians who have helped Bajagua. With the exception of one, none of them had made any campaign contributions prior to 1996.

Representative Bob Filner (D-CA)

Representative Filner has received at least \$61,050 from Bajagua's principals and their family members. (Appendix J) The company's principals began making contributions to Filner in 1996, when Bajagua was formed. He began supporting the Bajagua project in 1997. The contributions increased around the time Representatives Filner and Bilbray introduced their legislation (Bajagua legislation) in 1999. Representative Filner received the maximum allowed contributions from Bajagua investor Irwin Heller and Bajagua managing member James Simmons, totaling \$2000, the day before the Bajagua legislation was introduced in the House of Representatives. This was Heller's first contribution to Representative Filner. Contributions to him from Bajagua have remained high, with the Congressman often receiving the maximum contribution from each Bajagua principal per election cycle.

In addition, according to a July 2003 State Department email, Representative Filner brought Bajagua lobbyist Ambassador James Jones to the State Department to support the Bajagua project. "Ambassador Jones accompanied Congressman Filner to a meeting with former Principal Deputy Assistant Secretary Lino Gutierrez to push this project very early on." (Appendix H)

Representative Duncan Hunter (R-CA)

Representative Hunter received at least \$9000 (\$1500 of which went to his PAC) beginning in 2002. In February 2002, he received \$1000 from Bajagua managing partner James Simmons, two months after Representative Hunter grilled USIBWC Commissioner Carlos Ramirez at a hearing on the implementation of the Bajagua legislation. This was the first contribution by a Bajagua principal to Representative Hunter. That year, Bajagua called Representative Hunter "our champion" in a letter to Vice President Cheney. In March 2003, Bajagua managing partners Simmons and Enrique Landa each gave Representative Hunter a \$1500 contribution. Representative Hunter met with Council on Environmental Quality (CEQ) Chairman James Connaughton and the White House on the Bajagua issue in September 2003, according to emails from government employees. (Appendix H) In July 2004, Representative Hunter introduced an amendment to the Bajagua legislation to make it more favorable to Bajagua. In August 2004, Simmons contributed \$1500 to Representative Hunter's political action committee, the Peace Through Strength PAC.

The Rest of the San Diego Congressional Delegation

Representative Bilbray received a \$1000 contribution from Bajagua investor Irwin Heller in 1994. In 1999, he received \$1000 from Bajagua principal Enrique Landa. Representatives Bilbray and Filner introduced their legislation about six months later.

Representative Davis received \$500 in 2002 from James Simmons, and Representative Issa received \$1000 from Enrique Landa in 2003. Representatives Issa, Hunter, and Cunningham met with CEQ Chairman Connaughton to discuss Bajagua in 2003. (Appendix H) The San Diego House delegation co-sponsored Representative Hunter's amendment to the Bajagua legislation in 2004.

Legislation Designed for a Contractor

When USIBWC dismissed Bajagua's proposal in 1999 to build and operate a wastewater treatment facility in Mexico, the agency was working within the framework of Minute 283. The agreement between the United States and Mexico was for the treatment facility to be built in the U.S. For Bajagua's proposal to even be considered, a new international agreement would have to be reached. After USIBWC and EPA rejected Bajagua's proposal, Representatives Filner and Bilbray introduced legislation designed to ensure that the company's proposal would be selected and approved. They had supported the Bajagua proposal as early as 1997¹⁴ because they believed Bajagua provided the "best chance for a comprehensive solution to the problem of Mexican sewage flowing in to the U.S. and our waters."¹⁵

During his communication with USIBWC and EPA, Representative Filner expressed his concern that the agencies were being intransigent. According to USIBWC's then-Acting Commissioner Robert Ortega:

Congressman Filner kept insisting that we were impediments and wanted us to help Bajagua get the contract. He told us to tell them what was lacking in the bill in order for the[m] to get [a] sole-source contract. (Appendix H)

¹⁴ The 1999 "Final Supplemental Environmental Impact Statement for the International Boundary and Water Commission: South Bay International Wastewater Treatment Plant Long Term Treatment Options." <<http://www.epa.gov/Region9/water/iwtp/supp.pdf>> states:

The lead agencies acknowledge Congressman Filner's continued support of the Bajagua proposal. Since 1997, Congressman Filner and the lead agencies have been exchanging correspondence regarding this issue. Most recently, EPA and USIBWC participated in a public meeting on November 13, 1998, concerning the Bajagua proposal that was sponsored by Congressman Filner.

In this same document, the EPA and USIBWC referred Bilbray to their response to Filner.

¹⁵ Congressional Record, September 12, 2000. pp H7471-H7475.

EPA and USIBWC provided the information necessary to help Representatives Filner and Bilbray craft their legislation.¹⁶

In 2000, Representatives Filner and Bilbray's legislation became law. The law provides a framework allowing USIBWC to enter into a fee-for-services contract with a company to build and operate a wastewater treatment plant to be located in Mexico if the current facility in the U.S. (the South Bay International Wastewater Treatment Plant), which only provides advanced primary wastewater treatment, is not upgraded to provide secondary treatment.¹⁷ The advanced primary treated wastewater would be piped back into Mexico for secondary treatment at the Mexican facility, and any reclaimed water not sold back to Mexico would then be piped back to the United States and into the Pacific Ocean through an ocean outfall. When Public Law 106-457 passed in 2000, a new international agreement had to be reached. (Appendix A) That agreement, Minute 311, created the option to construct a facility in Mexico with U.S. funding. Unlike Minute 283, Minute 311 was an international treaty built around one company's specific proposal, which limits the degree to which other companies could qualify for the contract.

It was clear from the beginning that the intent behind the legislation was for Bajagua to get a contract to treat wastewater. Representatives Bilbray and Filner have stated on numerous occasions (Appendix B) that their legislation was meant to deliver Bajagua a sole-source contract. For instance, in December 2000, Representatives Bilbray and Filner wrote to USIBWC stating, "The intent of the Act is to provide authorization to proceed with the Mexican facility (Bajagua) as soon as possible." (Appendix B; parentheses in original) Representative Filner also made his intent clear when speaking about Bajagua and the legislation to the *San Diego Union-Tribune* in 2004. "You can't write them [Bajagua] in," said Filner. "But it's designed to make sure they're eligible."¹⁸

Legislative help also came from Representative Hunter. When Representatives Filner and Bilbray's legislation (which had by then been attached to a larger omnibus bill) arrived in conference committee in 2000, the committee made a number of changes that were not to Bajagua's benefit: the original bill did not set a cap on the amount of money that the government could spend on the private facility, so the committee set a cap of \$156 million over five years (2001-2005) on the contract; it struck the language exempting the facility from the Contract Disputes Act; it changed the life of the contract from 30 years to 20; it required the facility's owner to hold a 20 percent equity in the facility's capital structure during the duration of the 20 year contract (according to the

¹⁶ "Final Supplemental Environmental Impact Statement for the International Boundary and Water Commission South Bay International Wastewater Treatment Plant Long Term Treatment Options." International Boundary and Water Commission and the Environmental Protection Agency. March 1999. pp 3-9-3-10.

¹⁷ Primary treatment is a physical process to remove organic and inorganic solids. Secondary treatment is a higher standard of treatment than primary and is a biological process to remove fine, suspended, dispersed and dissolved solids. In violation of the U.S. Clean Water Act (33 USC 1311(b)(1)(B)) and the California Porter-Cologne Water Quality Act (Cal. Water Code 13020-13389), the SBIWTP only provided advanced primary treatment because the EPA and USIBWC did not have the appropriations to achieve secondary treatment.

¹⁸ Branscomb, Leslie Wolf. "Sewer project to get remedial help." *San Diego Union-Tribune*. 13 October 2004. <http://www.signonsandiego.com/uniontrib/20041013/news_6m13sewage.html>.

conference report, this was done “to ensure greater accountability with respect to the costs of developing, financing, constructing, and operating and maintaining the facility”); and it required all subcontracting to be competitively bid. (Appendix C) Many of those changes were reversed in 2004 when Representative Hunter amended the legislation. His amendment removed the spending cap of \$156 million and the requirement that Bajagua hold a 20 percent equity in the facility “throughout the term of the contract.”¹⁹ Representative Hunter’s bill also authorized the USIBWC to pay for insurance as part of payment for services to Bajagua in the event the U.S. government did not continue making appropriations to pay Bajagua for its services. (Appendix A)

Putting the Cart Before the Horse

One of the biggest problems with the Bajagua legislation was that the U.S. approved funding for a private project in Mexico before the Mexican government had agreed with the plan. After the Bajagua legislation was introduced in the House, the White House’s Office of Management and Budget (OMB) addressed the legislation in a “Statement of Administration Policy” in September 2000. The Statement accurately predicted the problems that would result from the passage of the Bajagua bill, such as how the previously-approved plan to clean Mexican sewage would be compromised and the legal complications in Mexico:

The Administration supports the intent of H.R. 3378, which attempts to address the long-term sewage treatment needs of the U.S.-Mexico border region. The Administration, however, opposes H.R. 3378, because its approach raises serious foreign policy and legal concerns and will hinder our ongoing efforts to address the region’s wastewater treatment needs.

The approach taken by H.R. 3378 will hamper the Administration’s efforts to implement its existing U.S. legal obligations with Mexico, which Mexico has repeatedly urged the United States to fulfill. Instead of authorizing the funding needed to fulfill these obligations, the bill attempts to legislate the terms of a new agreement. In addition, the bill provides for a 30-year contract that may be unenforceable in Mexico. (Appendix C)

OMB’s stance echoed that of the EPA and USIBWC in their 1998-1999 Draft and Final Supplemental Environmental Impact Statements and Record of Decision, which considered and dismissed the Bajagua proposal.

Several letters from the Mexican section of the Commission illustrate the concerns of the Mexican government with the Bajagua project, including that the United States made a unilateral decision to

¹⁹ Congressional Research Service Summary of HR 4784. 30 November 2004. Downloaded 27 Mar 2006. <<http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04794:@@@D&summ2=2&>>.

award a contract for a facility to be built in Mexico; that aspects of the proposal “that may not be possible in practice [were] announced publicly”; and that “a plan for contracting and administration that the United States Section has not formally presented within the Commission [was] announced publicly.” (Appendix E)

Representatives Filner and Bilbray stated in a December 2000 letter to USIBWC that, “The Mexican facility is not a public project in Mexico. Therefore, public contracting law in Mexico is not relevant.” (Appendix B) However, according to letters from the Mexican government to the USIBWC, Mexico does not see it that way. In a letter to the Principal Engineer of the USIBWC, the Principal Engineer of CILA wrote, “In the matter of a project in Mexico, the responsible Mexican authorities should have a decisive role in the approval of the different phases of the project, ... even the contracting and administration aspects of the project.”(Appendix E) Though the Bajagua plan has been described as “win-win solution” by its promoters,²⁰ the issue of sovereignty should not be dismissed. If the Mexican Congress passed a bill funding a private project in America by a Mexican company before the U.S. government agreed, there might be some problems, too.

But the biggest problem is the issue of ownership and the lack of competition. Public Law 106-457 exempted USIBWC from complying with the Federal Acquisition Regulation (FAR) for the secondary wastewater treatment plant, allowing the agency to award a sole-source contract for the ownership and operation of the plant. The exemption wasn’t necessary, however, because there were a number of other companies qualified to build and operate wastewater treatment facilities and interested in submitting bids. If, for instance, it turns out that building the treatment facility in Mexico is a better option than upgrading the current facility in the U.S., several other companies already own, operate, manage, and maintain wastewater plants in Mexico.²¹ According to the San Diego Metro Commission Meeting Minutes for February 23, 2001, there was at least one company other than Bajagua interested in bidding for the project. Had bidding been open, it is possible this or other companies would have put forward a better deal than Bajagua.

However, nothing in the law *requires* USIBWC to use the exemption from competition regulations, to grant Bajagua a contract on a sole-source basis, or even to award the contract to Bajagua at all. Instead, it allows the government to first solve the problem by upgrading the South Bay International Wastewater Treatment Plant (SBIWTP) to provide secondary treatment. Public Law 106-457 says that the USIBWC “is authorized and directed to provide for the secondary treatment of a total of not more than 50 mgd [million gallons per day] in Mexico ... of effluent from the IWTP if such treatment is not provided for at a facility in the United States.” (Appendix A) If, however, there was a failure to provide a treatment upgrade at the IWTP, the Bajagua legislation mandates the private Mexican facility – the Bajagua option.

²⁰ Filner, Bob. Congressional Record, September 12, 2000. p H7475.

²¹Schmidt, Gerold. “Legal and Institutional Changes towards Water Privatization in Mexico.” Paper submitted to The Human Right to Water on the Central American Political and Social Agenda workshop, June 2005, Managua, Nicaragua.
http://www.menschen-recht-wasser.de/downloads/Legal_and_institutional_changes_towards_water_privatization_in_Mexico.pdf>.

Until the Bajagua legislation passed, the plan was to build a treatment method called completely mixed aerated (CMA) ponds. The ponds would be located adjacent to the current SBIWTP and would provide the secondary treatment to wastewater required by California and U.S. environmental law. Some community members around the planned site objected on the basis that the ponds would have a bad odor, though this assertion was disputed by the USIBWC and EPA. Furthermore, Representatives Bilbray and Filner both felt that the Bajagua solution was preferable because it could treat more wastewater with secondary treatment than the planned upgrade at the SBIWTP would.

To free up the estimated \$54 million needed to build the CMA ponds, a cap on appropriations for the SBIWTP project had to be lifted. According to a letter from the EPA, funds were available but not specifically authorized for upgrading the facility. Congress simply had to lift the cap through legislation:

Currently, funds previously appropriated for Mexican border infrastructure projects remain available, and could be used for the upgrading [of] the IWTP if Congress removes the spending cap. In light of the availability of Mexican border funds, no additional appropriation is necessary to complete this upgrade. (Appendix D)

However, in correspondence to USIBWC after their legislation passed, Representatives Filner and Bilbray directed the agency to abandon plans to upgrade the SBIWTP, despite the fact that their legislation allowed for the upgrade:

It is not the intent of Congress that the United States enlarge the advanced primary treatment capacity at the International Wastewater Treatment Plant (IWTP) to handle volumes beyond the current 25 mgd. And additional capacity beyond the 25 mgd of advanced primary treatment now being treated at the IWTP is to be treated through all treatment levels at the Mexican facility. Accordingly, the IBWC should not anticipate the need to request funding to design, construct, operate or maintain additional treatment works beyond the currently operating 25mgd advanced primary treatment plant within the context of Title VIII to S. 835 [which became Title VIII of Public Law 106-457]. Further, the Act should not be interpreted to imply that funding for expansion of advanced primary is authorized or appropriated. (Appendix B)

The USIBWC's 2005 Record of Decision states that funding for upgrading the SBIWTP was abandoned by Congress because of Public Law 106-457:

Congress declined requests by USIBWC and EPA to authorize the necessary funding for implementation of [the CMA ponds], instead passing the Title VIII of Public Law 106-457, the Tijuana River Valley Estuary and Beach Cleanup Act of 2000, authorizing secondary

treatment for the SBIWTP's effluent in Mexico pursuant to a public-private partnership arrangement.²²

Drawing on Other Avenues of Influence

After the legislation became law, Bajagua still had to overcome the obstacles discussed above before the company could get the contract. The company also had to overcome EPA, DOJ, and USIBWC objections to the company's plan. To help this process along, Bajagua utilized the revolving door: The company hired former policymakers, who had influence in the various spheres relating to the deal, to lobby on its behalf. Bajagua hired an Ambassador to Mexico; a State Department officer who had also been a policy director in the White House Office of the Special Envoy for the Americas; a chief policy aide for the San Diego County Supervisor²³; a director of the San Diego Metropolitan Wastewater Department; the legislative director of a Representative who later introduced legislation helping Bajagua; and a former Representative who had introduced the original legislation helping Bajagua.

Ambassador James R. Jones and Eric P. Farnsworth

James R. Jones was Ambassador to Mexico from 1993 to 1997. While in that position, Ambassador Jones "assisted U.S. businesses with commercial ventures in Mexico." Jones is now co-Chairman of Manatt Jones Global Strategies, LLC, and a partner at Manatt, Phelps & Phillips, LLP.

Ambassador Jones²⁴ and Manatt, Phelps & Phillips, LLP, were hired as a lobbyists in 1999 by Poseidon Research Corporation,²⁵ a partner with Agua Clara, LLC (Bajagua's predecessor company) in its wastewater treatment plant venture.²⁶ Ambassador Jones was hired by Poseidon "to work with the governments of Mexico and the United States to situate a secondary water treatment plant for the

²² "Record of Decision for the Final Supplemental Environmental Impact Statement for International Boundary and Water Commission Clean Water Act Compliance at the South Bay International Wastewater Treatment Plant." International Boundary and Water Commission. 30 September 2005. Downloaded 27 March 2006. <http://www.ibwc.state.gov/Files/ROD_BSP.pdf>.

²³ The San Diego County Supervisor was Brian Bilbray, who later became a U.S. Representative for the San Diego area. While a Representative, Bilbray co-sponsored legislation that would deliver a sole-source contract for a wastewater treatment plant to Bajagua.

²⁴ Jack Buechner, also of Manatt, Phelps & Phillips, was also listed as a lobbyist for Bajagua in 1999.

²⁵ "Lobbying Report." Senate Office of Public Records. 17 August 1999. Downloaded 24 March 2006. http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/1999/01/000/265/000265172|2

²⁶ "Section 1 – Executive Summary Bajagua Wastewater Treatment and Water Reclamation Project." Cached webpage. <http://tinyurl.com/f96ax>

San Diego region in Tijuana, Mexico.” They lobbied the U.S. House of Representatives, the State Department, the EPA, the USIBWC for Poseidon from 1999 through 2001.²⁷

Eric P. Farnsworth was an officer at the State Department, and a policy director in the White House Office of the Special Envoy for the Americas from 1995 to 1998.²⁸ He joined Manatt Jones as a managing director in 1998. Farnsworth is currently a member of the Advisory Committee on International Economic Policy, and a vice president of the Council of the Americas.

Because of their prior roles as U.S. government officials in Latin America, Ambassador Jones and Farnsworth have great capacity to lend weight to the deal Bajagua is trying to broker in Mexico.

Ambassador Jones and Farnsworth registered as a lobbyists for Bajagua in 2001 under the auspices of Manatt Jones, then re-registered again under Manatt, Phelps & Phillips, LLP in 2002.²⁹ Ambassador Jones and Farnsworth lobbied the House of Representatives, the State Department – Ambassador Jones’ and Farnsworth’s old stomping ground – and the USIBWC on behalf of Bajagua for “Approval to build [a] water treatment plant in Mexico”³⁰ and later for “Building a water treatment plant in Mexico.”³¹

In 2003, Manatt, Phelps & Phillips, LLP, filed a termination report ending its lobbying activities as of December 31, 2002.³² However, according to a July 2003 State Department email:

Ambassador Jim Jones (former Ambassador to Mexico and we learned today former US Congressman) and his associate from Manatt Jones Global Strategies, which is a powerful Washington lobbying firm, met with [the State Department’s coordinator of US/Mexico border affairs] Dennis Linskey today to advance the Bajaagua [sic] project. (Appendix H)

²⁷ “Lobbying Report.” Senate Office of Public Records. 18 July 2001. Downloaded 24 March 2006. http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2001/01/000/469/000469700|3

²⁸ “Eric P. Farnsworth, Adjunct Fellow, Americas Program.” Center for Strategic and International Studies. Downloaded 16 February 2006. <http://www.csis.org/component/option,com_csis_experts/task,view/id,288/>.

²⁹ According to Senate Office of Public Records lobbying disclosure forms

³⁰ “Lobbying Report.” Senate Office of Public Records. 29 January 2002. Downloaded 16 February 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2001/01/000/418/000418628|3>.

³¹ “Lobbying Report.” Senate Office of Public Records. 23 January 2003. Downloaded 2 March 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2002/01/000/570/000570712|3>.

³² “Lobbying Report.” Senate Office of Public Records. 23 January 2003. Downloaded 2 March 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2002/01/000/570/000570712|3>.

Given this assertion, it appears that Ambassador Jones and Farnsworth may have been in violation of the Lobbying Disclosure Act of 1995 (2 U.S.C. § 1605) by lobbying the U.S. Government without disclosure of their activities.

Brian Bilbray and Benedetto Advocacy and Communications

Craig Benedetto worked as chief policy aide overseeing all county operations for Representative Bilbray when he was San Diego County Supervisor. Benedetto has also been Vice President for Public Policy at the Greater San Diego Chamber of Commerce, and has held other positions in San Diego's political arena.³³

Benedetto is president of Benedetto Communications, Inc., a public relations, marketing, and government relations firm he opened in 1999. He has handled Bajagua's press since at least 2000³⁴ (Bajagua's website directs press inquiries to Craig Benedetto and his firm³⁵) and has been a lobbyist for the company in the local San Diego area since 2001.³⁶

Former Representative Brian Bilbray (R-CA) was one of the original sponsors of the Bajagua legislation. After losing his congressional seat in 2000, Bilbray was hired in 2001 by his former employee Craig Benedetto to lobby the White House and State Department for Bajagua. The only time Benedetto's firm has lobbied the federal government was when Bilbray lobbied for Bajagua.

In 2001, Bilbray was called to testify before Congress about the Bajagua legislation, but did not identify himself as a lobbyist for Bajagua. Bilbray told the *San Diego Union-Tribune*, "I wasn't there because I was being paid [as a lobbyist], I was there because I had spent 20 years fighting the issue [of untreated sewage]."³⁷

³³ "Craig Benedetto Appointed to San Diego Regional EDC Board of Directors." Benedetto Communications, Inc. Downloaded 16 February 2006. <http://www.benedetto.com/news_craig_edc.htm>.

³⁴ "President Clinton Signs S. 835 – Includes Title VIII Authorizing Project Negotiation for Secondary Sewage Treatment Ponds in Mexico to Stem the Tide of Sewage." Bajagua Project, LLC press release. Downloaded 8 March 2006. <http://www.bajagua.com/docs/S_835_Passage_Press_Release1.pdf>.

³⁵ "Team." Bajagua Project, LLC website. Downloaded 16 February 2006. <<http://bajagua.com/team.shtml>>.

³⁶ "Lobbying." San Diego City Clerk's Office. Downloaded 16 February 2006. <<http://www.sandiego.gov/city-clerk/elections/lobby/index.shtml>>.

³⁷ Rother, Caitlin. "Border sewage pact done, but debate isn't." *San Diego Union-Tribune*. 26 February 2006. <<http://www.signonsandiego.com/news/mexico/tijuana/20060226-9999-1n26bajagua.html>>.

Francis David Schlesinger

David Schlesinger was the Director of the San Diego Metropolitan Wastewater Department from 1990 to 2001. While with the Department, he supported Bajagua and helped the company work out technical aspects of the project. (Appendix B)

On May 15, 2001, Representative Filner paid tribute to Schlesinger in the House of Representatives as Schlesinger was retiring from the Department. Both Representatives Filner and Schlesinger had worked together on a number of San Diego-related projects. Representative Filner stated:

Dave's talents were also critical to last year's Congressional approval of the Bajagua project to treat Mexican sewage. Dave helped to develop the innovative public-private partnership that promises to solve a 50-year-old problem plaguing San Diego. We always relied on Dave's "sense of the possible" – both politically and technically – to get over the many obstacles we faced over several years. (Appendix B)

After his retirement from the Department in 2001, Schlesinger went to work for Bajagua as its Director of Operations. He is responsible for "coordinating all aspects of planning, design, environmental review, project acquisition, and overseeing work by our engineering, legal, legislative, and public outreach consultants."³⁸ Schlesinger has lobbied the City of San Diego for Bajagua since as early as 2001, the year of his retirement from the San Diego Metropolitan Wastewater Department.

Matthew R. Simmons

Matthew R. Simmons worked for Representative Hunter "for ten years,"³⁹ ending up as Representative Hunter's legislative director, as well as the staff person in charge of working on water issues.⁴⁰

Simmons left Representative Hunter's office in late 2000 or early 2001 to work as a lobbyist for the Ferguson Group.⁴¹ From 2001 through 2005, he lobbied the House of Representatives and the Senate

³⁸ "BIOGRAPHY – Francis D. Schlesinger." Bajagua Project, LLC. Downloaded 8 March 2006. <<http://www.bajagua.com/team.shtml#>>.

³⁹ "Matthew R. Simmons Joins Consultants Collaborative." Consultants Collaborative. Downloaded 16 February 2006. <<http://www.cciconnect.com/simmons.html>>.

⁴⁰ "California Congressional Delegation Staff Roster, January 2000." Downloaded 16 February 2006. <<http://www.calinst.org/pubs/delstaff.htm>>.

⁴¹ "Lobbying Report." Senate Office of Public Disclosure. 30 October 2002. Downloaded 16 February 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2003/E/000/002/000002817|2>.

on behalf of Bajagua on the “IBWC Proposed Bi-National Wastewater Treatment Facility.”⁴² According to his year-end lobbying reports, Simmons “Facilitated Congressional oversight regarding the implementation of Public Law 106-457.”⁴³

In 2005, Simmons went to work for the Consultants Collaborative, Inc. (CCI) as its Vice President of Governmental Relations.⁴⁴ CCI is both an engineering consultant and a lobbying shop, and it took over the Bajagua lobbying contract at the same time. CCI’s founder and President James D. Simmons (no relation to Matthew Simmons) is one of the two managing members of Bajagua.

Shortly after Simmons began lobbying for Bajagua, Representative Hunter became Bajagua’s “champion.” In December 2001, he grilled USIBWC Commissioner Carlos Ramirez at a hearing on the implementation of the Bajagua legislation, and stated that he “strongly support[s] the implementation of PL 106-457, Title VIII and the construction of the Bajagua project.” (Appendix I) In 2004, Representative Hunter amended Public Law 106-457 to make it more favorable to Bajagua. (Appendix A) CCI lists Representative Hunter as a reference on its website.⁴⁵

Vice President Dick Cheney

The company even had connections to a higher power: In addition to hiring well-connected lobbyists, Bajagua also tapped into the power of the White House. Bajagua was able to turn to Vice President Dick Cheney for help when the company wanted to seal the deal. According to current and former government officials, the Vice President facilitated interagency discussions which broke a stalemate and resulted in a decision in favor of Bajagua’s proposal.

Documents and emails obtained by freelance journalist and University of Texas-El Paso Professor William Weaver show that Bajagua solicited, and received, the help of Vice President Cheney to pressure the USIBWC to award Bajagua a sole-source contract.

⁴² “Lobbying Report.” Senate Office of Public Disclosure. 10 August 2001. Downloaded 16 February 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2003/E/000/002/000002578|2>.

⁴³ “Lobbying Report.” Senate Office of Public Disclosure. 11 February 2002. Downloaded 16 February 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2003/E/000/002/000002706|2>.

⁴⁴ “Lobbying Report.” Senate Office of Public Records. 14 October 2005. Downloaded 16 February 2006. <http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2005/01/000/362/000362550|3>; “Matthew R. Simmons Joins Consultants Collaborative.” Consultants Collaborative. Downloaded 16 February 2006. <<http://www.cciconnect.com/simmons.html>>.

⁴⁵ “References.” Consultants Collaborative. Downloaded 16 February 2006. <<http://www.cciconnect.com/references.html>>.

Vice President Cheney met with Bajagua on at least two occasions, once in October 2002 and again in September 2003. In an October 2002 letter thanking the Vice President for meeting with the company about its wastewater proposal, Bajagua also asked him for help facilitating the project:

This project accomplishes something that the US, and Mexico, have been trying to do for sixty (60) years and will be a big environmental win for the President, for Mexico and for San Diego. If we can find a way to proceed with the IBWC they will be heroes and so will President Bush. All we ask is a productive forum to work out the details of the process. At this point IBWC has refused to meet with us for reasons that are not necessarily accurate. Would you consider arranging a meeting(s) to facilitate a successful result. Any and all help will be greatly appreciated and once again we thank you for all you have already done. (Appendix F)

Emails show that Vice President Cheney met with Bajagua again in September 2003: “[N]ote coincidence – Bajagua met with VP Cheney yesterday and White House met with Hunter.” (Appendix H)

At the time of Vice President Cheney’s second meeting with Bajagua, the Justice Department “expressed anxiety at having learned that Bajagua had gotten into high levels at OVP and State (Noriega).” (Appendix H) “OVP” stands for “Office of the Vice President” and “Noriega” is the State Department’s Assistant Secretary of State for Western Hemisphere Affairs Roger Noriega.

In correspondence with POGO, former USIBWC Acting Commissioner Robert Ortega wrote that it was “understood that the Vice President’s office had directed” a 2003 meeting, organized by the White House’s Council on Environmental Quality (CEQ) “to coordinate the US agencies (OMB, DOJ, EPA, IBWC, etc.) to resolution of execution of the PL106-457.” (Appendix H)

After the meeting, DOJ, EPA, and USIBWC changed their positions regarding the Bajagua proposal. For instance, Ortega wrote that, after the meeting, there was a shift in the Justice Department’s opinion regarding the legality of granting Bajagua a sole-source contract:

Prior to the Bush administration, the DOJ as represented by attorney Randall Humm was in agreement with IBWC that Bajagua could not be issued a sole source contract. I believe there were a few filings with the Surfriders and the California State Water Quality Control Board to this effect. Afterwards, [the] above [2003] meeting was called and DOJ represented by John Cruden took the opposite view of sole source contracting with Bajagua and strongly tried to convince the IBWC. (Appendix H)

In September 2004, then-USIBWC Commissioner Arturo Duran wrote to CEQ Chairman Connaughton letting him know that USIBWC, EPA, DOJ, and CEQ had all met and agreed to identify the Bajagua proposal as the Draft Supplemental Environmental Impact Statement preferred alternative.⁴⁶ (Appendix G)

⁴⁶ The preferred alternative is “the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors,” according to the Council on Environmental Quality. During the environmental assessment process, there is a draft and a final Supplemental Environmental Assessment Statement (SEIS) released. Comments on the draft are considered by the

Conclusion

Americans believe in the important role competition plays in maximizing return for the dollar and in reducing favoritism. But the Bajagua deal illustrates that contracting is not insulated enough from political pressure and lobbying: in this case, Congress clearly swept aside the notion of competition and not playing favorites.

There is no reason for the U.S. government to avoid competition for ownership and operation of wastewater treatment plants, whether they are located in the U.S. or in other countries. However, Bajagua had effectively stacked its political deck and was able to put the squeeze on when it needed to. This resulted in getting legislation designed to deliver a sole-source contract to the company drafted and passed. Going even further, some Members of Congress and current and former government employees went to bat for the company after the legislation passed, pressuring or lobbying several government agencies to move faster and actually award the contract to Bajagua.

As a result of all the political finagling, the SBIWTP never gained a secondary treatment capability. And because the Bajagua treatment project has been mired in diplomatic, bureaucratic and financial trouble, the San Diego-Tijuana region continues to have unacceptable levels of pollution in the South Bay.

agency or agencies administering the assessment and can influence the final SEIS. According to CEQ regulations, if an agency(s) has a preferred alternative(s) before the draft SEIS is released, the preferred alternative(s) should be identified.

POGO's Recommendations

1. In full consultation with the Mexican government, the USIBWC should postpone awarding a sole source contract to Bajagua and draft and release a request for proposals (RFP) and open up the process to a reasonably time-limited competition. Because the environmental assessment process has already been conducted twice, the RFP should mandate that proposals match the alternatives for secondary treatment analyzed during the last round of environmental assessment. Also, to ensure that proposals for secondary treatment on the U.S. side of the border are considered, authorization for funding should be granted to U.S.-located alternatives. Ironically, at the present time only a project on the Mexican side of the border can receive U.S. funding.
2. The ban on lobbying by former Members of Congress and their staffers should be extended beyond the current one-year limit.
3. Lobbying disclosures should go beyond identifying the general governmental body lobbied (e.g. the White House, the State Department, the House of Representatives): they should include the name of the official or elected representative lobbied and the meeting dates. Furthermore, lobbyists should be required to identify themselves as lobbyists if they testify before Congress.
4. Legislatively earmarking federal appropriations for sole-source or non-competitive contracts should be prohibited.
5. To avoid appearances of impropriety, members of Congress should not accept campaign contributions from contractors that they promote.
6. Members of Congress and congressional staffers should not go to work for companies that they regulate or oversee while they worked for the government.

(click here to view the Appendix listing and documents:

<http://www.pogo.org/p/contracts/Bajagua/co-060301-APPENDIX.html>)