



San Francisco Bay Regional Water Quality Control Board

October 29, 2019

Michael Carlin
San Francisco Public Utilities Commission
525 Golden Gate Avenue, 13th Floor
San Francisco, CA 94102

Dear Mr. Carlin:

This letter responds to your and your counsel's inquiries from October 18, 25, and 28 about the effective date of Order No. R2-2019-0028 (Oceanside permit). We appreciate your expressed need in the letters for certainty regarding the effective date of the permit as well as the specific provisions of the permit that will be effective as of that date. As stated in the permit itself, and reiterated in our October 1, 2019 transmittal and our October 25, 2019 response to the interim objection of the United States Environmental Protection Agency (U.S. EPA), the effective date of the Oceanside permit remains November 1, 2019. With this response, we provide a summary of the legal basis for permit effectiveness, as well as clarification on the provisions of the permit that go into effect on November 1, 2019. We hope that this serves to eliminate any confusion and set the stage for us to continue to work together on implementation of the permit's relevant requirements.

Although permits for the Oceanside Water Pollution Control Plant have historically been issued jointly by the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) and U.S. EPA, adoption by U.S. EPA is not required to effectuate permit provisions that the Regional Water Board already has authority to issue. U.S. EPA's and the Regional Board's respective authorities over the discharges covered by the permit are not overlapping, and the language of the permit does not make the effectiveness of state-issued provisions contingent on adoption or signature by U.S. EPA. Thus, because the Regional Water Board has adopted the Oceanside permit, the provisions relating to discharges the state is authorized to regulate will become effective whether or not U.S. EPA adopts (or signs) the permit. We have enumerated the provisions outside the Regional Board's authority to adopt in order to provide San Francisco with clarity about its regulatory requirements.

As San Francisco is aware, the Regional Water Board has authority under the Clean Water Act to issue National Pollutant Discharge Elimination System (NPDES) permits. See 54 Fed. Reg. 40664-01, 40664-40665 (Oct. 3, 1989); Wat. Code § 13370 *et seq.*;

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see also generally *NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board (NPDES MOA)* (Sept. 22, 1989). As a result, U.S. EPA retains only limited jurisdiction to issue NPDES permits in California. *NPDES MOA*, pp. 4-5. The authority of the two agencies is not concurrent. See 33 U.S.C. § 1342, subd. (c); 40 CFR § 123.1 (“Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.”)

U.S. EPA participates in permitting for the Oceanside Water Pollution Control plant only because Discharge Point 001 is located outside the waters of the State. See Order No. R2-2019-0028, at p. F-6. Accordingly, U.S. EPA retains jurisdiction over the provisions related to this ocean discharge. *City and County of San Francisco (EAB 1993) 4 EAD 559*, at p. *1, fn. 1 (“While California has been delegated NPDES permitting authority for discharges into ‘navigable waters’ within its jurisdiction, the subject outfall extends into ocean waters beyond that three-mile jurisdiction, consequently EPA is the NPDES permitting authority for discharges from the subject outfall.”) The Regional Water Board is the permitting authority for discharges within the three-mile boundary, that is, discharges from the nearshore outfalls (Discharge Points CSD-001 through CSD-007).

As a result, the joint permit is properly viewed as two separate permits, one issued by U.S. EPA and one issued by the Regional Water Board; each permit regulates different discharges, even if the requirements to control these discharges overlap.¹ Contrary to your assertions, the language of the permit, applicable law, and both Environmental Appeals Board (EAB) and State Water Resources Control Board (State Water Board) precedent support the view that joint permits are in fact dual permits. See Order No. R2-2019-0028, pp. 2 (requiring both ROWD and NPDES application), 3 (certifying that order is both a duly adopted WDR and an NPDES permit), 5 (establishing that order is both WDRs and an NPDES permit adopted by U.S. EPA); 40 CFR §§ 123.1; 124.4, subd. (a) (providing for consolidation of multiple permits for the same facility and specifying that “[t]hey need not be issued together if in the judgment of the Regional Administrator or State Director(s), joint processing would result in unreasonable delay in the issuance of one or more permits.”); *Matter of City and County of San Francisco*, supra, 4 EAD, at p. *3 (describing permit requirements for nearshore outfalls as elements of state-issued NPDES permit); State Water Board Order No. WQ 2002-0013 (*Point Loma Wastewater Treatment Plant*), p. 2 (joint permit issued by San Diego Regional Water Board contained both federal 301(h) waiver and State WDRs, “a separate permit that ensures compliance with state water quality standards”); State Water Board Order No. WQ 86-17 (*Rimmon Fay*), p. 5 (“Thus, for 301(h) waivers, the discharger needs both waste discharge requirements issued by the Regional Board and an NPDES permit issued by the Environmental Protection Agency.”)

Supporting the view that the Oceanside permit is a vehicle for separate state and federal permits is its invocation of parallel administrative review by the State Water Board and the EAB, which do not have overlapping jurisdiction. Cf. 40 CFR § 124.19 and Wat. Code § 13320; see also Environmental Appeals Board Practice Manual (Aug.

¹ For instance, implementation of the Long-Term Control Plan and the Nine Minimum Controls is necessary to control both nearshore and ocean discharges.

2013), p. 38. “EPA-issued permits must initially be challenged before the Environmental Appeals Board and then in the appropriate court of appeals.” *Southern California Alliance of POTWs v. EPA* (E.D. Cal. 2018) 297 F.Supp.3d 1060, 1071; see also *Southern California Alliance of POTWs v. EPA* (9th Cir. 2017) 853 F.3d 1076, 1081, 1083 n.4. By contrast, “[t]he [NPDES] permits issued by the state are subject to administrative and judicial review in accordance with state law.” *Southern California Alliance of POTWs v. EPA, supra*, 853 F.3d at 1081; see also *Southern California Alliance of POTWs v. U.S. EPA, supra*, 297 F.Supp.3d at 1071–1072 (citing 40 C.F.R. § 123.30 [judicial review of permits issued by the state is limited to state court]); Cal. Water Code §§ 13320, 13321, 13330 (providing for review and petition for stay by State Water Board, and review in state superior court).

In decisions arising out of joint permits, the State Water Board and the EAB have reviewed only the provisions within, respectively, state or federal authority to impose. See Order No. WQ 2002-0013 (*Point Loma*), *supra* (reviewing TSS limit imposed by the Regional Water Board in a joint permit); *In the Matter of City and County of San Francisco, supra*, 4 EAD 559 (reviewing provisions controlling discharges beyond State waters); see also *In re Great Lakes Chemical Corp.* (July 7, 1994) 5 E.A.D. 395, at p. *2 (denying review of RCRA permit conditions imposed under Arkansas’ authorized program and concluding that EAB “has no basis upon which to exercise its power of review.”); *In re Carlton, Inc.* (Feb. 28, 2001) 9 E.A.D. 690, at *3 (finding that EAB’s “jurisdiction to hear PSD permit appeals under 40 C.F.R. pt. 124 does not extend to appeals of state-issued minor NSR permits in approved States. Such permits are regarded as creatures of state law that can be challenged only under the state system of review.”). The Ninth Circuit has likewise recognized that the federal portions of joint NPDES permits are appealable to the EAB. See *City of San Diego v. Whitman* (9th Cir. 2001) 242 F.3d 1097, 1101-1102 (if city was aggrieved with decision regarding its 301(h) renewal application, recourse was to appeal decision to the EAB). The limited jurisdiction of each administrative appeals body over joint permit provisions indicates that the state and federal provisions are separable and may go into effect separately.

The Regional Water Board has already followed required procedures for the state WDRs within the Oceanside permit to go into effect separately. The Regional Water Board exercises its NPDES permitting authority when its board members vote to adopt a tentative permit at a public board meeting. See Wat. Code §§ 13223, 13263, 13377, 13378; *NPDES MOA*, pp. 3, 6. Here, board members voted in favor of the Oceanside permit at the September 11, 2019 board meeting. Neither the board members nor the text of the permit conditioned the effectiveness of the permit on U.S. EPA adoption.² The Regional Water Board’s adoption was all that was needed to effectuate the provisions of the permit related to the control of nearshore discharges; accordingly, the implementation of these provisions is not thwarted by U.S. EPA’s failure to sign the permit.

² The Regional Water Board could have made permit effectiveness contingent on U.S. EPA issuance, but chose not to. For instance, the 1990 iteration of the Oceanside permit provided that “[t]his order shall...become effective 30 days after the date of its adoption by the Regional Administrator, Environmental Protection Agency.” Order No. R2-1990-0093, p. 17.

The absence of a signature from a U.S. EPA representative is likewise not meaningful. See 40 CFR § 124.15 (requiring the Regional Administrator to issue “final permit decision” for U.S. EPA-issued permits but not requiring signature as means of communicating such decision); see also Order No. R2-1990-0093, p. 18 (signature of U.S. EPA representative absent on final 1990 Oceanside permit). Indeed, the current permit does not assign any consequence to either agency’s failure to sign it, nor is the permit’s effective date linked to the date of signature. Both signatures serve, not to issue or effectuate the permit, but to certify that the signed document is a copy of the permit that the agencies have already decided to issue.³ See Order No. R2-2019-0028, p. 3.

Having established that the permit provisions to control discharges within the Regional Water Board’s authority to regulate have in fact been adopted by the Regional Water Board, we disagree that this interpretation will cause “complete confusion” regarding applicable permit terms and obligations. If U.S. EPA has not issued its portion of the permit by November 1, the federal discharges – that is, the discharges to Discharge Point 001 – will be unpermitted. Because San Francisco has timely submitted a permit application, and “through no fault of the permittee,” U.S. EPA will not have issued a new permit, the conditions applicable to the ocean discharge under the 2009 Oceanside permit would continue in effect until U.S. EPA formally adopts the permit. See 40 CFR § 122.6, subd. (a). Accordingly, until U.S. EPA formally adopts the permit, San Francisco will be subject to the provisions of the 2019 permit to the extent that they are authorized pursuant to State law. Generally, San Francisco will not be subject to provisions in the 2019 permit relating exclusively to Discharge Point 001 because these provisions are required under U.S. EPA authority; San Francisco may thus continue to comply with the equivalent 2009 provisions. Where a provision is required to control discharges to both federal and state waters, however, San Francisco is still bound by it.

Because most of the permit will go into effect on November 1, we have for ease of reference enumerated below only the provisions that will **not** go into effect, because they relate only to discharges to federal waters:

- **Provisions III.B, III.C, and III.E (Discharge Prohibitions).** These provisions relate only to Discharge Point 001.
- **Provision IV (Effluent Limitations and Discharge Specifications).** This provision relates only to Discharge Point 001. (Note that during wet weather San Francisco must comply with Provisions VI.C.5.a [Nine Minimum Controls] and VI.C.5.c [Long-Term Control Plan] because their implementation is also necessary to control discharges to the nearshore outfalls.)
- **Provisions VI.A.2.c (Standard Provisions).** This exception to the Regional Standard Provisions in Attachment G relates only to Discharge Point 001.
- **Provision VI.C.2 (Effluent Characterization Study and Report).** This provision relates only to Discharge Point 001.

³ Because the Executive Officer has no authority to issue permits (Wat. Code § 13223), his signature cannot make the permit effective.

- **Provision VI.C.6 (Westside Recycled Water Project Operations Notification).** This provision relates only to Discharge Point 001.
- **Provision VI.C.7 (Flame Retardant Special Study).** This provision relates only to Discharge Point 001.
- **Monitoring and Reporting Program (MRP) Provision III (Influent Monitoring Requirements).** While San Francisco is not subject to dry weather influent monitoring at Monitoring Location INF-001A; it must comply with wet weather influent monitoring at Monitoring Location INF-001B so we can understand the performance of the entire facility during wet weather.
- **MRP Provision IV.A.2 (Effluent Monitoring Requirements: Oceanside Water Pollution Control Plant).** While San Francisco is not subject to dry weather effluent monitoring at Monitoring Location EFF-001A; it must comply with wet weather effluent monitoring at Monitoring Location EFF-001B so we can understand the performance of the entire facility during wet weather.
- **MRP Provision IV.C (Effluent Monitoring Requirements: Westside Recycled Water Project).** This provision relates only to Discharge Point 001.
- **MRP Provisions IV.D and V (Chronic Toxicity Monitoring Requirements).** These provisions relate only to Discharge Point 001.
- **MRP Provision VI.B (Offshore Monitoring).** This provision relates only to Discharge Point 001.

My staff and I would be happy to go over specific provisions with you in more detail and to answer any questions you have. Please feel free to reach out to me directly or to call Bill Johnson at (510) 622-2354. We appreciate the need to avoid any confusion as to permit effectiveness and implementation going forward and hope that we have been able to provide clarity with this response. We value our longstanding and productive partnership with San Francisco and are eager to continue to work with you collaboratively toward protecting water quality.

Sincerely,

Michael Montgomery
Executive Officer

cc: **U.S. EPA, Region 9:**

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