ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: City and County of San Francisco NPDES Permit No. CA0037681	)	NPDES Appeal No. 20-01

ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING PETITIONER LEAVE TO SUPPLEMENT PETITION FOR REVIEW, WITH LIMITATIONS

On May 11, 2020, the Environmental Appeals Board ("EAB") issued an Order in the above-captioned matter denying the City and County of San Francisco's ("San Francisco's") February 28, 2020 motion to stay contested permit conditions and denying San Francisco leave to amend its petition for review. San Francisco now seeks partial reconsideration of that Order or, in the alternative, leave to amend its petition for review.[1] For the reasons below, the EAB denies San Francisco's Motion for Reconsideration, but grants San Francisco leave to supplement its petition for review with certain limitations as set forth below.

[1] This appeal arises from a joint authorization under the National Pollutant Discharge Elimination System ("NPDES") issued by both U.S. EPA Region 9 ("Region") and the California Regional Water Quality Control Board for the San Francisco Bay Region ("California RWQCB"). The joint authorization allows San Francisco to discharge from its existing Oceanside wastewater facility. More information on this matter and the prior motion of which San Francisco now seeks reconsideration may be found in the EAB's prior order and other pleadings in this appeal.

A motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(m).[2] The Board reserves reconsideration for cases in which the Board has made a demonstrable error, such as a mistake on a material point of law or fact. Reconsideration is not an opportunity for a party to "reargue the case in a more convincing fashion." *See In re Town of Newmarket,* NPDES Appeal No. 12-05, at 1-2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (relying on well-established Board precedent for the standard for reconsideration); *see also City of Taunton,* NPDES Appeal 15-08, at 1-2 (EAB June 16, 2016) (Order Denying Reconsideration) (noting that Federal courts employ a similar standard including the principle that "[u]nless the court has misapprehended some material fact or point of law, such a motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected.") (quoting *In re Sun Pipe Line Co*., 831 F.2d 22, 24-25 (1st Cir. 1987)).

[2] The regulation cited above pertains to motions for reconsideration of a "final disposition." 40 C.F.R. § 124.19(m). The Region argues that reconsideration of an interlocutory order is not available under this regulatory provision because it is not a "final disposition." *See* Region 9 Response to Motion for Partial Reconsideration or, In the Alternative, Motion for Leave to Amend the Petition for Review at 12-13 (June 5, 2020). But the Board has previously considered motions for reconsideration relating to orders resolving motions. *See, e.g.*, *In re City of Taunton*, NPDES Appeal No. 15-08 (Order Denying Motion for Reconsideration [of Order on Pending Motions and Setting Oral Argument]) (EAB Nov. 24, 2015). In any event, and without deciding whether reconsideration of interlocutory orders is provided for under the regulation cited, the Board exercises its discretion to address San Francisco's motion for partial reconsideration of the EAB's interlocutory order denying San Francisco's Motion to Stay. *See* 40 C.F.R. § 124.19(n) (providing that the Board "may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal * * *.").

In its current motion filed on May 21, 2020, San Francisco asserts that the EAB erred by assuming that the City's "Motion to Amend was substantively linked to the Motion to Stay and had no independent basis" and therefore failed to consider how the Region's "two permits theory" was inextricably relevant to deficiencies in (i) the administrative record required to support EPA Region 9's issuance of the permit conditions contested by the Petition and (ii) the process underlying EPA Region 9's purported consolidation of the Permit. Motion to Reconsider at 6. San Francisco further asserts that its request to amend the Petition sought relief separate and apart from the Motion to Stay. *Id.* at 7. Notwithstanding San Francisco's broad assertions, its stated grounds for its February 28 Motion was that the Region "failed to stay all of the contested permit conditions of the jointly issued 2019 permit." Motion to Stay Contested Permit Conditions or Leave to Amend Petition at 2. In the "Request for Relief" section of the Motion the city stated:

> Lastly, [San Francisco seeks] leave to amend its January 13, 2020 Petition for Review in order **to add a substantive challenge to [the Region's] 'two permit' theory** * * * Since San Francisco was not aware this was the Region's position on January 13, 2020 – because the Region did not express this "two permit" theory until it was described in the Notice sent on February 7, 2020 – San Francisco respectfully requests the opportunity to amend its Petition to add **the argument that the Region's theory is clearly erroneous and contrary to law**.

Id. at 16.

The Board's Order determined that the Region was limited by the extent of its authority when it stayed the contested provisions of the permit and, thus, could not stay conditions to the extent that they apply to discharges that are not regulated by the Region. Similarly, the Order explained, the Board's jurisdiction does not extend to the review of permitting decisions issued by a state permitting authority under an EPA-authorized NPDES program. Thus, the Board's Order denied Francisco's request that the Board issue an order staying the contested provisions

as they apply to discharges regulated by the California RWQCB. The Board determined that neither its decision on the motion, nor the authority of the Region, depended on whether the NPDES authorization was characterized as one permit or two. *See* Order Denying Motion to Stay Contested Provisions at 11.

As shown above, San Francisco's stated purpose for amending its petition was to "add the argument that the Region's theory is clearly erroneous and contrary to law." Motion to Stay Contested Permit Conditions or for Leave to Amend Petition at 16. San Francisco did not argue that it needed to amend its Petition to assert that the administrative record required to support EPA Region 9's issuance of the permit conditions contested by the Petition was deficient or that the process underlying EPA Region 9's purported consolidation of the Permit was deficient. *Id.*; *see also* City and County of San Francisco's Reply in Support of Motion for Partial Reconsideration or, in the Alternative, Motion for Leave to Amend Petition for Review ("Reply in Support") (June 15, 2020) at 14 (acknowledging its motion "was limited" and "contained no substantive or procedural challenges" to the Region's "two-permit theory"), 15 (acknowledging that, because its motion "contained no discussion of its challenges to the Two Separate Permits Theory in the context of its request for leave to amend, it was not possible for the Board to have ruled on such challenges in its May 2020 Order"). Because these issues were not raised, the Board could not have erred in failing to consider them. As such, San Francisco has not established that the Board made any demonstrable error, such as a mistake on a material point of law or fact, in the Order. San Francisco's motion for partial reconsideration is therefore denied.

Nevertheless, we find it appropriate to grant San Francisco leave to supplement its petition for review in this matter as set forth below pursuant to our authority under 40 C.F.R. § 124.19(n). We do so in the interest of ensuring full and efficient consideration of any issues or

arguments allegedly arising from the Region's inconsistent characterization of the Oceanside Permit[3] as both one permit and two. Our prior Order observed, with examples, that both permitting authorities had referred to the authorizations in the Permit in both singular and plural terms. And that seeming inconsistency continues even in the briefing on the current motion. For example, the Region begins by stating that "EPA issued the Federal Permit" and the California "RWQCB issued the State Permit," suggesting there are two separate permits. Response at 2. But then the Region states that "the Oceanside Permit (singular) is both a Federal and State Permit." *Id.* at 3. Later in its response, the Region maintains that San Francisco "had the opportunity to comment on and challenge all of *the* draft and final permit terms" and that "[t]here is no disagreement that *the permit* was jointly issued under separate federal and state authorities," using the singular "permit" and not differentiating between a federal and state permit. Response at 7 (emphasis added).[4] The Board concludes that allowing San Francisco to

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[3] San Francisco petitioned this Board to review Region 9's issuance of the "Oceanside Permit," which is identified as both Order No. R2-2019-0028 and NPDES Permit No. CA0037681. The Oceanside Permit authorizes discharges from the Oceanside Water Pollution Control Plant, the Wastewater Collection System and the Westside Recycled Water Project, collectively the "Oceanside facility" into the Pacific Ocean from both nearshore and offshore discharge points. It was signed by both the California RWQCB (September 12, 2019) and the Region (on December 10, 2020). Throughout this Order, the Board's uses the term "Oceanside Permit," to reflect the above-described authorizations, without characterizing the Oceanside Permit as one permit or two.

[4] The inconsistency in describing the Ocean Permit occurs elsewhere as well. For example, the Region characterizes the "Federal Permit" as including all provisions of the Oceanside Permit because "San Francisco's entire westside system is designed to maximize the amount of NPDES-permitted outfall at Discharge Point 001 into federal waters and minimize the amount discharged through the CSDs into state waters." Response at 9. The Region continues by stating that "[t]here are no state-only provisions of the Oceanside Permit because of the

supplement its petition will promote the efficient, fair, and impartial adjudication of this permit appeal. This conclusion is not, however, an indication of how the Board will ultimately resolve any of the issues in this case. The Board therefore grants San Francisco leave to supplement its petition for review to allow San Francisco to brief any new issues or arguments arising from what San Francisco refers to as the Region's "two-permit theory" and that San Francisco asserts that it first became aware of when the Region issued its Stay Notice after San Francisco filed its petition for review.

In supplementing its petition for review, San Francisco may only raise new issues or arguments pertaining to any potential consequences allegedly arising from the Region's post-petition characterization of the Oceanside Permit as two permits. All standards pertaining to issues or arguments raised in petitions for review continue to apply. *See, e.g.,* 40 C.F.R. § 124.19(a)(4). For example, for any issue or argument that was not raised during the public comment period, the petitioner must explain why such issues were not reasonably ascertainable. *See id.;* 40 C.F.R. § 124.13.

San Francisco's supplement to its petition, if any, may be no more than 10,000 words and must be filed no later than June 30, 2020. The Region's response to San Francisco's supplemental petition, if any, may be no more than 10,000 words and must be filed no later than

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interrelated nature of the actions onshore, the discharges from the CSDs to state waters, and the discharges from Discharge Point 001 to federal waters offshore." *Id.* In contrast, in a letter the Region relies on elsewhere in its response, the California RWQCB has identified certain permit provisions as relating "only to discharges to federal waters." *See* Letter from Michael Montgomery, California RWQCB to Michael Carlin, San Francisco Public Utilities Commission (Oct. 29, 2019) (A.R. No. 134).

July 13, 2020. San Francisco may file a reply of no more than 5,000 words no later than July 20, 2020.

So ordered.[5]

ENVIRONMENTAL APPEALS BOARD

Dated: June 18, 2020

By: _____
Aaron P. Avila
Environmental Appeals Judge

[5] The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that copies of the *Order Denying Motion and Granting Petitioner Leave to Supplement Petition for Review, With Limitations* in the matter of City and County of San Francisco, NPDES Appeal No. 20-01, were sent to the following persons by email:

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Dated: ***Jun 18 2020***

Eurika Durr
Clerk of the Board