HUNTON ANDREWS KURTH LLP
J. TOM BOER (State Bar No. 199563)
SAMUEL L. BROWN (State Bar No. 283995)
50 California Street, Suite 1700
San Francisco, California 94111
Telephone: 415 • 975 • 3700

OFFICE OF CITY ATTORNEY DENNIS HERRERA
CITY AND COUNTY OF SAN FRANCISCO
JOHN RODDY (State Bar No. 96848)
ESTIE KUS (State Bar No. 239523)
City Hall, Room 234
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: 415 • 554 • 3986

Attorneys for Petitioner,
CITY AND COUNTY OF SAN FRANCISCO

BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF PETITION OF

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

For review of San Francisco Bay Regional Water Quality Control Board Order No. R2-2019-0028, NPDES No. CA0037681, Waste Discharge Requirements and National Pollutant Discharge Elimination System Permit for City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, adopted on September 11, 2019.

PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION; AND REQUEST FOR A HEARING

(Cal. Water Code § 13320; Cal. Code Regs. tit. 23 § 2050 et seq.)

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50 California Street, Suite 1700
San Francisco, California 94111

I. INTRODUCTION

City and County of San Francisco ("San Francisco") hereby petitions the State Water Resources Control Board ("State Board") pursuant to California Water Code section 13320(a) and Title 23, section 2050 of the California Code of Regulations, to review Order No. R2-2019-0028, NPDES No. CA0037681, Waste Discharge Requirements and National Pollutant Discharge Elimination System Permit for City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project (hereinafter the "Permit"), adopted by the San Francisco Bay Regional Water Quality Control Board ("Regional Board") on September 11, 2019.

The Permit creates significant regulatory uncertainty at the same time San Francisco is in the middle of a multi-billion dollar reinvestment in its combined sewer system. The Regional Board failed to consider over 50 years of planning, assessment, and information gathering by San Francisco, including the results of San Francisco's post-construction monitoring program that demonstrates the performance of the existing combined sewer system protects receiving water beneficial uses. San Francisco contests permit terms that are inappropriate, improper, and/or not supported by substantial evidence. Certain permit terms also fail to provide San Francisco with fair notice of its legal obligations under the Clean Water Act in violation of the Due Process Clause of the U.S. Constitution. The Regional Board also failed to respond to all of San Francisco's substantive comments and related information that clearly explained San Francisco's concerns with the Permit.

San Francisco, for the reasons explained in this Petition, respectfully requests the State Board remand the Permit to the Regional Board and requests a hearing in this matter to explain why a remand is appropriate and necessary.

II. NAME AND ADDRESS OF PETITIONER

John Roddy
City and County of San Francisco
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place.
San Francisco, CA 94102
Email: john.s.roddy@sfcityatty.org

Petitioner requests that copies of all communications and documents relating to this Petition also be sent to San Francisco's outside counsel as identified below.

J. Tom Boer
Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, CA 94111
Telephone: (415) 975-3700
Email: jtboer@huntonak.com

III. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW

San Francisco seeks review of the Permit adopted by the Regional Board and attached to this Petition as Exhibit 1 (Order No. R2-2019-0028).

IV. DATE OF THE REGIONAL BOARD ACTION

The Regional Board adopted the Revised Tentative Order No. R2-2019-0028 on September 11, 2019.

V. THE REGIONAL BOARD'S ADOPTION OF THE PERMIT WAS INAPPROPRIATE AND IMPROPER AND SHOULD BE REMANDED

The Regional Board's adoption of the Permit was inappropriate and improper, it is not supported by substantial evidence, and the Permit must be remanded to the Regional Board.[1] The following subsections of the Petition explain the reasons why the Permit should be remanded to the Regional Board. San Francisco presents: (A) An overview of the design and performance of the City's combined sewer system relevant to the contested permit terms; (B) The reasons why the permit terms at V and Attachment G, Provision G.I.I.1 are inappropriate and improper; (C) The reasons why the permit terms at VI.C.5.d are inappropriate and improper; (D) The reasons why the permit terms at V, V1.C.5.d and Attachment G, Provision G.I.I.1 fail to provide San Francisco fair notice of its legal obligations; (E) The reasons why the permit terms requiring reporting of sewer overflows from the

[1] *See* 23 Cal. Code Regs. § 2050(a)(4) (Petition must contain "[a] full and complete statement of the reasons the action or failure to act was inappropriate or improper"); *see also, Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 113 Cal.Rptr. 836.) (any findings made by an administrative agency in support of an action must be based on substantial evidence in the record); *In re Rimmon C. Fay*, Order WQ 86-17, 1986 WL 25526, at *4 (State Board found Regional Board adoption of permit improper because the Regional Board failed to include findings to support the permit term; remanded the permit and ordered the Regional Board to "make appropriate findings, based upon substantial evidence in the record. . .").

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50 California Street, Suite 1700
San Francisco, California 94111

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50 California Street, Suite 1700
San Francisco, California 94111

combined sewer system resulting from design capacity exceedances are inappropriate and inproper; and (F) The reasons why the Regional Board's failure to respond to San Francisco's comments timely submitted during the public comment period on Revised Tentative Order No. R2-2019-0028 are inappropriate and improper. The information and reasons in support of San Francisco's request for the State Board to remand the Permit to the Regional Board are fully set forth below.

A. Overview of the Design and Performance of the City's Combined Sewer System

San Francisco operates a combined sewer system, which collects storm water and domestic wastewater in one collection system for transport to San Francisco's wastewater treatment plants for treatment prior to discharge. *See* Figure 1.

Figure 1: Map of San Francisco Combined Sewer System.[2]

[2] The Westside Facilities subject to this Permit are shown in the light red area of Figure 1.

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San Francisco is the only city in California with an almost completely combined storm water and sanitary system.[3] Under the Clean Water Act ("CWA"), combined sewer systems are governed by the Combined Sewer Overflow Control Policy ("CSO Control Policy"), a framework for controlling discharges through the NPDES permitting.[4] The Permit at issue in this Petition authorizes discharges from the Oceanside Water Pollution Control Plant and "combined sewer discharges" ("CSD") from any of the seven CSO Outfalls from the part of the collection system on the Westside of San Francisco.[5] *See* Figure 2.

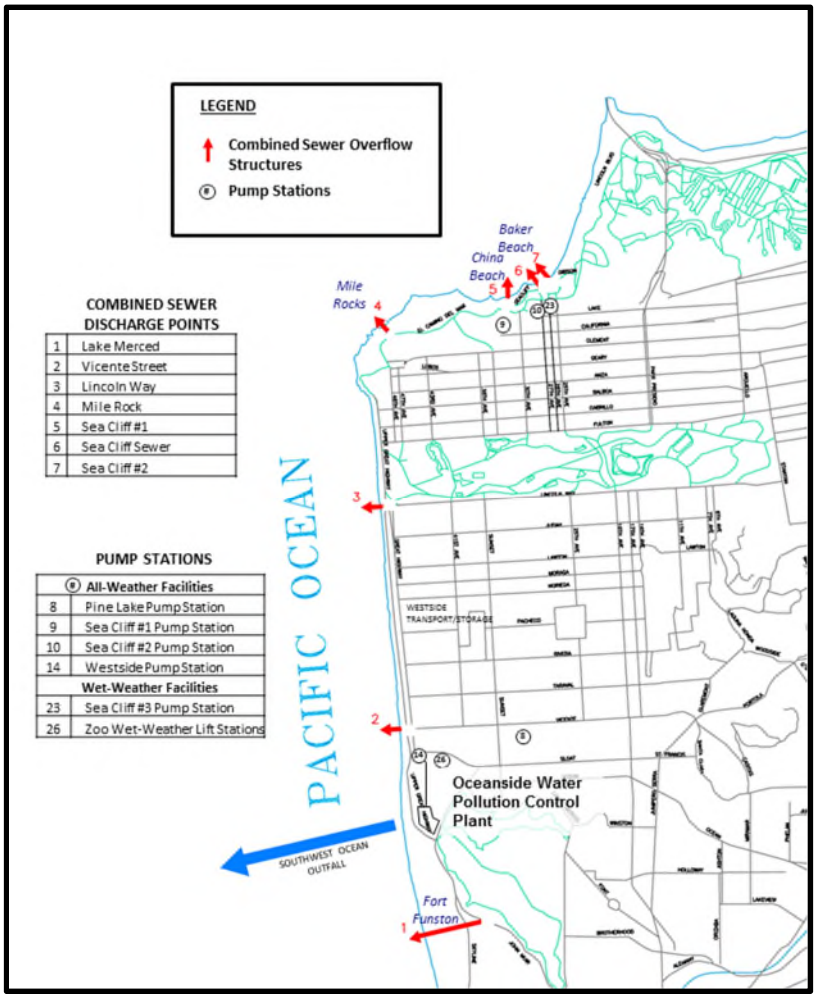

Figure 2: Location of Westside Facilities and CSD Outfalls.

[3] *See* Exhibit 2, Attachment B Appendix (State Water Resources Control Board Order No.79-16) at p. 3.
[4] Exhibit 3 (Combined Sewer Overflow Control Policy, April 19, 1994) ("CSO Control Policy"); 33 U.S.C.A § 1342(q).
[5] Exhibit 1 (Order No. R2-2019-0028) at Table 2.

CSDs may occur during heavy rainfall events, if the capacity of combined sewer system is exceeded. All CSDs receive equivalent-to-primary treatment prior to discharge.[6]

As explained in more detail below, the combined sewer system was designed and constructed by San Francisco with sufficient capacity to capture and treat combined wastewater and storm water during storms to limit CSDs to a long-term average of eight per year, based on historical rainfall data.[7] The development of the combined sewer system involves a long history, most recently articulated in the *Wastewater Long Term Control Plan Synthesis*, which identifies and explains the various documents that make up San Francisco's long-term control plan ("LTCP") consistent with the CSO Control Policy .[8]San Francisco's history most relevant to the contested permit terms is recounted below.

San Francisco's first efforts to comprehensively characterize wet weather sewer overflows and recommend improvements are described in the 1967 *Characterization and Treatment of Combined Sewer Overflows Report* ("CSO Report").[9] In the early 1970s, San Francisco developed its *San Francisco Master Plan for Waste Water Management* ("Master Plan") based on findings in the CSO Report.[10] The Master Plan recommended an approach to minimize overflows by maximizing

[6] Exhibit 1 (Order No. R2-2019-0028) at F-6.
[7] *Id.* at F-12.
[8] *See* Exhibit 4 (San Francisco Wastewater Long Term Control Plan Synthesis, March 30, 2018) ("LTCP Synthesis"). The CSO Control Policy provides that permitted combined sewer systems are responsible for developing and implementing a long-term CSO control plan (the "LTCP"). The policy requires that the LTCP address nine minimum controls: (i) characterization, monitoring, and modeling of the system; (ii) public participation; (iii) consideration of sensitive areas; (iv) evaluation of alternatives; (v) cost/performance consideration; (vi) operational plan; (vii) maximization of treatment at the POTW treatment plan(s); (viii) implementation schedule; and (ix) post-construction compliance monitoring program. Noted in Section V.A. below, San Francisco operates pursuant to a post-Phase II permit. Therefore, the LTCP requirements are different than would apply to a municipality that had not already complied with Clean Water Act regulatory requirements.
[9] Exhibit 5 (Characterization and Treatment of Combined Sewer Overflows Report, 1967) ("CSO Report"). The CSO Report was one of the first efforts in the nation to characterize sewer overflows and included an initial characterization of drainage districts and their relationship to major outfalls, flow monitoring, dry and wet weather discharge sampling, bioassays, and shoreline bacteria sampling.
[10] Exhibit 6 (San Francisco Master Plan for Waste Water Management, 1971) ("Master Plan"). As part of the master planning effort, San Francisco initiated automated monitoring of rainfall and sewer levels, created its first computational model of the sewer system, and undertook effluent studies and modeling to analyze water quality, currents, drift, and mass water movement.

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50 California Street, Suite 1700
San Francisco, California 94111

collection system capacity and, although it predated EPA's CSO Control Policy by almost 20 years, the monitoring, modeling, and other analyses undertaken by San Francisco to develop the Master Plan, and subsequent analyses, are consistent with the requirements in the CSO Control Policy, 59 Federal Register 18688.[11] The Master Plan developed control alternatives to, in part, reduce the average CSD frequency from the Westside collection system by an order of magnitude, from 82 to eight CSDs per year.[12]

After the Clean Water Act was passed in 1972, San Francisco modified the Master Plan in 1974 via an Environmental Impact Report ("EIR") and Environmental Impact Statement ("EIS") prepared by the United States Environmental Protection Agency ("EPA") under the National Environmental Policy Act.[13] The development of the EIR/EIS was followed by a planning period that included extensive surveys of beach recreational use and monitoring and modeling to evaluate the relationship between receiving waters and wet weather discharges.[14] In 1975, based on the information assessed to date, San Francisco identified an *Overview Facilities Plan*, which further developed plans for storm water and wastewater collection, transport, and treatment facilities.[15] The Regional Board adopted the first comprehensive Basin Plan for the San Francisco Bay Region in 1975, which prompted a series of regulatory actions that required San Francisco to undertake further evaluation of the relationship between wet weather discharges and the Pacific Ocean and San Francisco Bay.[16]

San Francisco's fieldwork, information gathering, and assessments resulted in detailed analyses on control alternatives,[17] and was the basis for the State Board's adoption of Order No. 79-

[11] Exhibit 6 (Master Plan) at pp. VI-1 – VI-32.
[12] *Id.* at p. II-2.
[13] Exhibit 7 (Final Environmental Impact Report and Statement, EPA 1974).
[14] *Id.*
[15] Exhibit 8 (Overview Facilities Plan, 1975). The Overview Facilities Plan incorporated results of monitoring efforts and studies, such as data collection and modeling, updated financial plans, a citywide seismic study, and solids handling studies.
[16] *See* Exhibit 4 (LTCP Synthesis) at p. 22. San Francisco's studies quantified the potential impacts of untreated sewer overflows on receiving waters, including on water quality, sediments and benthos, shellfish, fish and game populations, beach use, and public health.
[17] *See, e.g.*, Exhibit 2, Attachment B Appendix (Westside Wet Weather Revised Overflow Control Study, 1978).

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12.[18] Order No. 79-12 established the current design of San Francisco's combined sewer system, which, in part, set a long-term average discharge criteria of eight CSDs, per typical year, for each hydrologic section of the Westside collection system.[19] Based on Order No. 79-12, San Francisco designed and constructed the existing combined sewer system on the Westside to protect beneficial uses during wet weather events. Order No. 79-12 was later amended in 1979 by State Board Order No. 79-16, which granted an exception to the Ocean Plan for planned CSDs because the Regional Board deemed it "inappropriate to apply Ocean Plan standards strictly to combined waste and storm water discharges."[20] Order No. 79-16 became the basis for all subsequent planning, design, and construction of Westside's wet weather control facilities. When the State Board adopted Order No. 79-16, it found that the design of the Westside collection system would ***not*** impair beneficial uses.[21]

Based on the State Board approved design, San Francisco began construction of the components of the combined sewer system in the early 1980s.[22] The OSP and the Westside collection system infrastructure was completed in 1993 and the implementation of the Master Plan was completed in 1997, at a cost of nearly $2 billion.[23]

Since San Francisco completed implementation of its LTCP 1997, it has implemented a post-construction monitoring program consistent with the CSO Control Policy.[24] Based on actual wet weather monitoring data, the current CSD frequency in the Westside collection system, averaged over a 20-year period (1997-2018), is below the long-term average of eight CSDs, per typical year identified by Order No. 79-12.[25] In addition, San Francisco uses a Hydrologic and Hydraulic ("H&H") Model,

[18] Exhibit 2, Attachment B Appendix (San Francisco Bay Regional Water Quality Control Board, Order No. 79-12).
[19] *Id.* at p. 1.
[20] Exhibit 2, Attachment B Appendix (State Water Board, Order No. 79-16) at p. 9.
[21] *See* Exhibit 2, Attachment B Appendix (State Water Board, Order No. 79-16) at p. 10 and (2009 OSP NPDES Permit, Order No. R2-2009-0062) at F-13.
[22] Exhibit 4 (LTCP Synthesis) at p. 14.
[23] San Francisco Bay Basin Plan, Chapter 4.11.1 at p. 7-57, available at https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html (last visited, October 11, 2019).
[24] Exhibit 3 (CSO Control Policy) at II.C.9 (Post-Construction Compliance Monitoring Program).
[25] *See* Exhibit 2 (Technical Memorandum, Current Performance of the Westside Collection System During Wet Weather, May 17, 2019) ("PMC Tech Memo").

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50 California Street, Suite 1700
San Francisco, California 94111

which simulates the performance of the combined sewer system in the Westside collection system.[26] The current modeled frequency of CSDs in a typical year for each hydrologic segment of the Westside collection system based on the H&H Model is also below the long-term average of eight CSDs, per typical year, identified in Order No. WQ 79-16.[27]

As part of its long-term planning, in 2004, the SFPUC began a 6-year evaluation of the combined sewer system and future investment needs.[28] In 2012, based on that evaluation, San Francisco initiated a 20-year reinvestment into its combined sewer system through an approximately $7 billion dollar capital improvement program ("CIP") for the sewer system through 2032.[29] To assist with CIP prioritization, San Francisco developed and calibrated a Receiving Water Quality Model ("RWQ Model") of the Pacific Ocean and San Francisco Bay.[30] The RWQ Model was intended, in part, to allow for further evaluation of a primary focus of the CSO Control Policy, protecting receiving waters from harmful levels of bacteria.[31] The RWQ Model indicates that the current performance of the Westside collection system results in enterococcus bacteria concentrations in the receiving waters below 104 MPN/100mL[32] for over 99% of the typical year (*i.e.*, less than 2.3 days per typical year see a concentration above this level).[33]

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[26] Exhibit 2, Attachment B Appendix (PMC Tech Memo) at p. 1, n.2.
[27] *Id.* at pp. 1-2.
[28] *See* SFPUC, Sewer System Improvement Program (SSIP), available at https://sfwater.org/index.aspx?page=116 (last visited October 11, 2019).
[29] *Id.*
[30] Exhibit 2, Attachment B Appendix (PMC Tech Memo) at p. 2 (The RWQ Model was built using Delft3D FM modeling and is based on a Delft3D model developed by the United States Geological Survey Pacific Coastal and Marine Science Center).
[31] *See, e.g.*, Exhibit 3 (CSO Control Policy) at p. II.C.1.
[32] Exhibit 9 (Water Quality Control Plan for Ocean Waters of California, 2015) ("Ocean Plan"), at II.B.1. The Ocean Plan states that 104 MPN/100mL is the bacterial water quality objective. While this objective does not apply to CSDs into the Pacific Ocean, it is one metric that is relevant when assessing the relationship between CSDs, receiving water quality, and the protection of beneficial uses.
[33] Exhibit 2, Attachment B Appendix (PMC Tech Memo) at p. 3 (The approximately 2.3 days occur in the winter months, between October and February, when there is little recreational use in the receiving waters); *see also*, Exhibit 2, Attachment B Appendix (Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls, 2014) at pp. 3-13 (less recreational use in winter months).

The conclusions of San Francisco's post-construction monitoring program are consistent with recent findings by the Regional Board. For example, the receiving waters offshore Baker Beach, which are associated with CSD Outfalls Nos. 005-007 at Seacliff, were de-listed as impaired for bacteria in 2018 because the Regional Board found, based on "[s]ixteen lines of evidence," the "applicable water quality standards for [bacteria] ***are not being exceeded***."[34] EPA approved the de-listing in 2018, concluding it was "due to ***improved water quality***."[35] The San Francisco Bay Bacteria Total Maximum Daily Load ("TMDL") is another example, where the Regional Board found San Francisco's CSDs were not a significant source of bacteria to receiving waters.[36] This finding is also reflected in the Basin Plan.[37]

All available information indicates that the current performance of the Westside collection system is consistent with its design and that it protects beneficial uses in the Pacific Ocean and San Francisco Bay. This conclusion is supported by decades of information gathering and assessments and the ongoing post-construction monitoring program, including monitoring and modeling of the collection system and receiving waters. San Francisco's concerns with the Permit terms at V, V1.C.5.d and Attachment G, Provision G.I.I.1, in part, originate from the Regional Board's failure to identify and incorporate this history and the available information and evidence into the permit development process and the terms of the Permit.

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50 California Street, Suite 1700
San Francisco, California 94111

[34] *See* Exhibit 2, Attachment B Appendix (Staff Report, 2014 and 2016 California Integrated Report Clean Water Act Sections 303(d) and 305(b), October 3, 2017).
[35] Exhibit 2, Attachment B Appendix (Letter from T. Torres, California 2014-2016 CWA Section 303(d) List of Impaired Waters at Enclosure 1, April 6, 2018) (emphasis added).
[36] Exhibit 2, Attachment B Appendix (Staff Report, Total Maximum Daily Load and Implementation Plan for Bacteria at San Francisco Bay Beaches, April 13, 2016).
[37] Exhibit 10 (SF Bay Basin Plan, Chapter 7.2.5, San Francisco Bay Beaches Bacteria TMDL) at p. 7-57. The full Water Quality Control Plan (Basin Plan) for the San Francisco Bay Basin is available at https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html (last visited, October 11, 2019). The Basin Plan applies to the receiving waters associated with CSD Outfalls Nos. 005-007, *see* Basin Plan at Figure 2-5.

B. The Regional Board's Adoption of V and G.I.I.1 Is Inappropriate and Improper.

The Permit at Section V[38] and Attachment G, Provision G.I.I.1[39] includes generic, boilerplate water quality-based effluent limitations ("WQBELs"). The inclusion of V and G.I.I.1 in the Permit is inappropriate and improper because the Regional Board failed to follow the applicable NPDES permitting requirements when establishing these permit terms, because the terms are not supported by substantial evidence, and because the Regional Board failed to respond to San Francisco's comments on Tentative Order R2-2019-0028. The fact the same permit terms are included in other Regional Board-adopted permits does not provide an independent factual or legal basis to support V and G.I.I.1 in this Permit. Furthermore, the permit terms are unnecessary given the San Francisco-specific effluent limitations and the water quality-focused reopener provision in the Permit.[40]

San Francisco requests that the State Board remand the Permit to the Regional Board to make the necessary findings of fact and law, supported by substantial evidence in the administrative record, associated with San Francisco's discharges and applicable water quality standards: (i) consistent with the CWA and the NPDES permitting regulations; and (ii) after considering the information specific to

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[38] Section V, in relevant part, states:

> Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board (State Water Board), or U.S. EPA as required by the CWA and regulations adopted thereunder. If more stringent water quality standards are promulgated or approved pursuant to CWA section 303, or amendments thereto, the Regional Water Board and U.S. EPA may revise or modify this Order in accordance with the more stringent standards.

Exhibit 1 (Order No. R2-2019-0028) at p. 8.

[39] Attachment G, Regional Standard Provisions, and Monitoring and Reporting Requirements, Provision I.I.1, which states:

> Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050.

Exhibit 1 (Order No. R2-2019-0028) at G-2; *See also* Cal. Water Code § 13050(1) (the term "pollution," as used in this context, is defined under state law to mean, in relevant part, "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses.").

[40] Exhibit 1 (Order No. R2-2019-0028) at VI.C.1 and Fact Sheet at F27.

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50 California Street, Suite 1700
San Francisco, California 94111

San Francisco's performance and the associated receiving waters. After those foundational requirements are satisfied, the Regional Board must then either: (a) eliminate Sections V and G.I.I.1 from the Permit and find that the San Francisco-specific WQBELs at Sections IV.B and VI.C.5.c ensure compliance with water quality standards, including protecting beneficial uses; or (b) eliminate Sections V and G.I.I.1 from the Permit and establish, if necessary, San Francisco-specific WQBELs consistent with the CWA and NPDES permitting regulations.

1. The Regional Board Failed To Comply with NPDES Permitting Requirements.

The Regional Board apparently intended Sections V and G.I.I.1 of the Permit to be WQBELs, but the Regional Board failed to comply with the clear direction in the CWA and the NPDES permitting regulations for when and how to establish WQBELs. Because the Regional Board's adoption of Sections V and G.I.I.1 of the Permit is contrary to law, the Permit is inappropriate and improper and the State Board must remand the Permit to the Regional Board.

The Regional Board must comply with the procedural and substantive requirements in the NPDES permitting regulations when establishing WQBELs.[41] EPA guidance refers to this as the "standards-to-permits" process,[42] as summarized below:

> When drafting a [NPDES] permit, a permit writer must consider the impact of the proposed discharge on the quality of the receiving water. Water quality goals for a water body are defined by state water quality standards. By analyzing the effect of a discharge on the receiving water, a permit writer could find that technology based effluent limitations (TBELs) alone will not achieve the applicable water quality standards. In such cases, the [CWA] and its implementing regulations require development of [WQBELs].
>
> "CWA section 301(b)(1)(C) requires that permits include any effluent limitations necessary to meet water quality standards. . . [T]o satisfy that requirement, permit writers implement a process to determine when existing effluent limitations (e.g., TBELs) and existing effluent quality are not sufficient to comply with water quality standards and to, where necessary, develop WQBELs. Exhibit 6-2 illustrates the four basic parts of the *standards-to-permits process* used to assess the need for and develop WQBELs.

[41] *See* 40 C.F.R. Parts 122, 124.
[42] NPDES Permit Writers Manual, U.S. EPA (September 2010) at pp. 6-1 – 6-2.

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50 California Street, Suite 1700
San Francisco, California 94111

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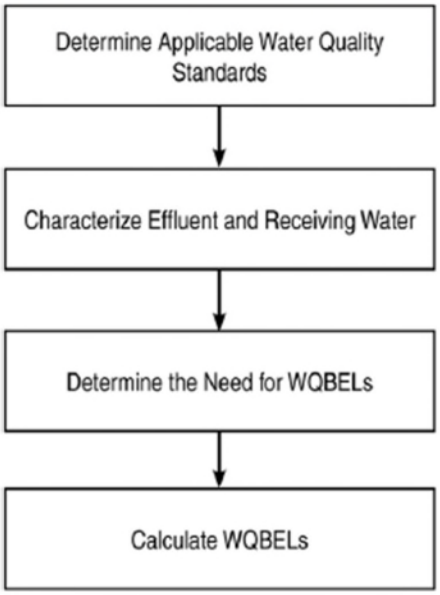
50 California Street, Suite 1700
San Francisco, California 94111

Exhibit 6-2 Standards-to-permits process



There is no indication or evidence that the Regional Board adopted Sections V and G.I.I.1 of the Permit consistent with the standards-to-permit framework as required. The most notable deficiencies are described below.

There is no evidence, for example, that prior to adopting Sections V and G.I.I.1 of the Permit the Regional Board went through a process to determine if the permit terms were necessary. Notably, CWA Section 301(b)(1)(C) requires that permits include WQBELs in NPDES permits if "*necessary* to meet water quality standards."[43] There is no evidence, for example, that Sections V and G.I.I.1 of the Permit are based on a reasonable potential analysis, as required by 40 C.F.R. 122.44(d). In fact, for wet weather discharges, the Permit appropriately identifies Section VI.C.5.c of the Permit as the appropriate WQBEL in response to the Regional Board's reasonable potential analysis; there is no associated justification for Sections V and G.I.I.1 in the Permit.[44]

[43] CWA Section 301(b)(1)(C); Exhibit 11 (NPDES Permit Writers Manual) at pp. 6-23.
[44] Exhibit 2 at Fact Sheet at F-25.

There is also no evidence that the Regional Board characterized the effluent from CSDs or the receiving waters.[45] The Regional Board did not identify what pollutant(s) of concern form the basis for the development or the adoption of Sections V and G.I.I.1 of the Permit.[46] The Regional Board did not explain how – if at all – it considered the information associated with San Francisco's post-construction monitoring program,[47] as required as part of any characterization of the effluent from CSDs and the receiving waters.[48]

There is also no evidence the Regional Board properly followed the steps necessary to adopt WQBELs when it adopted Sections V and G.I.I.1 of the Permit.[49] The NPDES permitting regulations require any WQBEL to be consistent with the "assumptions and requirements" of any Total Maximum Daily Load ("TMDL").[50] As noted above, the Regional Board developed (and EPA approved) a TMDL for bacteria in the receiving waters in San Francisco Bay.[51] In the TMDL, the Regional Board found San Francisco's CSDs were not a significant source of bacteria,[52] which is a finding also reflected in the Basin Plan.[53] There is no evidence the Regional Board considered this TMDL or its

[45] Exhibit 11 (NPDES Permit Writers Manual) at pp. 6-12 – 6-22.
[46] *Id.* at pp. 6-13.
[47] *See* Sections V.A and V.B.3 of this Petition for an overview of the information associated with San Francisco's post-construction monitoring program.
[48] *See, e.g.*, CSO Control Policy at II.C.9 (The post-construction water quality-monitoring program is meant to "verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of [CSD] controls.").
[49] Order No. R2-2019-00280028 at Attachment F, Section V (Rationale for Receiving Water Limitations) at p. F-26 (stating, in full, "This Order's receiving water limitations are based on Ocean Plan chapters II.C, II.D, and II.E, and State Water Board Order No. WQ 79-16. These limits are necessary to ensure compliance with applicable water quality standards in accordance with the CWA and regulations adopted thereunder)."
[50] 40 C.F.R. § 122.44(d)(1)(vii)(B); *see also, In re City of Moscow, Idaho*, 10 E.A.D. 135 (EAB 2001).
[51] Exhibit 2, Attachment B Appendix (Staff Report, Total Maximum Daily Load and Implementation Plan for Bacteria at San Francisco Bay Beaches, April 13, 2016). CSD Outfalls Nos. 005-007 discharge to receiving waters in San Francisco Bay
[52] *Id.* at pgs. 20, 24, 27, 47, and 49.
[53] Exhibit 10 (SF Bay Basin Plan, Chapter 7.2.5, San Francisco Bay Beaches Bacteria TMDL) at p. 7-57.

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findings (or the findings in the Basin Plan), prior to, or as part of, the adoption of Sections V and G.I.I.1 of the Permit.

The adoption of these generic, boilerplate WQBELs is also inconsistent with the instruction to permitting authorities to adopt WQBELs for combined sewer systems that include ". . . the ***appropriate site-specific considerations*** that will determine the CSO conditions to be established in the permit."[54] There is no evidence the Regional Board adopted Sections V and G.I.I.1 of the Permit taking into consideration San Francisco-specific considerations.[55] In fact, the Regional Board admitted that these permit terms are ***the same*** permit terms found in numerous other NPDES permits.[56] The admitted use of boilerplate terms is direct evidence that the Regional Board failed to consider appropriate site-specific considerations as required by the NPDES permitting regulations.

The Regional Board's misunderstanding of, and failure to comply with, the NPDES permitting regulations is illustrated by the inapposite and irrelevant statements in the Response to Comments as its attempt to justify Sections V and G.I.I.1 of the Permit. The Regional Board states, for example, "The permitting authority has discretion in translating water quality standards into permit

[54] Exhibit 11 (NPDES Permit Writer's Manual) at 9.2.3. (emphasis added).

[55] *See, e.g.*, Exhibit 2, Attachment B Appendix, Analysis of the Adequacy of San Francisco's Combined Sewer Overflow Control Efforts at 2-7, 2-9, The Cadmus Group, (Aug. 26, 1994) (EPA initiated assessment concluded San Francisco "constructed a wastewater treatment system that protects both water quality and the beneficial uses of these receiving waters" and because, in part, the nature of these specific receiving waters any "temporary elevation in bacteria" will rapidly "return to background levels.").

[56] California Regional Water Quality Control Board, San Francisco Bay Region, Response to Written Comments on the Tentative Order for City and County of San Francisco, Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Plant ("SFRWQCB Response to Written Comments") at Response to San Francisco Comment B.1 at p. 14 ("Similar language is also used in other NPDES permits for discharges to the marine waters (e.g., Massachusetts Port Authority and Logan International Airport, NPDES Permit No. MA0000788, and Department of the Navy Puget Sound Naval Shipyard, NPDES Permit No. WA0002062) because, pursuant to Clean Water Act section 403, these terms ensure that discharges do not cause unreasonable degradation to marine waters.")

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San Francisco, California 94111

limitations."[57] San Francisco agrees, but in the context of V and G.I.I.1, the Regional Board did not ***translate*** anything consistent with the NPDES permitting regulations. The Regional Board states, "Receiving water limitations are directly derived from the applicable water quality standards."[58] Again, San Francisco agrees that WQBELs are derived from applicable water quality standards, but the requirements at V and G.I.I.1 are not ***derived*** from anything; they simply make an oblique reference to water quality standards. The Regional Board states, "Nothing in [federal case law] forbids a state from incorporating water quality standards into the terms of its NPDES permits."[59] San Francisco agrees, but there must be ***actual*** incorporation consistent with the standards-to-permit process in the NPDES permitting regulations. The Regional Board cites to federal case law that "[c]ourts have upheld and found narrative water quality standards to be enforceable."[60] This response is misleading and the case law inapposite. As a matter of law, a permittee cannot "violate" water quality standards.[61] It is only after water quality standards are translated into WQBELs, through the standards-to-permits process, "the rubber hits the road" and the permittee must then comply with derived WQBELs.[62] The permits in those cases cited by the Regional Board were not under review, and the federal courts did not find a permitting authority could ignore the NPDES permitting regulations.[63] The cases simply held that WQBELs – once included in the permit – may be enforced, which illustrates San Francisco's concern with Sections V and G.I.I.1 of the Permit.[64]

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[57] *Id.* at p. 12.
[58] SFRWQCB Response to Written Comments at Response to San Francisco Comment B.1 at p. 11.
[59] *Id.* at pp. 12-13.
[60] *Id.*
[61] *See, e.g.*, *American Paper Institute v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits").
[62] *American Paper Institute v. EPA*, 996 F.2d at 350.
[63] SFRWQCB Response to Written Comments at Response to San Francisco Comment B.1 at pp. 13-14.
[64] The cases cited by the Regional Board illustrate San Francisco's concern with Sections V and G.I.I.1 of the Permit and, as explained in Section V.D of this Petition, why the Permit fails to

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San Francisco, California 94111

The Regional Board's reliance on generic WQBELs that broadly prohibit "violating" water quality standards and impairing beneficial uses, instead of developing site-specific permit limitations designed to address any substantiated issues with San Francisco's discharges, and possible effect on receiving waters in San Francisco Bay, is inappropriate and improper. [65] On remand, the Regional Board must comply with the CWA and the NPDES permitting regulations when adopting, if necessary, any WQBELs.

2. The Permit at V and G.I.I.1 Is Not Based on Substantial Evidence.

The Regional Board's purported rationale for the inclusion of Sections V and G.I.I.1 in the Permit, stated in its Response to Comments, is that such terms are necessary because San Francisco's compliance with VI.C.5.c "will not necessarily achieve water quality standards."[66] This statement contradicts the Regional Board's inclusion in the Permit of San Francisco-specific WQBELs at VI.C.5.c that are designed and have been demonstrated to protect beneficial uses.

The Regional Board provides no explanation ***why*** the implementation of VI.C.5.c does not protect beneficial uses, especially in light of the demonstrated performance of the Westside Facilities.[67] The Regional Board cites no data, includes no analyses, and provides no other information to support this position. It does not identify what pollutant(s) it believes "will not necessarily achieve water quality standards." The Regional Board does not explain how the Westside Facilities "will not necessarily achieve water quality standards" when the Permit identifies that ***none*** of the "receiving

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provide San Francisco with fair notice of its obligations under the CWA and the practical ramifications via enforcement.

[65] *See NRDC,* 16 F.3d at 1399 ("[w]ater quality standards are a critical component of the CWA regulatory scheme because such standards serve as *a guideline for setting applicable limitations in individual discharge permits*.") (emphasis added); *American Paper Inst. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as *the basis for specific effluent limitations in NPDES permits*.") (emphasis added).

[66] Exhibit 12 (SFRWQCB Response to Comments) at Response to San Francisco Comment B.4 at p. 14-15 ("*For this reason*, compliance with [V and G.I.I.1] is also required") (emphasis added).*; see also*, Exhibit 1 (Order No. R2-2019-0028), Fact Sheet at F-26 ("These limits are necessary to ensure compliance with applicable water quality standards. . .").

[67] Exhibit 2, Attachment B Appendix (PMC Tech Memo) at pp. 2-3.

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San Francisco, California 94111

waters [are] on California's list of impaired waters" for any pollutant, including bacteria.[68] The Regional Board does not attempt to reconcile this new position with decades of contrary Regional Board, State Board and EPA findings nor explain the basis for the departure from those findings.[69] In its comments, however, San Francisco ***did*** explain, with supporting information, why the performance of the Westside Facilities protects beneficial uses.[70] The Regional Board did not respond to San Francisco's post-construction monitoring information or provide a meaningful explanation why it disagreed with San Francisco's position or technical information.[71] San Francisco ***has*** an existing post-construction monitoring program and, as explained in Section V.A of this Petition, the information associated with this program demonstrates the Westside Facilities protect beneficial uses.[72] The Regional Board failed to articulate any rationale or support for its new position with ***any***, let alone substantial, evidence. The Regional Board has acted inappropriately and improperly, and San Francisco requests the State Board remand the Permit.[73]

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[68] Exhibit 1 (Order No. R2-2019-0028), Fact Sheet at F-14; *see also* Exhibit 12 (SFRWQCB Response to Comments) at Response to San Francisco Comment B.6 ("We confirm that the receiving waters associated with Discharge Point Nos. CSO-001 through CSD-007 are not impaired by any pollutant, including bacteria").

[69] *See* Section V.A of this Petition; *see also* Exhibit 2, SFPUC Comments on Tentative Order for NPDES Permit No. CA0037681; Exhibit 2, Attachment B Appendix (2009 OSP NPDES Permit, Order No. R2-2009-0062, Fact Sheet) at F-34 (The design of the collection system "would not compromise beneficial uses") and (2003 OSP NPDES Permit, Order No. R2-2003-0073) at p. 10, finding 15 (The LTCP "would provide adequate overall protection of beneficial uses").

[70] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.1 at p. 4 (seeking confirmation that during wet weather, compliance with the long-term control plan requirements of Provision VI.C.5.c will result in attainment of applicable water quality standards).

[71] *See, e.g.*, Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at pp. 8-9, citing the PMC Tech Memo; *see also* Section V.A of this Petition.

[72] *See* Section V.A of this Petition; *see also* PMC Tech Memo.

[73] *See In re City and County of San Francisco, San Francisco Baykeeper*, Order No. WQ 95-4, 1995 WL 576920, at *8 (concluding that the Regional Board must articulate the rationale for its findings in the permit findings and the fact sheet, and explaining that inclusion of the rationale in the response to comments failed to adequately inform the discharger and the public of the basis for the finding at issue).

3. The Regional Board's Justification for V and G.I.I.1 Is Contrary to Law.

The Regional Board characterizes both V and G.I.I.1 as "receiving water limitations."[74] The Regional Board provides no meaningful explanation of the nature or importance of a "receiving water limitation," how it is different from a WQBEL, or how a "receiving water limitation" fits into the CWA's legal framework. In its comments, San Francisco requested that the Regional Board clarify the distinction between a WQBEL and a receiving water limitation, if any, and the corresponding legal implications arising from the distinction.[75] The Regional Board failed to respond to this comment and request. By not responding, the Regional Board has failed to provide San Francisco with an explanation of the basis of these Permit terms and denied San Francisco a full opportunity to contest the factual and/or legal basis for adopting the Permit via this Petition.[76] As explained in Section V.F of this Petition, by failing to respond, the Regional Board has acted inappropriately and improperly and therefore the Permit should be remanded to the Regional Board.[77]

WQBELs are, by definition, "designed to protect water quality by ensuring that water quality standards are met in ***the receiving water***."[78] EPA explains, "water quality-based effluent limits . . . are designed to ensure that the applicable state water quality standards are met."[79] The Regional Board itself states that V and G.I.I.1 ***are*** WQBELs - "[c]ompliance with receiving water limitations is determined with respect to the discharge's effect on ***the receiving water***." [80] The Regional Board did not cite any legal authority supporting the use of "receiving water limitations."[81] Instead, it relies on

[74] Exhibit 1 (Order No. R2-2019-0028) at p. 8.
[75] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.1 at p. 2, fn. 1.
[76] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.1 at p. 11.
[77] *See id.* at pp. 11-12 (including a discussion of receiving water limitations but failing respond to SFPUC's comments and questions (e.g. comparing receiving water limitations to "effluent limitations," but not water quality-based effluent limitations).
[78] Exhibit 11 (NPDES Permit Writers Manual) at 6-1.
[79] *In re City of Moscow, Idaho*, 10 E.A.D. 135 (EAB 2001). The Regional Board in its Response to Written Comments at 16, for some reason, attempts to distinguish this decision by saying *In re City of Moscow* did not involve a combined sewer system. That fact is irrelevant and the holding in *In re City of Moscow* is a universal CWA principle and applies irrespective of the type of permittee.
[80] *See* Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.1 at p. 12.
[81] *Id.*

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San Francisco, California 94111

isolated statements made in unrelated contexts that merely use the phrase.[82] If anything, the authorities the Regional Board cites suggest, unsurprisingly, that there is no legal distinction between the definition of WQBELs and Sections V and G.I.I.1 of the Permit.[83]

4. The Adoption of the Permit Terms at V and G.I.I.1 in Other Regional Board-Adopted Permits Does Not Justify Their Inclusion In This Permit.

The Regional Board relies on the fact that similar, generic water quality-based permit terms have been included in other NPDES permits to justify its inclusion of those terms in this Permit as appropriate.[84] The fact the same permit terms are included in other permits does nothing to support the Regional Board's position nor does it overcome the other legal, factual and procedural deficiencies identified in Section V.B of this Petition.

In the Response to Comments, the Regional Board points to a handful of permits in support of its argument that the same generic, boilerplate permit terms have been adopted by other regional boards.[85] A review of those permits reveals that many of them actually support San Francisco's argument, in that these generic terms are actually not included in the permits;[86] are not treated as

[82] *Id.*

[83] *See, e.g.*, *Id.* at pp. 11-12, citing to State Water Board Order No. 2012-0011-DWQ [NPDES Statewide Storm Water Permit for the State of Cal. Dept. of Transportation], as amended by State Water Board Order WQ 2014-0077-DWQ (setting forth in the permit's "Receiving Water Limitations" section certain narrative criteria strikingly similar to that articulated in the NPDES Permit Writers' Manual for the development of narrative WQBELs, such as a prohibition against discharges that cause an "[a]lteration of temperature, turbidity, or apparent color beyond present natural background levels").

[84] *Id.* at pp. 13-14 (stating, e.g. "Permit terms similar to those in section V and Attachment G section I.I.1 are frequently used in NPDES permits for publicly owned treatment works issued by the Regional Water Board. . ."); Exhibit 14 (Staff Summary Report prepared for San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at p. 2; Exhibit 15 (Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at 48:3-19.

[85] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.1 at pp. 13-14.

[86] Exhibit 16 (City of Sacramento, NPDES Permit Order No. R5-2015-0045) at Section V (Receiving Water Limits) at pp. 6-8 (setting forth narrative criteria designed to achieve water quality standards, but not including generic terms prohibiting violation of water quality standards) and at Section III.C (Discharge Prohibitions) at p. 4 (prohibiting the creation of a "nuisance" but not "pollution," which is the term that is defined to mean, in relevant part, "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses.").

independent requirements, but are instead presented as part of the explanation of why WQBELS are required;[87] or, at a minimum, are coupled with facility-specific WQBELs.[88] Regardless, replicating improper permit terms is not an appropriate or lawful permit writing strategy.

The Regional Board points to a provision in the CSO Control Policy to support its defense of V and G.I.I.1, where it is stated that permits should require compliance with applicable water quality standards "expressed in the form of narrative limitations."[89] That provision in the CSO Control Policy, however, explicitly applies to ***Phase I*** NPDES permits. As explained in Section V.A of this Petition, San Francisco has not had a Phase I permit in decades and this Permit is a post-Phase II permit. A provision like V or G.I.I.1 may be appropriate for a combined sewer system that has not characterized its system, has not implemented the nine minimum control measures, and has not developed an LTCP, *which is the expectation for Phase I permittees*. The Regional Board is applying, however, in this case an archaic and inapplicable legal framework to San Francisco's combined sewer system, as it exists, in 2019. The Permit at V and Attachment G, Provision I.I.1 – especially given the existing, San Francisco-specific, LTCP-based permit terms at VI.C.5.c – is therefore in direct conflict with the CSO Control Policy.

5. The Permit Terms at V and G.I.I.1 Are Unnecessary Because the Permit Already Contains Facility-Specific Effluent Limitations and a Reopener Provision.

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[87] *See, e.g.* Exhibit 16 (City of Sacramento, NPDES Permit Order No. R5-2015-0045) at Attachment F (Fact Sheet) at F-19 - F-20 ("Section 122.44(d)(1)(i) of 40 C.F.R. requires that permits include effluent limitations for all pollutants that are or may be discharged at levels that have the reasonable potential to cause or contribute to an exceedance of a water quality standard, including numeric and narrative objectives within a standard. Where reasonable potential has been established for a pollutant, but there is no numeric criterion or objective for the pollutant, WQBEL's must be established. . .") and at F-42 (explaining that the receiving water limitations in the permit incorporate numerical and narrative water quality objectives based on the Basin Plan).

[88] *See, e.g.* Exhibit 17 (South San Francisco and San Bruno and North Bayside System Unit, Order No. R2-2019-0021) at p. 8 (incorporating generic water quality-based permit terms in section entitled "Receiving Water Limitations" after setting forth facility-specific WQBELs for temperature, turbidity, toxicity, and other criteria); Exhibit 18 (City of Holyoke, NPDES Permit No. MA0101630) at pp. 4-5; Exhibit 19 (Massachusetts Water Resources Authority, NPDES Permit No. MA013284) at p. 7.

[89] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.1 at p. 13.

During the adoption hearing, the Regional Board staff represented to the Board that Sections V and G.I.I.1 of the Permit are ***necessary*** because they "serve as backstops in the event that the effluent limitations and other provisions in the Permit prove to be inadequate."[90] Such a "backstop" is neither appropriate nor necessary. The Permit already contains San Francisco-specific WQBELs that protect designated uses.[91] Moreover, the Permit includes a broad "reopener" provision that allows the Regional Board to modify or reopen the Permit before expiration if, in relevant part, "present or future investigations demonstrate that the discharges governed by this Order have or will have a reasonable potential to cause or contribute to . . . adverse impacts on water quality or beneficial uses of the receiving waters."[92] The reopener provision is specifically recommended in EPA guidance for combined sewer systems to manage any uncertainty associated with the protection of beneficial uses.[93] The Regional Board does not explain why this reopener provision does not adequately address its concern about the potential, in the future, for unknown concerns related to receiving waters. The inclusion of generic terms at Section V and Attachment G, Provision I.I.1 is unnecessary, which adds weight to San Francisco's position that these permit terms are inappropriate and improper.

C. The Regional Board's Adoption of VI.C.5.d Is Inappropriate and Improper.

The Permit at VI.C.5.d establishes what the Regional Board describes as an "LTCP Update." VI.C.5.d includes Table 7, which identifies a long, detailed list of tasks that must be completed by San Francisco over period of years in order to "update" its LTCP. As explained below, VI.C.5.d is inappropriate and improper because it is contrary to law and not based on substantial evidence.

The purpose of section VI.C.5.d is unclear; however, VI.C.5.d can reasonably be interpreted to require a wholesale re-examination of the fundamental bases of the design of San Francisco's combined sewer system established over decades, as explained in Section V.A of this Petition. Notably, VI.C.5.d demands actions that the CSO Control Policy explicitly exempted San Francisco

[90] Exhibit 15 (Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at 14:16-20.
[91] Exhibit 1 (Order No. R2-2019-0028) at Section IV.B (dry weather WQBEL) at p. 7 and VI.C.5.c (wet weather narrative WQBELs) at pp. 18-20.
[92] *Id.* at Section VI.C.1.a. at p. 99 and Fact Sheet at F-27.
[93] Exhibit 11 (NPDES Permit Writer's Manual) at pp. 9-19.

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San Francisco, California 94111

from performing. Further, based on the language of VI.C.5.d, *why* this re-examination is being required is unclear and not supported by substantial evidence.[94] The Regional Board included no factual justification specific to San Francisco to support the terms of VI.C.5.d and, similar to the points made in Section V.B of this Petition, there is no indication that the Regional Board considered the information associated with the post-construction monitoring submitted by San Francisco during Permit development and as part of its comments on the Permit.[95] While San Francisco recognizes the ongoing need to assess the performance of the Westside Facilities, the permit terms in VI.C.5.d are inconsistent with the CSO Control Policy. San Francisco requests the State Board remand the permit to the Regional Board to replace VI.C.5.d with appropriate permit terms that are consistent with the CSO Control Policy, after consideration of all available facts and information related to the Westside Facilities.

1. The Permit at VI.C.5.d Is Contrary to the CWA and the CSO Control Policy.

The Permit at VI.C.5.d is inappropriate and improper because it imposes elements of the CSO Control Policy LTCP requirements that do not apply to San Francisco and because the stated justifications for VI.C.5.d are contrary to law.

a. *The Permit at VI.C.5.d Is Contrary to the LTCP Exemptions in the CSO Control Policy.*

Section VI.C.5.d of the Permit is inappropriate and improper because the Regional Board is imposing requirements on San Francisco that the CSO Control Policy explicitly determined did not apply to San Francisco. The CSO Control Policy recognizes that in 1994 extensive work had already been done by some municipalities, like San Francisco, to abate CSOs.[96] For example, for any combined sewer system that as of 1994 has:

> . . . substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet [water quality standards] and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this Policy. . .[97]

[94] *See* Section V.A. of this Petition.
[95] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order).
[96] Exhibit 3 (CSO Control Policy) at I.C.
[97] *Id.* at I.C.2.

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San Francisco, California 94111

The Westside Facilities, constructed consistent with approvals from the State Board, were almost complete in 1994 and completed in 1997.[98] The Regional Board has affirmed that the I.C exemption in the CSO Control Policy applies to San Francisco.[99] The practical implication is that a number of the minimum elements for developing a LTCP in the CSO Control Policy at II.C do not apply, by law, to San Francisco. Elements at II.C that do not apply to San Francisco include, but are not limited to, II.C.1 (Characterization, Monitoring, and Modeling), II.C.2 (Public Participation), and II.C.4 (Evaluation of Alternatives). [100] Contrary to the CSO Control Policy and the Basin Plan, the Permit at VI.C.5.d includes and applies these elements to San Francisco via Table 7.[101]

San Francisco raised the applicability of the I.C exemption in its comments on the Permit, asking:

> If the Regional Board and EPA disagree with this position, the SFPUC requests an explanation why, including their position on the practical implication of I.C as applied to the SFPUC. Relatedly, the SFPUC requests the Regional Board and EPA explain the demands in Table 7 in light of I.C and their prior findings that the SFPUC is exempt from most of the planning and construction requirements in the CSO Control Policy associated with the LTCP.[102]

The Regional Board did not respond to these questions and comments on the I.C exemption as applied to San Francisco.[103] As explained in Section V.F of this Petition, in addition to the Regional Board's

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[98] Exhibit 2, Attachment B Appendix (Analysis of the Adequacy of SF's Combined Sewer Overflow Control Efforts, 1994) at 2-6; *see also* Section V.A of this Petition.

[99] *See, e.g.*, Exhibit 2, Attachment B Appendix (1997 Oceanside NPDES Permit No. CA0037681) at p. 6, finding 11 ("the City's program qualifies for the CSO Control Policy's classification under Section I.C. as being substantially complete and exempt from the planning and construction requirements.").

[100] San Francisco's position is consistent with the Basin Plan, which says, "since construction was completed in 1997, the [Regional] Board has issued permits to [San Francisco] that require compliance with the provisions of the CSO Control Policy that apply . . . maintenance of the wet weather facilities to ensure continued maximization of storage and treatment; continued implementation of the nine minimum controls, which constitute the technology-based requirements of the CSO Control Policy; post-construction monitoring to confirm the system's performance; and re-evaluation of the feasibility of reducing or eliminating discharges to sensitive areas." Exhibit 26 (SF Bay Basin Plan Chapter 4.9.1 - Wet Weather Overflows) at 4-22.

[101] Exhibit 1 (Order No. R2-2019-0028) at 21-23.

[102] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Section 2.

[103] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at pp. 17-18.

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San Francisco, California 94111

action here being contrary to the CWA and CSO Control Policy, the failure of the Regional Board to respond to San Francisco's comment is an independent basis for the State Board to remand the Permit to the Regional Board.

b. *The Regional Board's Justification for VI.C.5.d Is Contrary to Law*.

In response to the concerns raised by San Francisco in its comments on the Permit regarding the Regional Board's legal authority for VI.C.5.d, the Regional Board cited CSO Policy sections IV.B.2.b., IV.B.2.d., IV.B.2.e., and IV.B.2.f for its authority.[104] As the Regional Board itself explained, those cited provisions of the CSO Control Policy are "***Phase II*** Permits-Requirements for Implementation of a Long-Term CSO Control Plan"[105] The Permit is ***not*** a Phase II permit; it is a ***post***-Phase II permit. A Phase II permit is a permit issued during the initial implementation of an LTCP. San Francisco completed implementation of its LTCP for the Westside Facilities in 1997 and the Regional Board has issued two post-Phase II Oceanside permits issued to San Francisco since 1997.[106] The Regional Board provided no explanation why it is legal or appropriate to apply Phase II permitting requirements to a combined sewer system via a post-Phase II permit. No other justification cited by the Regional Board in the Permit supports the provisions at VI.C.5.d or is consistent with the available facts or the applicable law. The Permit must be remanded to the Regional Board for an explanation and to appropriately apply the CSO Control Policy to San Francisco consistent with law.

2. Section VI.C.5.d Is Not Supported by Substantial Evidence.

The Permit is inappropriate and improper because VI.C.5.d is not supported by substantial evidence. The Regional Board has provided no findings in support of this requirement, and its responses are simply post hoc rationales, unsupported by any evidence or law.

[104] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at p. 17.
[105] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at p. 17 (emphasis added).
[106] *See* Exhibit 2, Attachment B Appendix (2003 Oceanside NPDES Permit, Order No. R2-2003-0073) and (2009 Oceanside NPDES Permit, Order No. Order No. R2-2009-0062); *see also* Exhibit 4 (LTCP Synthesis) at p. 15.

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San Francisco, California 94111

The Regional Board states, for example, "since decades have passed since San Francisco constructed most of its wet weather facilities, *we find it unlikely that no improvement can be made*."[107] The Regional Board provided no explanation of what - if any - evidence supported its conclusion that "improvements" are necessary. The Regional Board also argues it is a "*likely scenario* . . . that San Francisco will identify ways to minimize (e.g., reduce frequency or magnitude) combined sewer discharges and maximize pollutant removal during wet weather."[108] There is no explanation for why the Regional Board found this is to be a "likely scenario."

Other Regional Board responses include ". . . it is appropriate to assess ways to reduce the volume, frequency, and magnitude of the combined sewer discharges . . . to *better protect* beneficial uses" and "[t]he Order contemplates *progress towards* attaining designated uses . . ." [109] The Regional Board has provided no evidence to support those statements.[110] To the contrary, San Francisco has provided substantial evidence demonstrating the protection of beneficial uses based on the existing performance of the Westside Facilities.

The Regional Board fails to provide the necessary context to understand the relevance, if any, of several of its responses that try to justify VI.C.5.d.[111] Representative examples include:

- The Regional Board, states "approximately 100 million gallons of combined wastewater and storm water were discharged from the combined sewer discharge

[107] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.9 at 18.

[108] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.9 at 18.

[109] Exhibit 12 (SFRWQCB Response to Written Comments) at p. 22.

[110] The Regional Board appears to justify adoption of VI.C.5.d on an inference that the existing LTCP, (*see* VI.C.5.c), may not protect beneficial uses. The Regional Board said, for example, VI.C.5.d "require[s] San Francisco to minimize (e.g., reduce frequency or magnitude) combined sewer discharges and maximize pollutant removal during wet weather . . . to *ensure protection* of beneficial uses."). Although the Regional Board provided some limited information in its Response to Comments about beneficial uses, the Regional Board failed to provide substantial evidence for its position or explain in the Permit the basis for any inference that beneficial uses were not currently protected.

[111] Exhibit 2, Attachment B Appendix (PMC Tech Memo) at pp. 2-3.

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San Francisco, California 94111

outfalls between 2011 and 2014,"[112] without explaining that this volume is *only 1%* of combined flows received by the SFPUC and is significantly less volume than expected under State Board Order No. 79-16, when the State Board found the design of the Westside collection system would protect beneficial uses.[113]

- The Regional Board tries to take the position that "20 percent of [recreational] users were in contact with receiving water" after "combined sewer discharges."[114] This is false and the report cited by the Regional Board explicitly says that observed users were engaged in "nonwater contact recreation," and its findings "cannot be extrapolated to estimate how many people were engaged in water contact recreation."[115] The Regional Board failed to note that the same report also found inclement weather conditions (*i.e.*, rain in the winter), which are the conditions where CSDs occur, "discourage water contact recreation and limit exposure."[116]
- The Regional Board also cites data for copper and zinc.[117] First, the Regional Board inappropriately compares averages to maximum concentrations and, again, the relevance of this information to the permitting decision is unclear. The Regional Board also fails to explain, "the median and average concentrations" from the data in the report is "similar to those expected in storm water runoff" and "are mostly below the water quality objectives."[118] Further, the copper and zinc averages cited by the Regional Board are comparable and *less than* the averages from storm water discharges

[112] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.12 at 20 (citing the 2014 Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls at pp. 1-4)
[113] Exhibit 2, Attachment B Appendix (State Water Board, Order No. 79-16) at p. 10.
[114] *Id.*
[115] Exhibit 2, Attachment B Appendix (Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls, 2014) at pp. 3-14.
[116] *Id.* at pp. 3-14.
[117] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.12 at 20 (citing 2014 *Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls, Appendix A*).
[118] Exhibit 2, Attachment B Appendix (Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls, 2014) at p. 3-15, and Table 3-4.

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San Francisco, California 94111

> associated with infrastructure owned and operated by the California Department of Transportation.[119] San Francisco is aware of the data associated with copper and zinc, but, again, it is not clear what relevance the data has in this context or why the Regional Board is citing it; in the Bayside NPDES Permit, the Regional Board found "given the relatively short duration of [CSDs] (*i.e.*, just a few hours each time), and accounting for the inevitable dilution within the receiving waters during wet weather, water quality standards appear to be maintained" notwithstanding similar levels of copper and zinc in CSDs from the Westside Facilities.[120]

Even if taken together, none of these out of context statements or unsupported rationales constitute substantial evidence justifying VI.C.5.d.

3. The Regional Board Misapplied the Sections of the CSO Control Policy that Do Apply to San Francisco.

San Francisco does not assert, and never has asserted, that it is "exempt" in "perpetuity" from assessing and making improvements, ***as necessary***, to the combined sewer system.[121] San Francisco recognizes that the Westside Facilities "should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy."[122] San Francisco clearly acknowledged this in its comments.[123]

San Francisco, for example, does not object to appropriate permit terms to assess CSDs into sensitive areas.[124] The specific text of Table 7, Task 3, however, fails to align with the CSO Control Policy requirement that any CSDs to a sensitive area, that can't be eliminated or relocated, be tied to

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[119] *Id.* at pp. 3-14 – 3-15 and Table 3-4.
[120] Exhibit 13 (Southeast, Bayside NPDES Permit Order No. R2-2013-0029) at F-42.
[121] *See* Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at p. 17; Exhibit 15 (Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019 at p. 55, lines 4-5.
[122] Exhibit 3 (CSO Control Policy) at I.C.2.
[123] *See* Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Section 2 at p. 10.
[124] Exhibit 3 (CSO Control Policy) at II.C.3; *see also*, Exhibit 2, Attachment B Appendix (2009 OSP NPDES Permit, Order No. R2-2009-0062); Exhibit 2, Attachment B Appendix (Special Study: Sensitive Areas Feasibility Report for Overflows Oceanside Water Pollution Control Plant NPDES Permit No. R2-2009-0062 (Dec. 21, 2011)).

the level of control "***deemed necessary*** to meet [water quality standards] for full protection of existing and designated uses."[125]

Table 7, Task 3 requires a report "that evaluates, prioritizes, and proposes control alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of discharges to sensitive areas" and then San Francisco must "prioritize and propose for implementation alternatives to eliminate, relocate, or reduce the magnitude or frequency of discharges" and propose an "implementation schedule."[126] Table 7 is divorced from the requirements in the CSO Control Policy.[127] Table 7, for example, includes a mandate to "reduce the magnitude or frequency of discharges," but fails to align the "reduction" to what is ***necessary to protect beneficial uses***.

Section VI.C.5.d of the Permit ***does*** mandate reduction for the sake of reduction,[128] notwithstanding the Regional Board's response that VI.C.5 does not "require San Francisco to minimize (*e.g.*, reduce frequency or magnitude) combined sewer discharges and maximize pollutant removal during wet weather simply for the sake of reduction, but rather to ensure protection of beneficial uses."[129] The plain language of Section VI.C.5.d speaks for itself – there is no limit on "reduction" to what is necessary to protect beneficial uses. Other responses by the Regional Board confirm this interpretation of Section VI.C.5.d of the Permit, *i.e.*, Section VI.C.5.d necessary to "assess ways to reduce volume, frequency and magnitude of [CSDs] to sensitive areas to ***better*** protect beneficial uses."[130] The legal standard is CSD performance necessary to protect beneficial uses, ***not*** "better" protection. All available evidence demonstrates the Westside Facilities protect beneficial

[125] Exhibit 3 (CSO Control Policy) at II.C.3 (emphasis added). As ***all*** receiving waters are sensitive areas, according to the Regional Board, the Regional Board found a "reduction" is "more likely" that "elimination or relocation." *See* Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.9, B.11.

[126] Exhibit 1 (Order No. R2-2019-0028) at Task 3(f), (g).

[127] Exhibit 3 (CSO Control Policy) at II.2.C.3.b.ii.

[128] *See* Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Section 2 (San Francisco raised the concern that VI.C.5.d mandates reduction for the sake of reduction inconsistent with the CSO Control Policy at II.C.3).

[129] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.12 at p. 19.

[130] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.12.

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San Francisco, California 94111

uses.[131] This finding, combined with the text of Section VI.C.5.d, illustrates the Permit is inconsistent with the CSO Control Policy and contrary to law and must be remanded to the Regional Board.

4. VI.C.5.d Imposes Significant Practical Implications and Resource Burdens on San Francisco.

San Francisco's concerns with VI.C.5.d are not theoretical or academic, but grounded in practical implications and resource burdens that will be imposed. As explained in Section V.A of this Petition, San Francisco is in the middle of a CIP to re-invest in priorities for the sewer system through 2032. Based on all available information, including San Francisco's post-construction monitoring program,[132] the CIP did *not* prioritize projects where the primary purpose is to "minimize combined sewer discharges" because they are unnecessary to protect beneficial uses given the performance of the Westside Facilities.[133] Other projects are a higher priority for inclusion in the CIP and are a better use of San Francisco's finite public resources. The Permit at VI.C.5.d will not only require San Francisco to re-evaluate its CIP, but the foundation of its combined sewer system that was developed over 50 years, without the Regional Board identifying evidence demonstrating that beneficial uses are not protected or explaining what it now means to protect beneficial uses (since the Regional Board's new position is a marked departure of decades of findings and permitting).[134] San Francisco's concerns with VI.C.5.d are also based on the significant resource burden imposed by Table 7. These practical implications and resource burdens must be considered alongside the legal, factual and procedural reasons why VI.C.5.d is inappropriate and improper and the Permit must be remanded to the Regional Board.

D. The Permit Terms Fail To Provide San Francisco with Fair Notice of Its Legal Obligations.

Independent of whether the Regional Board has the legal authority or factual basis to justify Sections V and VI.C.5.d and Attachment G, Provision G.I.I.1 of the Permit, the State Board must

[131] *See* Section V.A. of this Petition.
[132] Section V.A. of this Petition.
[133] *See* SFPUC, Sewer System Improvement Program (SSIP), *available at* https://sfwater.org/index.aspx?page=116 (last visited October 11, 2019).
[134] Section V.A. of this Petition.

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San Francisco, California 94111

remand the Permit because the terms are vague, unclear, and fail to provide fair notice to San Francisco of its legal obligations.

As an initial matter, and as discussed further in Section V.F of this Petition, the Regional Board failed to respond to San Francisco's comment that the permit terms are vague and fail to provide fair notice.[135] The Regional Board simply responded, "by distributing the tentative order for public comment, we provided San Francisco fair notice of our expectations, and San Francisco has availed itself of its opportunity to comment."[136] This statement does not remotely respond to San Francisco's concerns expressed in its comments. The Regional Board appears to conflate providing "notice," which is required as part of the NPDES permitting process,[137] with the requirement that regulatory agencies provide "fair notice," as mandated by the Due Process Clause of the U.S. Constitution.[138] As discussed in Section V.F of this Petition, because the Regional Board failed to respond to San Francisco's comments on fair notice, the State Board must remand the Permit to the Regional Board.

The CWA imposes civil and criminal liability on permittees for noncompliance with NPDES permits.[139] Fair notice is an "essential requirement of any statutory scheme"[140] and is grounded in "the *government's* obligation to promulgate clear and unambiguous standards."[141] When evaluating fair notice arguments in the context of NPDES permits, courts recognize the Due Process requirement as a basic standard in administrative law.[142]

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[135] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.2. at pp. 11-12.
[136] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at p. 17.
[137] *See* 40 C.F.R. § 124.10 (The permitting authority shall give public notice on draft NPDES permit for public comment).
[138] *Cranston v. City of Richmond*, 40 Cal.3d 755, 763-64 (1985); *McMurty v. Bd. Of Med. Examiners*, 180 Cal. App. 2d 760, 766 (1960) ("This principle [due process] applies not only to statutes of a penal nature but also those prescribing a standard of conduct which is the subject of administrative regulation.").
[139] *See* 33 U.S.C. §§ 1319(b), (d).
[140] *Pac. Bell Wireless, LLC v. Pub. Utilities Com.*, 140 Cal. App. 4th 718, 740 (2006) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).
[141] *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (emphasis added).
[142] *See, e.g., Wisconsin Resources Protection Council v. Flambeau Min. Co.*, 727 F.3d 700, 708 (7th Cir. 2013) (In determining whether regulated party received fair notice of EPA's approval of NPDES permit, Court recognized that due process requirement has been "thoroughly incorporated

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A fundamental principle in our legal system, the U.S. Supreme Court explained, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[143] This principle raises two concerns: first, "regulated parties should know what is required of them so they may act accordingly;" and second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[144] Permittees are entitled to "reasonable certainty" of what conduct is prohibited in the permit terms.[145] For the reasons set forth below, Sections V and VI.C.5.d and Attachment G, Provision G.I.I.1 of the Permit fail to provide fair notice to San Francisco and the Permit must be remanded to the Regional Board.

1. The Permit Terms at V Attachment G, Provision I.I.1. Fail To Provide Fair Notice.

Section V declares the Westside Facilities "shall not cause or contribute to a violation of any applicable water quality standard."[146] San Francisco has no reasonable certainty what Section V requires or what San Francisco must now do, if anything, to ensure compliance. As explained above, San Francisco cannot "violate" a water quality standard, it can only violate a WQBEL in an NPDES permit.[147] It is unclear if or how San Francisco can violate a WQBEL like Section V that imprecisely and cryptically simply says do not "violate water quality standards" – whatever that now means. Plainly put, the Regional Board is demanding that San Francisco not violate water quality standards by not violating water quality standards – circular logic, without defined meaning, and a textbook example of a lack of fair notice. Likewise, Provision G.I.I.1 demands the Westside Facilities not

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into administrative law.") (citing *Gen. Elec. Co. v. United States EPA*, 53 F.3d 1324, 1328-29) (D.C. Cir. 1995).

[143] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[144] *Id.*

[145] Exhibit 20 (State Water Resources Control Bd. WQ Order No. 80-4) at p. 34 (explaining that "[a]n order must be sufficiently clear to give fair notice of prohibited conduct"); Exhibit 21 (Combined Sewer Overflows: Guidance for Permit Writers, U.S. EPA, September 1995) at pp. 3-36 – 3-37 (encouraging ". . . the permit writer [to] include the specific narrative language in the permit to ensure that the permittee understands exactly what standards it must meet").

[146] Exhibit 1 (Order No. R2-2019-0028) at p. 8.

[147] *American Paper Institute v. EPA*, 996 F.2d at 350.

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San Francisco, California 94111

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San Francisco, California 94111

"create pollution," where "pollution" means "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses." [148] San Francisco is unclear what, if anything, it must do to comply with Provision G.I.I.1 and fair notice demands the Permit explain what "conduct is forbidden or required" so that San Francisco "may act accordingly."[149]

The Regional Board appears to try to sidestep the lack of fair notice conundrum by simply citing to the Ocean Plan, Basin Plan and State Water Board Order No. WQ 79-16.[150] This does not help, as explained in Section V.B of this Petition, because water quality standards must be translated in order for permittees to understand, with "precision and guidance" what "conduct is forbidden or required."[151] The Westside Facilities, for example, are not subject to the Ocean Plan bacteria objectives[152] – what implication does that have for San Francisco and whether CSDs will "violate water quality standards" or not "project beneficial uses" and therefore violate V and G.I.I.1? What would San Francisco need to ***do*** in response to these permit terms, if they are in fact "necessary" as claimed by the Regional Board?[153] The permit terms are so vague that San Francisco cannot discern either the actions that must be taken or the impact that those actions must have. The Regional Board and the Permit provide no guidance. The Regional Board also cites State Water Board Order No. WQ 79-16 for the proposition that San Francisco must take action – something – to the "greatest extent practical."[154] It is uncertain what the Regional Board means by "greatest extent practical" or what is ***necessary*** for San Francisco to do, in order to comply with Sections V and G.I.I.1 of the Permit.

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[148] Exhibit 1 (Order No. R2-2019-0028) at G-2.
[149] *FCC v. Fox Television Stations, Inc.*, 567 U.S. at 253.
[150] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.13.
[151] *FCC v. Fox Television Stations, Inc.*, 567 U.S. at 253.
[152] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.8.
[153] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.3.
[154] Exhibit 2, Attachment B Appendix (State Water Board, Order No. 79-16).

The tenuous situation San Francisco will find itself in is clearly demonstrated by the Regional Board staff's statement at the adoption hearing that V and G.I.I.1 "serve as backstops in the event that the effluent limitations and other provisions in the Permit prove to be inadequate."[155] Thus the Regional Board or EPA, at any time, without any of the procedural and substantive safeguards built into the NPDES permitting process, may use these open-ended, undefined WQBELs as a basis to find the Westside Facilities do not protect beneficial uses or are otherwise is inconsistent with applicable water quality standards and bring a civil and criminal enforcement action.

As explained above, fair notice demands that NPDES permits be drafted with "precision and guidance . . . so that those enforcing the law do not act in an arbitrary or discriminatory way."[156] The Permit has not met this standard and the Permit must be remanded to the Regional Board to provide San Francisco with fair notice of its legal obligations under the CWA and the Permit.

2. The Permit Term in Section VI.C.5.d Mandates that San Francisco Update Its LTCP Without Providing Fair Notice of What Level of Control Protects Beneficial Uses.

The Permit at VI.C.5.d also fails to provide fair notice to San Francisco for similar reasons as those identified in Section V.D.1 of this Petition. Vague and unclear terms in Table 7 at VI.C.5.d, that are inconsistent with the CSO Control Policy fails to provide fair notice.

Section VI.C.5.d of the Permit at Task 3 in Table 7, for example, fails to provide any explanation to San Francisco on ***why*** reduction is necessary or, critically, ***how much*** reduction would be necessary to protect beneficial uses. As explained in Section V.A of this petition and San Francisco's comments on the Tentative Order, the Regional Board has taken the position for decades that the current frequency and volume of CSDs protects beneficial uses.[157] A long history of contrary

[155] Exhibit 15 (Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at 14:16-20.

[156] *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. at 253. Again, these permit terms are also unnecessary to serve as this "backstop" given the reopener provision of the Permit discussed in Section V.B of this Petition serves the same policy purpose as the Regional Board's justification for V and G.I.I.1 while also incorporating procedural and substantive safeguards.

[157] See Section V.A of this Petition; *see also*, Exhibit 2, Attachment B Appendix (2009 Oceanside NPDES Permit) at Fact Sheet at F-34 (The design of the collection system "would not compromise

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San Francisco, California 94111

findings supports San Francisco's position it does not have fair notice of what is required by VI.C.5.d.[158] If the Regional Board's consistent findings on the level of control necessary to protect beneficial uses is no longer accurate, San Francisco no longer knows what level of control would provide "full protection of . . . uses."[159] The Regional Board and the Permit fail to provide any guidance. San Francisco must "know what is required of [it] so [it] may act accordingly."[160] Practically, San Francisco now has no understanding on what the Regionals Board believes is sufficient to protect beneficial uses or as the Regional Board said to "***better*** protect beneficial uses." Without fair notice of the threshold that constitutes protection of beneficial uses in the Regional Board's interpretation, San Francisco lacks a clear conception of how much is necessary to "minimize" CSDs, "maximize" pollutant removal, and "reduce the magnitude or frequency of discharges to sensitive areas" in order to comply with the terms of VI.C.5.d.[161] San Francisco is ***entitled by law*** to"precision and guidance" in the Permit.[162] For the multiple reasons identified above, the Permit should be remanded to the Regional Board because the Permit fails to provide San Francisco fair notice of its legal obligations under the CWA.

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beneficial uses") and (2003 Oceanside NPDES Permit) at p. 10, finding 15 (The LTCP "would provide adequate overall protection of beneficial uses").

[158] *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. at 253; *See* Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.1.c at pp. 5-6 ("The SFPUC's collection system was designed to protect beneficial uses. State Water Board Order No. WQ 79-16 at 10-13. The collection system was designed for a long-term average of eight (8) CSDs, per year, from CSD-001 through CSD-007. *Id* at 6, 16. The Regional Board and EPA made a finding that eight (8) CSDs would protect beneficial uses. *Id* at 10-13. The design of the collection system on the Westside was not based on blind faith, but on modeling, monitoring, use assessments, cost and benefits comparisons and additional data and analyses and Regional Board and EPA findings made over the course of decades, including in the existing Oceanside NPDES permit. *Id.* at 1-6; *see also* San Francisco Bay Regional Water Quality Control Board, Order No. 79-12 (Jan. 16, 1979) (Appendix); Westside Wet Weather Facilities Revised Overflow Control Study, Abstract Report and Request for Revised Overflow Frequency (December 15, 1978) (Appendix).").

[159] Exhibit 3 (CSO Control Policy) at II.C.3.b.ii.

[160] *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. at 253.

[161] *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law").

[162] *FCC v. Fox Television Stations, Inc.*, 567 U.S. at 253.

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E. <u>The Permit Requirements To Report, and Otherwise Regulate, Sewer Overflows from the Combined Sewer System Resulting from Design Capacity Exceedances Are Inappropriate and Improper</u>.

The Permit – at Section VI.C.5.(a)(ii)(b),[163] in the definitions of "Combined Sewer Overflow"[164] and "Sewer Overflow from the Combined Sewer System" ("SOCSS"),[165] and in the description of SOCSS provided in the Fact Sheet[166] — imposes terms requiring the reporting, and potential regulation, of all SOCSS. Imposition of terms seeking to regulate SOCSS resulting from design exceedances (as opposed to those associated with operations and maintenance deficiencies) is new to this Permit and is inappropriate and improper for the reasons addressed in this Section.

The Staff Summary Report describes the alleged need for, and scope of these terms as:

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[163] Section VI.C.5.(a)(ii)(b) lists various reporting requirements for sewer overflows from the combined sewer system in subsections (1) – (5). Because of the overly broad definition of the term "sewer overflows from the combined sewer system," these requirements inappropriately and improperly extend to design capacity exceedances unrelated to any failure in the system or its operation and maintenance. Exhibit 1 (Order No. R2-2019-0028) at p. 17.

[164] Exhibit 1 (Order No. R2-2019-0028) at Attachment A - Definitions, defines a Combined Sewer Overflow as:

> The *Combined Sewer Overflow (CSO) Control Policy* defines a combined sewer overflow as the discharge from a combined sewer system at a point prior to the POTW's treatment plant.

Based upon the use of the term elsewhere in the Permit, and statements in the Response to Comments, the Regional Board appears to be overly broadly and erroneously interpreting this term to include SOCSS.

[165] Attachment A – Definitions, defines Sewer Overflow from the Combined System to include overflows resulting from design capacity exceedances:

> Release or diversion of untreated or partially treated wastewater or combined wastewater and stormwater from the combined sewer collection system. Sewer overflows from the combined sewer system can occur in public rights of way or on private property. Sewer overflows from the combined sewer system do not include releases due to failures in privately owned sewer laterals or authorized combined sewer discharges …

Exhibit 1 (Order No. R2-2019-0028) at A-5.

[166] Exhibit 1 (Order No. R2-2019-0028) at Attachment F – Fact Sheet at Section VI.C.5.a. at F-30.

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> Members of the public are concerned about the impacts of sewer overflows from the combined sewer system on homes and businesses, and generally support new requirements to report such overflows. We and U.S. EPA take these concerns seriously and are discussing potential solutions with San Francisco. The Revised Tentative Order retains requirements to (1) ensure that wet weather operations minimize the frequency, volume, and duration of these overflows; (2) submit a report that describes the location, frequency, and characteristics of these overflows for at least the last 10 years, and considers the impacts of climate change and sea level rise; and (3) report these overflows through the statewide CIWQS database.[167]

As explained in San Francisco's comments:

> [The City was] prepared to work with the [Regional Board and EPA] to develop a workable framework for the monitoring and reporting of SOCSS. Broadly stated, [this would entail] … developing a monitoring and reporting program for SOCSS that: (i) reports SOCSS associated with operation, maintenance, or other combined sewer system failures; and (ii) uploads reportable data to the California Integrated Water Quality System.[168]

Critically, therefore, San Francisco's objection to SOCSS reporting, and potential regulation, is limited to those aspects of the Permit cited above that seek to impose reporting requirements where an overflow results because of "storms exceeding the system's level of service."[169] San Francisco does not object to reporting requirements, or the Regional Board's potential jurisdiction over, SOCSS arising as a result of "operation, maintenance, or other combined sewer system failures."[170]

San Francisco explained the basis for its objection to the overly broad regulation of SOCSS as follows:

> The definition of SOCSS … must be revised to exclude SOCSS occurring as a result of storms exceeding the system's level of service. By definition, as a result of the inherent nature of a combined sewer system, SOCSS may occur when the design capacity of the system is exceeded by a storm event. There is no material benefit in collecting data on these occurrences because it is known in advance that they will occur.[171]

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[167] Exhibit 14 (Staff Summary Report prepared for San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at p. 2.
[168] Exhibit 2, Attachment C (SF PUC Comments on Tentative Order for NPDES Permit No. CA0037681) at p. 1.
[169] *Id.*
[170] *Id.* San Francisco recognizes that the *CSO Control Policy* extends regulatory oversight for operation and maintenance of a combined sewer system and, therefore, if properly exercised the Policy confers jurisdiction of such issues to the Regional Board in issuing a permit.
[171] *Id.*

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San Francisco, California 94111

Decisions related to the design capacity of a combined sewer system – just like decisions related to the design of a municipal storm water system – must be left in the sole purview of accountable, local elected officials. It is not an area where the Regional Board has the expertise, basis, or legal authority to second-guess those elected officials or to arbitrarily mandate a specific level of service.[172]

The Regional Board claims that reporting of SOCSS resulting from design capacity exceedances is necessary "because understanding the causes of overflows is vital to determining whether and what corrective actions might be appropriate."[173] By definition, there can only be one "corrective action" for SOCSS due to a design capacity exceedance that do not reach surface waters: increase the design capacity of the combined system. This would require re-engineering the entire combined system on the Westside or, theoretically, approving different design capacities for different parts of the City. The latter would be arbitrary and capricious and the former would cost billions of dollars and likely take decades to implement at substantial city-wide disruption.[174] Either option demonstrates exactly why selecting an appropriate design capacity is a local issue properly left to elected officials.

Consistent with the reasons outlined in this Section of the Petition, San Francisco requests the State Board remand the Permit to the Regional Board. On remand, the Regional Board must: (i) limit the definition of SOCSS to those wet weather overflows that result from an operation and maintenance failure and explicitly exclude any events associated solely with an exceedance of design capacity; and (ii) amend the definition of Combined Sewer Overflow to remove any ambiguity so that the term only applies to overflows reaching a surface water.

1. The Permit Requirements Addressing SOCSS Resulting from Design Capacity Exceedances Are Not Based on Substantial Evidence.

[172] *See, e. g., Hess v. Port Authority TransHudson Corporation*, 513 U. S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").
[173] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.3 at p. 22. (emphasis added).
[174] Although the Regional Board does not try and mandate a level of service in this Permit, its basis for mandating the reporting of SOCSS resulting from design capacity exceedances is to determine whether "corrective action" is necessary. If the Regional Board does not have authority to order a change in the design capacity of the system it does not have a basis to require reporting of SOCSS resulting from design capacity exceedances.

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San Francisco, California 94111

The Regional Board's effort to regulate SOCSS resulting from design capacity exceedances in the Permit must be rejected because: (i) the Regional Board failed to provide substantial evidence that such SOCSS occur within the geographic footprint of the Oceanside Permit; and (ii) the Regional Board failed to provide substantial evidence of its need to obtain information about design capacity exceedances (as opposed to SOCSS due to operation and maintenance deficiencies).

a. The Regional Board Failed To Provide Substantial Evidence that It Has Jurisdiction over SOCSS Resulting from Design Capacity Exceedances.

For the first time, in its Response to Comments, the Regional Board asserts that it can require reporting of SOCSS resulting from design capacity exceedances because "the State [has] jurisdiction over discharges from the combined sewer system that do not reach surface waters if those discharges reach or threaten to reach waters of the State. *For example, groundwaters are waters of the State*."[175] It is difficult not to question the sincerity of the Regional Board's position, given (i) the Regional Board has never alleged an impact to groundwater resulting from the system nor requested San Francisco to seek WDRs despite regulating San Francisco's combined sewer system for decades; and (ii) the Regional Board has failed to provide reference, in the Administrative Record, to any other municipality in California being ordered to seek WDRs for the alleged discharge to groundwater from operation of a combined sewer system, sanitary sewer system, and/or storm water system under normal circumstances (i.e., separate and apart from the discharge of hazardous substances unassociated with sanitary waste from a sewer line directly to groundwater). More critically, the Regional Board

[175] Exhibit 12, Attachment 1 (Tabular Comments and Responses) at A.16 (emphasis added). In addition to the lack of substantial evidence, addressed here, the sudden reliance on a new "theory" for the basis of requiring reporting of SOCSS that result from design capacity exceedances, only after the close of public comment, raises substantial fair notice and due process concerns. *See* Exhibit 20 (State Water Resources Control Bd. WQ Order No. 80-4) at p. 34 (explaining that "[a]n order must be sufficiently clear to give fair notice of prohibited conduct"); Exhibit 21 (Combined Sewer Overflows: Guidance for Permit Writers, U.S. EPA, September 1995) at pp. 3-36 – 3-37 (encouraging ". . . the permit writer [to] include the specific narrative language in the permit to ensure that the permittee understands exactly what standards it must meet"). The State Board, therefore, should not allow the Regional Board to rely upon this "theory" as a basis for the permit provisions without a remand to adequately develop the record and solicit public comments. This is particularly the case here, where the position taken by the Regional Board raises widespread and serious public policy concerns for municipalities statewide because this "theory" of jurisdiction would equally extend to any sewer or storm water conveyance system statewide.

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San Francisco, California 94111

provided no data whatsoever, or other concrete information, showing that operation of San Francisco's combined system is discharging or depositing waste into groundwater in a manner that creates or threatens to create a condition of pollution or nuisance.[176] Nor is there any allegation that this situation exists. Absent such substantial evidence, the Regional Board cannot rely upon unfounded rationales as a basis to require SOCSS reporting. The Regional Board cannot impose substantive permit terms absent data and based upon nothing more than conjecture and supposition.

b. The Regional Board Failed To Provide Substantial Evidence that SOCSS Occur within the Geographic Region Covered by the Oceanside Permit.

At the September 11 hearing, Regional Board staff testified, in support of the broad SOCSS reporting requirement, that:

> Members of the public are concerned about the impacts of sewer overflows from the combined sewer system on homes and businesses, including manholes that are discharged by surcharging. And here are a couple of photographs to illustrate these issues and these photos were taken on the Bayside of the City but are just provided here as context for the public's comments.[177]

Not only did staff fail to produce any specific evidence of SOCSS on the Westside, staff arbitrarily and capriciously entered photographs of SOCSS occurring on the opposite side of the City into the record for this permit issuance. Photographic documentation of events for a hydrologically disconnected portion of the combined sewer system, covered by a separately issued permit, cannot provide substantial evidence to justify regulation of SOCSS pursuant to the Oceanside permit.

In fact, the irrelevance of the public and staff comments about SOCSS was identified during the September 11 hearing:

> BOARD MEMBER MCGRATH: … There's testimony that we've received about concerns about flooding and backup. Since the City has two different systems, I want to make sure that we know the location of the comments and whether or not they're on the Westside or on the Bayside. There are specific incidents that they refer to and I

[176] *See, e.g., San Diego Gas & Electric v. San Diego Regional Water Quality Control Bd.* (2019) 36 Cal.App.5th 427 at 431, (In order to prove its case, the Regional Board must further "adequately demonstrate[] that the waste discharged … created, or threatened to create, a condition of pollution or nuisance."). Further, raising this theory for the first time in its response to comments raises serious due process and fair notice concerns because San Francisco was not given an opportunity to address the issue. *See Cranston*, 40 Cal.3d at 763-54.

[177] Exhibit 15 (Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019) at 11:6-14 (emphasis added).

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San Francisco, California 94111

> want to make sure that we know whether or not it's on the area covered by this permit or the area covered by the Bayside permit.
>
> JESSICA WATKINS: Yeah, I think that the issues that the public brings up may be more representative of what's happening on the Bayside, but there are flooding – areas of flooding –
>
> BOARD MEMBER MCGRATH: It does happen on this side, as well[?]
>
> JESSICA WATKINS: Yeah, so if you look at San Francisco's flood planning documentation that's available online, you could see that they're planning or – I don't know what the stages of the planning are, but, they're aware of areas like 15th and Wawona and I think San Francisco could give more details, but there are at least two or three locations on the Westside.[178]

The Regional Board staff provides only a conclusory statement about potential flood planning documents related to 15th and Wawona and a vague reference to "two or three" other unidentified locations. Further, the Regional Board staff fails to identify whether this handful of locations experiences SOCSS resulting from design capacity exceedances or whether possible flooding, or overflows, are only associated with operation and maintenance deficiencies. In other words, Board staff failed to specifically identify even a single location within the geographic footprint of the Oceanside permit where SOCSS occur due to design capacity exceedances. This is insufficient evidence to rely upon to insert into the Permit an entirely new reporting regime for those SOCSS resulting from design capacity exceedances.

c. The Regional Board's Reliance on EPA's Nine Minimum Controls Guidance to Justify a Reporting Requirement for SOCSS Resulting from Design Capacity Exceedances Is Misplaced.

The Regional Board lists, in response to San Francisco's Comment C.3, a variety of reasons allegedly supporting the requirement to report SOCSS, including those resulting from design capacity exceedances.[179] As illustrated below, however, nothing on the Regional Board's list

[178] *Id.* at 20:13 - 21:13 (emphasis added).
[179] *Id.* at pp. 22-23.

provides substantial evidence of a need to collect information on SOCSS resulting from design capacity exceedances.

The Regional Board makes a conclusory citation to sixteen separate pages of EPA's 1995 *Combined Sewer Overflows Guidance for Nine Minimum Controls* ("NMC Guidance") without explicitly explaining how those particular pages dictate the need for, or otherwise authorize requiring reporting on SOCSS resulting from design capacity exceedances.[180] As a general matter, the NMC's were not designed to address SOCSS that do not reach a surface water and none of the NMC's can be relied upon by the Regional Board as a potential basis to require "corrective action" to address SOCCS resulting from design capacity exceedances:

> The NMC are controls that *can reduce CSOs and their effects on receiving water quality, do not require engineering studies or major construction, and can be implemented in a relatively short period (e.g., less than approximately two years).*[181]

Any effort to increase the design capacity of San Francisco's combined system subject to the Permit would require: (i) engineering studies; (ii) major construction; and (iii) substantially more than two years to implement. Therefore, the Regional Board's citation to the NMC Guidance provides zero support for requiring the reporting of SOCSS that result from design capacity exceedances.

Setting aside the complete misrepresentation of the scope of the NMC Guidance as being remotely relevant to collection of information concerning design capacity, many of the specific provisions of the NMC Guidance cited by the Regional Board: (i) have no relevance to identifying or reporting SOCSS that result from design capacity exceedances, and (ii) could be supported via

[180] Exhibit 22 (CSO Guidance for Nine Minimum Controls – EPA, May 1995) ("NMC Guidance") at 2-3 to 2-4; 3-2 to 3-4; 5-2; 5-3; 6-2 to 6-3; 7-3, 7-8 to 7-10; 7-14; and 8-1 to 8-3.
[181] *Id.* at 1-7 (emphasis added).

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implementation of a more narrow SOCSS reporting regime that is limited SOCSS associated with operation and maintenance failures:

- The Regional Board claims that SOCSS reporting is necessary to determine whether "operations and maintenance activities are adequate."[182] *Ipso post facto*, citation to this NMC is entirely irrelevant to a requirement to report SOCSS resulting from design capacity exceedances because those SOCSS are entirely unrelated to the operation and maintenance of the combined system.
- The Regional Board claims that SOCSS reporting is necessary to ensure measures to maximize storage within the collection system are functioning properly.[183] This NMC is entirely irrelevant to a requirement to report SOCSS resulting from design capacity exceedances because, by definition, if the system is functioning at its design capacity, it is maximizing storage properly within the collection system. The Regional Board cites to an unpublished case, *Foti v. City of Jamestown Bd. of Pub. Utils.*, 2014 WL 3842376 (W.D.N.Y. Aug. 5, 2014) in an effort to claim that this NMC is somehow relevant to reporting of SOCSS resulting from design capacity exceedances. In addition to lacking any precedential value, the case is legally and factually irrelevant to this matter for several reasons: (i) the issue adjudicated by the court is a motion to compel discovery, not anything substantively related to sewer overflows or backups; (ii) the *dicta* discussing sewer backups is addressing "raw sewage" and "sanitary waste flooding basements." In other words, the *Foti* case facts are for a sanitary sewer system, not a combined sewer system; and (iii) the term "Nine Minimum Controls" is not mentioned in the case.

[182] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.3 at p. 23. (emphasis added).
[183] *Id.*

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San Francisco, California 94111

- The Regional Board claims that SOCSS reporting is necessary to ensure that flows to the treatment works are maximized without causing sewer backups.[184] Contrary to the Regional Board's efforts to ascribe broad relevance to this particular NMC, the guidance indicates that the NMC is narrow and limited to "simple modifications to the [combined sewer system] and treatment plant to enable as much wet weather flow as possible to reach the treatment plant. The objective of this minimum control is to reduce the magnitude, frequency, and duration of CSOs that flow untreated into receiving waters."[185] Therefore the scope of this NMC is irrelevant to a requirement to report SOCSS resulting from design capacity exceedances.[186]
- The Regional Board claims that SOCSS reporting is necessary to determine whether "dry weather overflows are being controlled."[187] Beyond the fact that the Regional Board has provided no evidence whatsoever indicating that dry weather overflows are not being controlled, this issue is irrelevant to a requirement to report SOCSS resulting from design capacity exceedances because, by definition, design capacity exceedances will not occur in a

[184] *Id.*
[185] Exhibit 22 (NMC Guidance) at 5-1 (emphasis added).
[186] The Regional Board seeks to rely upon the decision in *United States v. Wayne County*, 369 F.3d 508 (6th Cir. 2004), to validate its argument that sewer backups provide a basis to report SOCCS resulting from design capacity exceedances. *Wayne County* provides no support for the legality or legitimacy of the permit terms in dispute here. The Regional Board characterizes *Wayne County* as describing a Consent Decree where the "major driver of system upgrades and repairs" was an enforcement action driven by concern over sewer backups into basements. This severely mischaracterizes the *Wayne County* decision. In fact, the opinion provides minimal information about the basis for the original enforcement action; to the extent the issue is addressed, the opinion indicates that basement flooding was only discussed by the parties in the original action in the context of evaluating the potential consequences of closing bypasses that discharged directly to surface waters. *United States v. Wayne County*, 369 F.3d at 513-514 ("[T]he cause and effect between extreme weather and sewage discharges into the Detroit River was a significant reason, if not the primary reason, for the filing of the lawsuit by the United States and the State of Michigan."). Ultimately, therefore, the case does not directly address sewer overflows from combined sewer systems resulting from design capacity exceedances nor the legitimacy of any effort to regulate such overflows.
[187] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.3 at p. 23.

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San Francisco, California 94111

combined sewer system during dry weather *without a failure in operation and maintenance* of the system.

- Finally, the Regional Board tries to argue that reporting SOCSS resulting from design capacity exceedances is necessary to evaluate whether appropriate action has been taken "to minimize floatables" and implement "pollution prevention activities" like the fats, oil, and grease programs.[188] Neither of these objectives are relevant to a requirement to report SOCSS associated with design capacity exceedances because they both reflect an interest in information associated with operation and maintenance deficiencies.

d. The Regional Board's Other Authorities Uniformly Indicate that It Lacks CWA Jurisdiction over SOCSS that Do Not Reach a Surface Water.

In its response to San Francisco Comment C.6 challenging the necessity of collecting information about SOCSS resulting from design capacity exceedances, the Regional Board cites two cases in an attempt to justify the reporting requirement as relevant to determining whether "capacity improvements are needed." Rather than support the basis for the Regional Board's position, the cases do not provide any authority for the Regional Board to impose "capacity improvements" and uniformly indicate that the NPDES program *does not extend jurisdiction over* SOCSS that do not reach a surface water:

- S*an Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F.Supp.2d 719 (N.D.Cal. 2011). The Court laid out the elements to "establish a violation of the [CWA]'s NPDES requirements" that is entirely contrary to the Regional Board's position that it can seek to regulate SOCSS caused by design exceedances that do not reach a surface water. The Court identified the following elements that a plaintiff must prove: "(1) a person (2) discharged (3) a pollutant (4) *to navigable waters of the United States* (5) from a point source (6) without a permit."[189] The Court declined to grant summary judgment where sanitary sewer overflows were identified, but were not shown to have discharged to a surface water. In other words, absent proof that an overflow discharged

[188] *Id.* (emphasis added).
[189] S*an Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F.Supp.2d at 754.

to a surface water, the Court found no basis to find a violation of the NPDES requirements.[190] Similarly, the Court found no violation of the CWA where reports indicated: (i) "overflow was fully captured and returned to a sanitary sewer" before reaching a surface water; and (ii) where an overflow reached storm water conveyances during dry weather and evidence indicated it was cleaned-up.[191]

- *Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1*, 16 F.Supp.3d at 305. The Plaintiff sought "to hold Defendant liable for sewage spills discharged into the Saddle River …" based on eye witness accounts of specific sanitary sewer overflows.[192] Although this is a sanitary sewer case – not a combined sewer – it nonetheless reinforces the judiciary's interpretation that CWA jurisdiction requires a direct impact to with a surface water (here, the Saddle River).

Here, the Regional Board seeks to extend its authority – via the Clean Water Act – over SOCSS resulting from design capacity exceedances (none of which reach a surface water). As even the cases cited by the Regional Board demonstrate, however, the Regional Board cannot rely upon the CWA as a basis to take this action.

Having failed to support its regulation of SOCSS resulting from design capacity exceedances by substantial evidence, the Regional Board has acted inappropriately and improperly, and the Permit must be remanded.[193]

e. The Regional Board's Position that It Is Necessary to Require Reporting of SOCSS To Confirm Whether Such Events Reach Waters of the United States Is Inappropriate and Improper.

The Regional Board argues that it must require reporting of SOCSS, including those resulting from design capacity exceedances, because without such reporting the Regional Board "cannot confirm whether overflows from the combined sewer system reach water of the United States…."[194] As a result, the Regional Board explained that it imposed the Permit requirement set forth in Section

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[190] *Id.* at 757.
[191] *Id.* at 757, 761.
[192] *Id.*
[193] *See In re City and County of San Francisco, San Francisco Baykeeper,* Order No. WQ 95-4, 1995 WL 576920, at *4 (concluding that the Regional Board must articulate the rationale for its findings in the permit findings and the fact sheet, and explaining that inclusion of the rationale in the response to comments failed to adequately inform the discharger and the public of the basis for the finding at issue).
[194] Exhibit 12, Attachment 1 (Tabular Comments and Responses) at A.17.

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VI.C.5.a.ii(b) to mandate that San Francisco report the discharge of SOCSS to surface waters. The Regional Board similarly argues in its response to San Francisco's Comment C.16 that "[p]reventing nuisance is integral to protecting the water contact recreation beneficial use and achieving the water quality objectives in the Ocean Plan and Basin Plan. Accordingly, the information about sewer overflows from the combined sewer system provides an essential means to evaluate compliance with these provisions."[195] The Regional Board does not have a need to collect information about the discharge of SOCSS to surface waters via Section VI.C.5.a.ii(b). As such, the basis for imposing the reporting requirement is not supported by substantial evidence.

The Permit includes a reporting mechanism for any discharge, including SOCCS, that reaches a surface water (including a Water of the United States) in Attachment G ("Standard Provisions – Reporting").[196] Two provisions – "Two-Hour Notification" and "Five-Day Written Report" – set forth the process for reporting unauthorized discharges to surface waters.[197] Unauthorized discharges are defined for purposes of the section as any "discharge, not regulated by waste discharge requirements, of treated, partially-treated, or untreated wastewater resulting from the intentional or unintentional diversion of wastewater from a collection, treatment, or disposal system."[198] For "any unauthorized discharge that enters a drainage channel or surface water," San Francisco must notify the California Office of Emergency Services and within five days, submit a written report of the incident description, including the location, cause, quantity, duration, and treatment-level of the discharge.[199] Because Attachment G of the Permit already includes a

[195] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at p. 28.
[196] Exhibit 1 (Order No. R2-2019-0028) at Attachment F, Section VI (Rationale for Effluent Limitations and Discharge Specifications) at F-30.
[197] *Id.* at Attachment G, Section V (Standard Provisions – Reporting) at pp. G-12 – G13.
[198] *Id.* at Section V (Standard Provisions – Reporting) at p. G-12, n.1 (citing California Code of Regulations, Title 23, section 2250(b)).
[199] *Id.* at p. G-12

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San Francisco, California 94111

mechanism for reporting SOCSS that reach a surface water, the inclusion of Control 2 of the Nine Minimum Controls is unnecessary and duplicative. The Regional Board has also failed to provide any substantial evidence explaining why the Standard Provisions – Reporting requirements in Attachment G are insufficient to meet its stated need to collect information on discharges to surface waters.

Further, the requirement to report unauthorized discharges from the combined system that reach a surface water was also included in the 2009 Oceanside NPDES Permit issued by the Regional Board. That Permit included almost identical "Two-Hour Notification" and "Five-Day Written Report" provisions.[200] Therefore, the Regional Board has mandated reports about any overflow from the combined sewer system that reach waters of the United States for a decade. Despite the reporting requirement in the 2009 Oceanside Permit, the Regional Board has failed to provide any substantial evidence indicating that SOCSS resulting from design capacity exceedances reach a surface water of any kind, much less impact water quality objectives, or that such discharges would not already be subject to the pre-existing reporting Requirements in Attachment G to the Permit. As a result, the Regional Board has provided no evidence, much less substantial evidence, to show how these reporting requirements were inadequate to meet its claimed need.

2. The Permit Requirements Addressing SOCSS Resulting from Design Capacity Exceedances Are Contrary to Law.

Because the Permit requirements adopted by the Regional Board that address SOCSS resulting from design capacity exceedances are contrary to law, the Permit must be remanded to the Regional Board.

a. The Regional Board Erroneously Claims that Its Overly Broad Definition of a Combined Sewer Overflow Is "Consistent" With EPA's CSO Policy.

[200] *See* Exhibit 2, Attachment B Appendix (2009 OSP NPDES Permit) at Attachment G, Section V (Standard Provisions – Reporting) at pp. 19-21.

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In Attachment A – Definitions, the Regional Board seeks to define a "Combined Sewer Overflow" as "the discharge from a combined sewer system at a point prior to the POTW's treatment plant."[201] It appears that the Regional Board may be attempting to regulate SOCCS resulting from design capacity exceedances via the definition of "Combined Sewer Overflow" because of the way the term is used in other sections of the Permit and is discussed by the Regional Board in the Response to Comments. For example, in four Tasks in Table 7 at VI.C.5.d, the Regional Board demands actions related to "combined sewer system discharges and sewer overflows." "Discharges" in San Francisco occur in only two ways: (i) a discharge through Discharge Point No. 001 after treatment at the Oceanside Wastewater Treatment Plant or (ii) via a CSD via one of the CSD Outfalls. On the other hand, as noted, "combined sewer overflows" are defined as "the discharge from a combined sewer system at a point prior to the POTW's treatment plant." The requirements in VI.C.5.d are incredibly vague, so it is unclear what exactly the Regional Board seeks to accomplish via the inclusion of "combined … sewer overflows" in Table 7. It can be inferred, however, that the Regional Board seeks to regulate SOCSS by the Regional Board's citation to a requirement to "update [an] LTCP and implement comprehensive 'basement backup' program to avoid sewage overflows into basements" as a basis to support the requirements in Table 7. If that is, in fact the case, the Regional Board is applying an expansive definition of the term "Combined Sewer Overflow" that is inconsistent with the law.

The Regional Board erroneously argues that its expansive definition of "combined sewer overflow" is consistent with the CSO Policy.[202] Plainly put, while the CSO Policy does define a CSO as a "discharge from a [combined sewer system] at a point prior to the POTW Treatment Plant," the scope of EPA's definition extends only to overflows occurring from combined sewer

[201] Exhibit 1 (Order No. R2-2019-0028) at Attachment A – Definitions at A-1.
[202] *Id.*

discharge structures to surface waters. This is readily evident from the CSO Policy's statements that (i) "CSOs are point sources subject to NPDES permit requirements …" and (ii) the objective of the CSO Policy is to "bring *all wet weather CSO discharge points into compliance* with technology-based and water quality-base requirements of the CWA."[203] In fact, EPA has independently confirmed the correct, narrow interpretation of the term "combined sewer overflow" by, for example, providing the following definition in its 2004 Report to Congress:

> **What is a CSO?**
> A combined sewer system is a wastewater collection system, owned by a state or municipality, that is specifically designed to collect and convey sanitary wastewater (domestic sewage from homes as well as industrial and commercial wastewater) and storm water through a single pipe. During precipitation events (e.g. rainfall or snowmelt), the systems are designed to overflow when collection system capacity is exceeded, *resulting in combined sewer overflow (CSO) that discharges directly to surface waters*.[204]

The definition adopted by the Regional Board in the Permit is substantially beyond this in scope and therefore contrary to law. The Regional Board also erroneously justifies its overbroad use of the term by claiming it is consistent with EPA's usage. As noted here, that is incorrect and, in fact, there is considerable authority supporting the conclusion that the CWA does not confer authority to regulate discharges that never reach a Water of the United States. The State Board must remand the Permit to the Regional Board with directions that the Board adopt a definition of Combined Sewer Overflow consistent with the CSO Policy or, in the alternative, to provide an explanation for how the need for separate, broader definition is supported by substantial evidence and crafted consistent with law.

b. The Legal Basis Cited by the Regional Board in Support of Its SOCSS Permit Terms Is Insufficient and Unsupported By Applicable Precedent.

[203] Exhibit 3 (CSO Policy) at 18689, 18695.
[204] Exhibit 23 (Report to Congress on Impacts and Control of CSO and SSO - August 2004) at Fact Sheet (emphasis added). *See also id.* at ES-2 ("Most [combined sewer systems] are designed to discharge flows that exceed conveyance capacity directly to surface waters … Such events are called CSOs.").

The case law and administrative citations relied upon by the Regional Board in its response to comments do not remotely support the Board's extensive claim of legal authority over the regulation of SOCSS resulting from design capacity exceedances. For example, the single case relied upon by the Regional Board for the principle that the Nine Minimum Controls require broadly collecting information about SOCSS actually stands for the contrary proposition that a CWA violation will only arise where an overflow reaches a surface water.[205] The Regional Board also cites prior administrative actions, and judicial decisions, in support of its position that "Water Code section 13050 does not exclude conditions arising out of the operation of a combined sewer system…"[206] However, while perhaps accurate that the specific issue of whether Water Code section 13050 applies to SOCCS resulting from a design capacity exceedance in a combined sewer system has not been adjudicated, the legal authority cited by the Regional Board remains inapposite, i.e., not a single cited decision holds that Water Code section 13050 applies to an overflow from a combined sewer system or supports such a proposition. Further, all of the decisions relied upon by the Regional Board for its claimed authority are clearly distinguishable on the facts.

In responding to San Francisco's Comment C.3., the Regional Board cites to *Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1*, 16 F.Supp.3d 294, 319-320 (S.D.N.Y. 2014), for the proposition that "[f]ailing to monitor and report some overflows would hamper efforts to evaluate implementation of the Nine Minimum Controls and ensure permit compliance."[207] This is an incorrect and misleading citation by the Regional Board and, in fact, *Borough of Upper Saddle River* stands for the opposite proposition: there is no authority to regulate SOCSS that do not reach a surface water under the NPDES program. Yes, the Court did find that some overflows at issue in the case

[205] *See Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1* (S.D.N.Y. 2014) 16 F.Supp.3d 294, 328 (holding sewer district strictly liable for the sewage spills that they "have not contested reached the Saddle River [surface water]" because it was proof that a point source discharge reached navigable water).

[206] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at pp. 27-28.

[207] *Id.* at Response to San Francisco Comment C.3 at p. 22.

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were violations of the CWA, but only those overflows that reached a surface water.[208] However, where overflows were confirmed to have occurred, but the plaintiff failed to show that that those overflows reached a surface water, the Court found the evidence insufficient to sustain a Clean Water Act violation.[209] Further, nothing in the *Borough of Upper Saddle River* directly addresses implementation of the Nine Minimum Controls. This is the only case cited by the Regional Board in its response to comments to support the position that the Nine Minimum Controls demand tracking of SOCSS resulting from design capacity exceedances. As a result, the Regional Board has failed to show that its position is supported by applicable law.

The Regional Board next cites to two administrative orders to argue that it has authority to regulate SOCSS resulting from design capacity exceedances as nuisances under Water Code § 13050. Neither order is remotely relevant. In fact, both are Cleanup and Abatement Orders issued in contexts completely foreign to the issue in dispute here:

- *State Water Board Order No. WQ 96-2* (*County of San Diego*). This is a Cleanup and Abatement Order associated with a former disposal site, the Duck Pond Landfill.[210] The Order in no way addresses anything remotely associated with the operation of a combined sewer system addressed by Order No. R2-2019-0028; rather, as characterized by the State Board, the order addresses "the essential question [of] whether each of the petitioners, having had some level of involvement with a landfill … is appropriately named in a WDR order or a CAO regarding water quality problems at the landfill."[211] The State Board concluded that the "City's control of the roadway [overlying the Landfill] by easement is properly relied upon by the SDRWQCB to name the City in the CAO."[212] As evident by the State Board's own characterization of the issues at stake in its review of the matter, WQ 96-2 has no relevance to the issues addressed by this petition.

- *Cleanup and Abatement Order R5-2004-0043.* The factual and legal issues relevant to this order are completely inapposite to the matter at hand. The Central Valley Region identified

[208] *Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1*, 16 F.Supp.3d at 329 ("[A] sewer overflow of approximately 10,000 gallons of sewage was being discharged into the Saddle River … Accordingly, as Defendant has not rebutted this evidence, the Court also finds that this spill reached the Saddle River and thus violated the Act.").
[209] 16 F.Supp.3d at 329 ("However, based on the record presented, the Court could not confirm that Defendant's spills entered into the Saddle River or its tributaries on the remaining dates … Accordingly, the Court DENIES summary judgment with respect to alleged violations on those dates.").
[210] *See* Exhibit 24 (State Water Board Order No. WQ 96-2) at 2.
[211] *Id.* at 2.
[212] *Id.* at 12.

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San Francisco, California 94111

the City of Lodi as a discharger due to its operation of a "leaking, sagging, sewer line in the area of the pure phase liquid PCE release…"[213] Chlorinated solvents from dry cleaning operations was discharged to the City's damaged sewer lines and, as a result, a portion of those chlorinated solvents were "released to the underlying soils and groundwater."[214] The Order specifically found that "PCE had leaked from the sewer to the groundwater" and had contaminated several municipal drinking water supply wells.[215]

In essence, the Regional Board's position is that it can regulate SOCSS resulting from design capacity exceedances via the Permit because prior administrative actions have named municipalities as dischargers pursuant to Water Code § 13304 in connection with (i) the release of hazardous substances from damaged sewer lines causing contamination of drinking water supplies, and (ii) due to the exacerbation of contamination at a former landfills from alleged discharge from sewers. As is clearly evident from the underlying facts and legal disposition, neither of the cited administrative actions provides legal support for the challenged Permit terms addressing SOCSS.

Next, the Regional Board cites a string of cases to support its position that "nuisance under the Water Code is not precisely the same as common law nuisance" and, as a result, the "assertion that sewer overflows from the combined system can never be nuisances is incorrect."[216] Not a single one of the cases cited by the Regional Board provides support for the claimed proposition:

- *San Diego Gas & Electric v. San Diego Regional Water Quality Control Bd.* (2019) 36 Cal.App.5th 427. Consistent with the Regional Board's citation, it is accurate that this case found that the elements for proving a nuisance under Water Code § 13304 did not include "application of the common law substantial factor test for causation."[217] That aspect of the law, however, has no meaningful relevance to the question of whether Water Code § 13304 allows the Regional Board to regulate SOCSS caused by design capacity exceedances. The case has nothing to do with sewer systems or the issuance of WDRs/NPDES permits for operation of such systems; rather the question confronting the court was whether the accumulation of heavy metals and other pollutants in marine sediments originating from a former power plant provided authority for the Regional Board to issue a cleanup and abatement order to SDG&E.[218] In fact, as discussed above in Section 2.a, if anything the

[213] Exhibit 25 (Cleanup and Abatement Order No. R5-2004-0043) at ¶ 12.
[214] *Id.* at ¶ 1.
[215] *Id.* at ¶ 7.
[216] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at p. 28.
[217] *San Diego Gas & Electric v. San Diego Regional Water Quality Control Bd.*, 36 Cal. App.5th at 431.
[218] *Id.*

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case supports San Francisco's position that the Regional Board has entirely failed to provide substantial evidence to support its effort to regulate SOCSS associated with design capacity exceedances.

- *City of Modesto v. Dow Chemical Co.* (2018) 19 Cal.App.5th 130. This case is also irrelevant to the legal issues in this matter. The case concerns liability under Water Code 13304 to be named as a discharger for the release of chlorinated solvents. The Court found that "PCE also entered the soil by releases of separator water on the ground or down the drain and into the sewer system, thence out of sewer pipes into the ground."[219] Other than the fact that it involves a municipality and the words (i) "nuisance" and (ii) "sewer," it has no relevance to the whether the Regional Board has authority to regulate SOCSS resulting from a design capacity exceedance that do not reach a surface water.

- *Newhall Land & Farming Co. v. Sup. Ct.* (1993) 19 Cal.App.4th 334. This case addresses whether allegations that the "discharge[of] hazardous substances in violation of the applicable California law [where] … those substances have leached through the soil and polluted groundwater … pleads facts which support the existence of a public nuisance."[220] As such the case stands for the axiomatic principle that pollution of water can be a public nuisance. It has no bearing on the matters in dispute here.

- *Tesoro Refining and Marketing Co. v. City of Long Beach* (C.D. Cal. 2017) 334 F.Supp.3d 1031. As with the *Newhall* case, all this case stands for is that pollution of groundwater via releases of hazardous substances from pipelines can be a public nuisance. It also has no bearing on the matters in dispute here.

Throwing together a long string-cite of cases that stand for the proposition that, with appropriate evidence, the Regional Board has authority to issue Cleanup and Abatement Orders for the pollution of groundwater with hazardous substances, and that such contamination can potentially be a public nuisance, provides no meaningful precedent or guidance to support the Regional Board's position that it has authority to regulate design capacity exceedances from San Francisco's combined sewer system as a public nuisance under Water Code § 13050. As noted above, *if* the Regional Board's point is that SOCSS resulting from a design exceedance are contributing to existing groundwater contamination – or independently causing such contamination – the Regional Board failed to provide any substantial evidence supporting this conclusion. Further, such an unbounded interpretation of the state's authority would mean that every municipal entity in California faces nuisance liability for the regular operation of a sewer and/or stormwater systems every time they leak or flood. Given that is

[219] *City of Modesto,* 19 Cal.App.5th at 141.
[220] *Id.* at 341.

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recognized that *all* sewer systems leak,[221] the ratification of the Regional Board's position by the State Board would have widespread consequences statewide.

c. SOCSS Resulting from Design Capacity Exceedances Are Not a Public Nuisance as a Matter of Law and, as a Result, the Regional Board Lacks Legal Authority To Require the Reporting Specified in the Permit.

The Regional Board argues that SOCSS, including those resulting from design capacity exceedances, are a public nuisance pursuant to Water Code 13050.[222] The Regional Board further argues that collection of information on all SOCSS, including those resulting from design capacity exceedances, is "an essential means to evaluate compliance" with Permit terms prohibiting the creation of a nuisance.[223] The Regional Board's position, to the extent it relies upon this legal authority to collect information about SOCSS resulting from design capacity exceedances, is contrary to law because such SOCSS are not a public nuisance.

San Francisco is authorized by state and local statutes as well as its Permit to operate the combined sewer system as designed. As a result, SOCSS that occur in connection with the intended and expected operation of the combined system – due to rainfall in excess of design capacity – cannot be a public nuisance. The Civil Code is abundantly clear about the underlying legal issue:

> Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.[224]

The California legislature has statutorily authorized San Francisco to construct and operate a sewer system:

> There is granted to every municipal corporation of the State the right to construct, operate, and maintain water and gas pipes, mains and conduits, electric light and power lines, telephone and telegraph lines, ***sewers and sewer mains, all with the necessary appurtenances***, across, along, in, under, over, or upon any road, street, alley, avenue,

[221] *Harz, et al. v. Zell, et al*., 2001 WL 36021794 (Sup. Ct. Santa Barbara Sept. 24, 2001).
[222] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at p. 28.
[223] *Id.*
[224] Cal. Civ. Code § 3482.

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> or highway, and across, under, or over any railway, canal, ditch, or flume which the route of such works intersects, crosses, or runs along, in such manner as to afford security for life and property.[225]

The San Francisco Charter specifically authorizes the City's construction, management, and operation of the city's sewer system, and designates the Public Utilities Commission as having "exclusive charge of the construction, management, maintenance, extension, expansion, operation, use and control of all water, clean water [i.e., sewer] and energy supplies of the City …"[226]

A statutory shield from nuisance claims arises where "the acts complained of are authorized by the express terms of the statute under which the justification is made, or ***by the plainest and most necessary implication from the powers expressly conferred***, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury."[227] As a result, for example, "[w]here an improvement is erected improperly, it cannot 'be fairly stated that the legislature contemplated the doing of the very act' causing damage."[228]

Here, SOCSS resulting from design capacity exceedances are not due to "improper" construction. Quite to the contrary, the system is functioning as designed when these SOCSS occur. The benefit of a combined sewer system is the capture and treatment of a significant percentage of stormwater; the trade-off, however, is that a sufficiently large-enough storm event will result in SOCSS. By its very nature, it is not feasible to design a combined sewer system that will not flood, or have SOCSS, for certain large storm events – the only issue is the engineering and design decisions

[225] Cal. Public Utilities Code § 10101 (emphasis added). The California Government Code similarly provides that "[a] city legislative body may construct, establish, and maintain drains and sewers." Cal. Gov't. Code § 38900; *see also* Cal. Gov't Code § 54309 et seq. (authorizing the municipalities to issue bonds for, and undertake the "collection, treatment or disposal of sewage, waste or storm water, including drainage").

[226] San Francisco Charter § 8B.121(a).

[227] *Paterno v. State of California*, 74 Cal.App.4th 68, 104 (1999) (citations omitted) (emphasis added).

[228] *Id.* (citations omitted).

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made, at some point, selecting the level of service that will be provided by the system. This is exactly the type of situation that the statutory shield in the Civil Code was intended to shield from nuisance claims – whether by regulators or third-parties.

In *Harz, et al. v. Zell, et al.,* a California Superior Court recognized that section 3482 provided a shield from a public nuisance claim where the plaintiff alleged liability for PCE leaking through the City of Santa Barbara's clay sewer pipes.[229] The court found that it was "undisputed that a brand new, state-of-the-art sewer system will leak," and, because the City was authorized to construct and maintain sewers by Government Code § 38900, it could not be liable for public nuisance for the leaking, which was inherent in the design and nature of the sewer system.[230] The situation here is analogous: it is undisputed, for a combined sewer system, that a storm event in excess of the system's design capacity will result SOCSS. Because San Francisco is authorized to construct, maintain, and operate such a system by state law (and by its permits), a public nuisance cannot arise due to the occurrence of something – overflows – inherent in the design and nature of its system.

The holding in *Harz* is consistent with the broader precedent recognized by numerous other courts that have concluded that section 3482 bars public nuisance claims against public infrastructure projects built pursuant to legislative authorization.[231] Historically the California Attorney General has

[229] 2001 WL 36021794 (Sup. Ct. Santa Barbara Sept. 24, 2001).

[230] *Id.*

[231] *See, e.g., Dina v. People ex rel. Dept. of Transportation*, 151 Cal.App.4th 1029 (2007) (because state highways are constructed and maintained under authority of the state constitution and statutes, § 3482 barred a nuisance claim by property owners' alleging damages due to noise, dust, and vibrations); *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.*, Cal.App.3d 863 (1978) (where construction of rapid transit station was authorized by statute, theater owner and lessee who were inconvenienced by such construction could not recover under nuisance theory); *Lombardy v. Peter Kiewit Sons' Co.*, 266 Cal.App.2d 599, 605-606 (1968) (with regard to state highways, the court found that "[t[he conditions of which appellants complain are obnoxious to all persons who live in close proximity to the state's freeways but they must be endured without redress" due to § 3482); *Larson v. Santa Clara Valley Water Conservation Dist.*, 218 Cal. App. 2d 515, 526 (1963) (finding nuisance claims barred by § 3482 where a reservoir was constructed under

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argued for a broad application of section 3482 to bar public nuisance suits against public infrastructure operating as designed.

In addition to the legislative authorization for the combined sewer system noted above, San Francisco's specific system has been constructed, operated and maintained consistent with official mandate via the Permit and other regulatory action as described in Section V.A.. In issuing the Permit, the Regional Board recognized it was permitting a combined system stating, for example:

> The Discharger's collection system is predominantly a combined sewer system with some limited separate sanitary sewers. The combined sewer system consists of approximately 250 miles of pipe, one major pump station (Westside Pump Station), six minor pump stations … and three large transport/storage structures ....[232]

Further, in permitting San Francisco's system, the Regional Board was aware of the consequences of extreme weather stating, for example, in Chapter 4 of the Basin Plan:

> During periods of heavy rainfall, large pulses of water enter sewerage systems. When these pulses exceed the collection, treatment, or disposal capacity of a sewerage system, overflows occur. This is especially problematic for sewer systems that combine both sanitary sewage and stormwater (Combined Sewer Systems or CSS), such as the City and County of San Francisco's system.[233]

Both federal and state courts have found that activity – including operation of stormwater drainage and a sewage treatment and collection system – undertaken consistent with a permit issued by the Regional Board is shielded from public nuisance claims by section 3482.[234]

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legislative authorization and an injury was allegedly caused due to the method of its operation resulting in shallow and murky conditions).

[232] Exhibit 1 (Order No. R2-2019-0028) at Attachment F at II.A.2.

[233] Exhibit 26 (SF Bay Basin Plan Chapter 4.9 - Wet Weather Overflows) at 4-22.

[234] *See, e.g.*, *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2001) (upholding district court conclusion that § 3482 provided a shield from actions alleging nuisance in connection with stormwater drainage authorized by a NPDES permit issued by the Regional Water Board); *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 1257-58 (1996) (permit issued by Regional Water Board for operation of sewage treatment and collection system shields nuisance claims due to section 3482 for operations consistent with the permit).

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In its comments on the Permit, San Francisco also objected to the Regional Board's claim that SOCSS resulting from a design capacity exceedance are a public nuisance because such events are protected by design immunity.[235] The Regional Board failed to refute this position in its comments.[236] Nonetheless, we provide legal argument here in support of San Francisco's comment.

Pursuant to the principle of design immunity, "as long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity [from nuisance claims]. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances."[237] Applying this standard, courts have upheld an affirmative defense of design immunity in response to alleged liability under a variety of circumstances and for a range of public entities.[238] In fact, the California Attorney General has repeatedly argued in support of the design immunity defense in defending claims against California agencies.[239]

In a particularly analogous situation, the California Supreme Court recognized that storm events that exceed a flood control system's design capacity do not give rise to claims against a public entity. In *Belair v. Riverside County Flood Control Dist.*, the Supreme Court limited liability of public

[235] *See* California Government Code § 830.6.
[236] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at p. 28.
[237] *Ramirez v. City of Redondo Beach*, 192 Cal.App.3d 515, 525 (1987).
[238] *See, e.g., Gonzales v. City of Atwater*, 212 Cal.Rptr.3d 137 (2017) (declining liability arising from dangerous condition at intersection); *Wyckoff v. State*, 90 Cal.App.4th 45 (2001) (application of design immunity defense in response to wrongful death claim alleging that the lack of a center median barrier constituted a dangerous condition of public property); *Grenier v. City of Irwindale*, 57 Cal.App.4th 931 (1997) (design immunity defense upheld in response to damages alleged against City in connection with street flooding).
[239] *See, e.g., Paterno v. State of California*, 74 Cal.App.4th 68, 104 (1999) ("The Attorney General points to *Mikkelsen v. State of California* … which held that where a nuisance cause of action was based on negligent plans or design, the design immunity provision of the [Government] Claims Act barred it.").

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agencies to those situations where its public improvement "substantially contributed" to the flooding causing damages, holding:

> Where independently generated forces not induced by the public flood control improvement - such as a rainstorm - contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, i.e., where the injury occurred in substantial part because the improvement failed to function as it was intended. *The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity*.[240]

The threshold for determining liability established by *Belair,* therefore, is whether or not a project functioned consistent with its design capacity. If it functioned consistent with its design, but the storm exceeded that capacity, the public entity will face no nuisance or other liability for operating the system. By definition, SOCSS resulting from design capacity exceedances occur where the combined system functioned consistent with its design. These SOCSS, therefore, are not public nuisances and the Regional Board cannot rely upon the public nuisance provision in the Permit, or otherwise, as a basis to require reporting.

In an effort to craft a theory extending jurisdiction over SOCCS resulting from design capacity exceedances, the Regional Board has gone to unreasonable and perhaps unprecedented lengths. The legal theories cobbled together by the Regional Board are beyond anything contemplated by the CWA, contrary to the underlying intent of the CSO Policy (i.e., to allow for the continued use of combined sewer systems by municipalities nationwide), and inconsistent with a variety of state laws that protect municipalities from public nuisance claims in connection with the operation of infrastructure. Nor has the Regional Board provided substantial evidence adequately supporting the need to collect

[240] 47 Cal.3d 550, 560 (1988) (emphasis added); *see also Tri-Chem, Inc. v. Los Angeles County Flood Control Dist.*, 60 Cal.App.3d 306, 315 (1976) (no liability against City for damages caused due to rainfall exceeding the inlet capacity of the drainage line into which water entering the drains and ditch flowed).

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San Francisco, California 94111

information on SOCSS resulting from design capacity exceedances. Having acted contrary to law and without substantial evidence, the Permit should be remanded.

F. The Regional Board Failed To Respond to Significant Comments Made by San Francisco and When It Did Respond, the Board Did Not Provide Sufficient Explanations For Its Findings.

The Clean Water Act and EPA's regulations prescribe standards for State Programs authorized to issue NPDES permits, including the requirement that a permit issuer shall "briefly describe and respond to all significant comments on the draft permit."[241] The State Board Regulations in Title 23 apply this requirement to the Regional Board's issuance of the Permit: "Waste discharge requirements for discharge from point sources to navigable waters *shall be issued and administered in accordance with the currently applicable federal regulations* for the National Pollutant Discharge Elimination System (NPDES) program."[242] Accordingly, the "Region as a permit issuer has certain procedural obligations. . . .[,]" which are set forth in 40 C.F.R. § 124.17.[243] Specifically, the Regional Board's Response to Comments "must address the issues raised in a meaningful fashion" and the response, "though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by the commenter."[244] The administrative record must reflect the permit issuer's "considered judgement," meaning "the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions."[245] Failure by the Regional Board to adhere to the response requirement in the Clean Water Act is an independent reason for remand of the Permit.

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[241] 40 C.F.R. § 124.17(a)(2); *see* § 124.17(a)(c) ("(Applicable to State programs, see §§ 123.25 (NPDES)").

[242] 23 Cal. Code Regs. § 2235.2 (emphasis added); *see also San Francisco Baykeeper v. California State Water Res. Control Bd.*, No. A098908, 2003 WL 21235472, at *3 (Cal. Ct. App. May 28, 2003) ("The Porter-Cologne Act provides that WDRs issued by the state must apply and ensure full compliance with the CWA§") (citing § 2235.2).

[243] *In re Town of Concord Department of Public Works*, 16 E.A.D. 514, at *9 (EAB 2014).

[244] *In re Washington Aqueduct Water Supply System*, 11 E.A.D. 565, at *16 (EAB 2004) (Region erred in not properly responding to comment that data upon which it relied to calculate reasonable potential to exceed was not representative).

[245] *Id.*

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1. The Regional Board Failed to Respond to At Least Seven Comments Made by San Francisco.

The Regional Board failed to meet the requirement set out in 40 C.F.R. § 124.17 when it did not address specific requests made by San Francisco. In its' *Supplemental CSO Control Policy Comments (Attachment B)*, San Francisco made 17 specific requests for information or clarification from the Regional Board.[246] At least seven of those requests were not addressed ***at all*** by the Regional Board—these instances of the Board's failure to respond provide an independent justification for the State Board to remand the Petition:[247]

(i) As discussed in Section V.B.2 of this Petition, San Francisco requested that the Regional Board clarify the distinction between a WQBEL and a receiving water limitation, if any, and the corresponding legal implications from the distinction, but the Regional Board failed to articulate any distinction in its Response to Comments.[248]

(ii) San Francisco asked the Regional Board and EPA to confirm that the receiving waters associated with CSD-001 through CSD-007 are not impaired based on bacteria and to reflect that finding in the Fact Sheet at F-14 of the Tentative Order.[249] Additionally, San Francisco requested that the Regional Board "confirm that the findings requested by San Francisco included in the Fact Sheet are factually correct" and "[i]f yes . . . [San Francisco] asks the Regional Board and EPA to provide an explanation why factually accurate and relevant findings are rejected from the permit."[250] In its Response to Comments, the Board merely confirmed "the receiving waters associated with Discharge Point Nos. CSD-001 through CSD-007 are not impaired by any pollutant, including bacteria. Fact Sheet section III.D already says, 'This Order does not authorize any discharge to receiving waters on California's list of impaired waters.' Therefore, no additional finding is needed."[251] The Regional Board explicitly failed to make any

[246] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order).
[247] *See* Exhibit 27 (Response to Comments Summary Chart).
[248] *See* Section V.B.2 of this Petition.
[249] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.1.c. at p. 8.
[250] *Id.*
[251] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.6 at p. 16.

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San Francisco, California 94111

determination about the legitimacy of the factual findings and did not explain *why*, if true, those findings were not included in the permit. In fact, the Board mischaracterized San Francisco's comments when it failed to mention these specific requests in its summary of comments.[252]

(iii) San Francisco requested that the Regional Board identify the federal and state statutory and regulatory legal authority for *each* task and sub-task in Table 7 because "[i]t is not clear what element(s) is being cited and it is not clear what specific element or authority the RB and EPA is relying on for the position they have the legal authority for each task and sub-task in Table 7."[253] In its Response to Comments, the Board provided a list of citations to the CSO Policy and EPA guidance, without actually providing an explanation, as requested, about how the legal authority supports each task and sub-task in Table 7.[254]

(iv) As discussed in Section V.C.1.a of this Petition, San Francisco raised in its comments that the Regional Board previously affirmed that the I.C.2 exemption in the CSO Control Policy applies to the SFPUC and asked the Regional Board to provide reasons for *why* it disagrees and an explanation of the practical implications of I.C. as applied to San Francisco.[255] However, the Regional Board did not respond in its Response to Comments.

(v) As discussed in Section V.C.2 of this Petition, San Francisco provided comments demonstrating that the current performance of the combined sewer system protects beneficial uses, but the Regional Board failed to respond to these comments nor did it

[252] *Id.* ("San Francisco Comment B.6**:** San Francisco requests confirmation that the receiving waters associated with Discharge Point Nos. CSD-001 through CSD-007 are not impaired by bacteria and that we revise Fact Sheet section III.D to say so.").
[253] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.2 at p. 9.
[254] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at pp. 16-17.
[255] *See* Section V.C.1.a of this Petition.

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San Francisco, California 94111

answer San Francisco's request to explain San Francisco's current protection of beneficial uses.[256]

(vi) San Francisco requested that the Regional Board confirm its understanding of "elimination" of CSDs—defined as "the separation of the combined sewer system into distinct sanitary and storm sewer systems."[257] The Regional Board, in response, mentioned the "purpose" of "elimination" in "the context of the assessment" and described similar "alternatives," but did not confirm or deny whether it agreed with San Francisco's technical definition of "elimination," as requested.[258]

(vii) Finally, as discussed in Section V.D. of this Petition, the Regional Board failed to respond to San Francisco's comments that the permit terms fail to provide fair notice.[259] The Board merely stated that it "provided San Francisco fair notice of our expectations," without further explanation to the specific instances of vagueness that San Francisco included in its comments.[260]

Further, as discussed in depth above in Section V.E.2.c, San Francisco, in its *Supplemental Sewer Overflows in the Combined Sewer System Comments (Attachment C)*, objected to the unqualified characterization in Section VI.C.5.a of the Fact Sheet that regulators "need" to collect information about SOCSS, stating that it was protected by design immunity granted pursuant to the California Government Code section 830.6.[261] The Regional Board's response failed to rebut this and did not even mention the design immunity exception of this regulation in its Response to Comments.[262]

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[256] *See* Section V.C.2 of this Petition.
[257] Exhibit 2, Attachment B (SFPUC Comments on Tentative Order) at Comment B.2 at p. 11.
[258] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.10 at p. 19.
[259] *See* Section V.D. of this Petition.
[260] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment B.7 at p. 17.
[261] *See* Exhibit 2, Attachment C (Supplemental Sewer Overflows in the Combined Sewer System Comments) at p. 4.
[262] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.16 at p. 28.

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These instances of non-responsiveness by the Regional Board to San Francisco's important inquiries—concerning CSO Control Policy compliance and the Regional Board's authority to collect supplemental information related to SOCSS—fall short of the basic standard required by the Clean Water Act: after the issuance of a final NPDES permit, the issuer must "respond to all significant comments."[263] There is no doubt that the information requested by San Francisco—the accuracy of California's list of impaired waters, the specific legal authority for the requirements of Table 7, an explanation regarding the Region's departure from the CSO Policy, compliance with protection of beneficial uses, and the definition of "elimination" of CSDs—is significant and essential to this Petition and San Francisco understanding how to properly implement and comply with the Permit. Although the Regional Board has discretion in how it responds to comments, there is no such discretion for *whether* to respond to such important comments.[264] Therefore, the Permit terms commented on by San Francisco in which the Regional Board failed to respond should be remanded.

2. The Regional Board Failed To Provide a Sufficient Explanation to Comments Made by San Francisco.

In its Response to Comments, the Regional Board did not provide adequate rationale for various permit terms or proper legal authority to support its findings related to SOCSS, in response to comments made on the Tentative Order by San Francisco. "Absent an explanation for permit changes, the record does not reflect the 'considered judgment' necessary to support the permit determination."[265] Where the permit issuer "fails to adequately identify and explain changes to the permit as 40 C.F.R. § 124.17(a)(1) requires, the Board has not hesitated to remand the permit to the permitting agency for further consideration."[266] The Regional Board's insufficient explanations, listed below and explained throughout this Petition, merit remand of the Permit.[267]

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[263] 40 C.F.R. § 124.17(a)(2).
[264] *Id.* (The permit issuer's "response shall" . . . "respond to all significant comments.").
[265] *In re ConocoPhillips Co.*, 13 E.A.D. 768, 780 (EAB 2008).
[266] *Id; see also In re Town of Concord Department of Public Works*, 16 E.A.D. 514, at *9 (EAB 2014) (remanding the aluminum limit [permit term] for further explanation as to the changes in the 7Q10 calculation and the justification for the data used in the new calculation).
[267] *See* Exhibit 27 (Response to Comments Summary Chart).

(i) As discussed in Section V.B.4. of this Petition, the Regional Board failed to provide any rationale as to why it believes San Francisco's compliance with Provision VI.C.5.c will not "necessarily" achieve water quality standards, in response to San Francisco's comments, which included technical information concluding otherwise.[268] Without providing such rationale, the Regional Board failed to respond clearly to San Francisco. San Francisco, without further explanation, is unable to interpret what compliance means regarding this Permit Provision.

(ii) As discussed in Section V.C.1.b. of this Petition, the Regional Board provided no explanation for why it is legal or appropriate to apply Phase II permitting requirements to a combined sewer system via post-Phase II permit.[269] Without explaining the legal authority supporting these Permit term requirements, the Regional Board failed to adequately demonstrate its considered judgment. The Regional Board's arbitrary application of Permit requirements does not meet the standard for a proper Response to Comments.

(iii) As discussed in Section V.E.1.b of this Petition, San Francisco challenged the necessity of collecting information about SOCSS resulting from design capacity exceedance.[270] Rather than supporting the basis for its authority to collect this information—allegedly as relevant to determining whether capital improvements are necessary—the Regional Board cited cases that fail to support its finding.[271] This example demonstrates the importance of the Regional Board's duty to provide its rationale for its findings—without

[268] *See* Section V.B.4. of this Petition.
[269] *See* Section V.C.1.b. of this Petition.
[270] Exhibit 2, Attachment C (Supplemental Sewer Overflows in the Combined Sewer System Comments) at p. 4.
[271] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.6 at p. 24.

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San Francisco, California 94111

understanding the cases' rationale, the Board made improper conclusions about the Permit terms.

(iv) As discussed in Section V.E.2.b of this Petition, San Francisco challenged the Regional Board's legal authority over regulation of SOCSS resulting from design capacity exceedance.[272] In response, the single case relied upon by the Regional Board for the principle that the Nine Minimum Controls require broadly collecting information about SOCSS actually stands for the contrary proposition that a CWA violation will only arise where an overflow reaches a surface water.[273] Although the Board was required to demonstrate it considered judgment in response to San Francisco's comment, the Board failed to provide an adequate explanation for why the Nine Minimum Controls require collecting SOCSS information.

For the reasons set forth throughout this Petition, the Regional Board did not meet its obligation under 40 C.F.R. section 124.17(a)(2) to provide proper explanations for its findings claimed to support the Permit terms in the Revised Tentative Order. These procedural duties are essential to NPDES permitting process, and the Regional Board's failure to abide by them in its Response to Comments merits remand of this Permit.

VI. THE MANNER IN WHICH PETITIONER IS AGGRIEVED

The Petitioner is aggrieved as a permit holder for the reasons identified in Section V of this Petition.

[272] Exhibit 2, Attachment (Supplemental Sewer Overflows in the Combined Sewer System Comments) at p. 4.

[273] Exhibit 12 (SFRWQCB Response to Written Comments) at Response to San Francisco Comment C.3 at pp. 22-23; Section V.E.2.b. of this Petition.

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VII. THE SPECIFIC ACTION BY THE STATE BOARD WHICH THE PETITIONER REQUESTS

Petitioner requests that the State Board remand the Permit to the Regional Board consistent with San Francisco's requests in Section V of this Petition.

VIII. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

For purposes of this filing, a preliminary Statement of Points and Authorities is subsumed in Section V of this Petition. Petitioner reserves the right to file supplemental points and authorities in support of this Petition upon receipt and review of the administrative record, as additional information and evidence is developed or becomes available, in response to any filing made by or on behalf of the Regional Board, or in response to any action by U.S. EPA related to the Permit.

IX. REQUEST FOR EVIDENTIARY HEARING

Petitioner requests that the State Board hold an evidentiary hearing in this matter.

X. STATEMENT THAT PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD

A true and correct copy of this Petition was sent to the Regional Board, to the attention of Michael Montgomery, Executive Officer, on October 11, 2019. By copy of this Petition, Petitioner is also notifying the Regional Board and identified parties of the Petitioner's request for a hearing and that the State Board issue a stay.

XI. STATEMENT THAT SUBSTANTIVE ISSUES AND OBJECTIONS WERE RAISED BEFORE THE REGIONAL BOARD

The substantive issues and objections issues raised in this Petition were raised before the Regional Board on numerous occasions prior to the filing of this Petition, including in the written comments submitted by San Francisco on the tentative order and orally at the September 11, 2019 hearing on the Permit.

DATED: October 11, 2019

HUNTON ANDREWS KURTH LLP

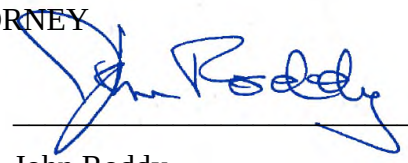
J. Tom Boer

Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, California 94111

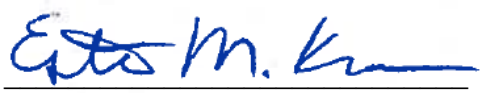
Samuel L. Brown

Attorneys for Petitioner
CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF SAN FRANCISCO CITY ATTORNEY



John Roddy



Estie Kus

Attorneys for Petitioner
CITY AND COUNTY OF SAN FRANCISCO

Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, California 94111