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

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

SUPPLEMENT TO PETITION FOR REVIEW OF CITY AND COUNTY OF SAN FRANCISCO'S OCEANSIDE WASTEWATER TREATMENT PLANT'S NPDES PERMIT ISSUED BY EPA REGION 9

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I. INTRODUCTION

The City and County of San Francisco ("San Francisco") files this Supplement to Petition for Review ("Supplement") asking the Environmental Appeals Board ("Board") to remand National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0037681 ("Permit") due to severe procedural deficiencies — disclosed only after the filing of San Francisco's Petition for Review ("Petition") — that render the Permit clearly erroneous as a matter of fact and law, reveal due process violations and an abuse of discretion, and raise important policy considerations requiring Board action.

Region 9 of U.S. Environmental Protection Agency ("Region 9" or "Region") first articulated its novel Two Separate Permits Theory in its Notice of Stay of Contested Permit Conditions, issued roughly two months after Region 9's adoption of the Permit and a month after San Francisco filed its Petition. The Region relies on its newly minted theory in an attempt to justify its *post hoc* claim that the jointly issued State/federal Permit was purportedly two separate NPDES permits, a "State-only permit" and a "federal-only permit." The Board's June 18, 2020 Order ("Order") granted San Francisco leave to file this Supplement to address the plethora of issues raised by the Region's new theory and its supposed issuance of a federal-only permit.[1]

Region 9 attempts to unilaterally re-write history with its post-Permit claims of separate permits. It does this in direct contradiction of the plain language of the Permit, and the record developed during the roughly six-year history leading to its issuance, which uniformly refer to

[1] The Board's Order limits San Francisco's arguments to "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." Dkt. No. 18 at 6. The Board directs that "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." *Id*. This Supplement complies with the Order. The Region never raised the theory or any claim of separate permits prior to issuing the final Permit. By definition, this limits the arguments in the Supplement to those associated with the Region's position revealed after the close of public comment. *See* 40 C.F.R. § 124.18(c) (record "complete" when final permit issued).

the Permit as a single jointly issued State/federal NPDES permit. It does this *despite* it resulting in confusing and duplicative compliance obligations, and without clarity as to which terms are in the "State permit" versus the "federal permit." It does this *despite* the significant consequences it has on San Francisco as the permittee and the dangerous precedent for other jointly-issued permits.

The Board has the opportunity to rectify the egregious procedural and substantive ramifications that flow from Region 9's post-Permit actions. The Board should either (i) grant the relief requested in San Francisco's Petition for Review and find that the Permit is a single, jointly issued State/federal permit or (ii) remand the Permit back to Region 9 to remedy the deficiencies outlined in San Francisco's Petition and this Supplement.

II. FACTUAL AND REGULATORY BACKGROUND

San Francisco owns and operates a combined sewer system, where domestic sewage, industrial wastewater, and stormwater are collected and treated at one of three facilities located within the San Francisco city limits. AR #98a at 4-24. San Francisco's Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project (collectively, the "Westside Facilities") are the facilities subject to authorization by the Permit, which is at issue here. AR #17 at F-3–F-4.

The Westside Facilities discharge treated effluent from one main outfall, Discharge Point No. 001 and, during heavy wet weather, seven combined sewer discharge ("CSD") outfalls, Discharge Point Nos CSD-001 through CSD-007. *Id.* at F-6. The main outfall is a 4.5-mile-long deepwater outfall that originates at the Oceanside Treatment Plant and discharges approximately 3.8 miles offshore in the Pacific Ocean (the "Deepwater Outfall"). *Id*. When stormwater volume exceeds the capacity of the Deepwater Outfall during large storms, the system discharges

combined stormwater/wastewater to both the Deepwater Outfall and to nearshore surface waters via the CSD outfalls. AR #98a at 4-24.

San Francisco requires a Clean Water Act ("CWA") NPDES permit to discharge from the seven CSD structures and the Deepwater Outfall. 33 U.S.C. § 1342(a). "States [like California] ... have received authorizations from EPA under CWA section 402(b) to administer the NPDES permit program *within their boundaries* in lieu of the Federal government. *See* 33 U.S.C. § 1342(b), (c); 40 C.F.R. § 123.1(d)(1)." Dkt. No. 14 at 3 (emphasis in original).[2] While EPA has permitting authority over discharges into the Pacific Ocean beyond three miles from shore ("federal waters"), California has authority over discharges to waters in the Pacific Ocean within three miles from shore ("State waters"). *See id*.

The Westside Facilities' main outfall, the Deepwater Outfall, discharges to federal waters. It is, therefore, within EPA's sole jurisdiction. In contrast, the CSD structures discharge to nearshore waters within State jurisdiction, and are subject to EPA's delegation of authority to California. AR #17 at F-6. Therefore, to operate and discharge from the Westside Facilities, San Francisco needs CWA authorization from both California and EPA.

Given the indivisible nature of the Westside Facilities and the dual permitting authorities over its discharges, the Permit is jointly issued by Region 9 and the California Regional Water Quality Control Board for the San Francisco Bay Region ("RWQCB") (collectively, the "agencies"). Dkt. No. 14 at 1-2. The RWQCB's permitting authority is limited to discharges from the nearshore CSD structures to State waters, while Region 9's direct permitting authority is limited to discharges from the Deepwater Outfall to federal waters. *See id.* at 4; AR #17 at 5, F-6.

[2] California is authorized to implement the NPDES program. *See* 54 Fed. Reg. 40,664 (Oct. 3, 1989); 39 Fed. Reg. 26,061 (July 16, 1974).

San Francisco's system is neither designed nor operated according to a "State" and "federal" distinction. Rather, the Westside Facilities operate as one integrated, interdependent system; discharges occur at the nearshore CSD structures after the quantity of combined treated wastewater and stormwater discharging through the Deepwater Outfall is maximized. AR #17 at F-5–F-6. Operating the Deepwater Outfall in compliance with permit terms requires total reliance on infrastructure located across the Westside Facilities, including pump stations, transport-storage boxes, and conveyance pipes that perform the same precise functions for nearshore discharges under State jurisdiction. *Id.* To operate the Westside Facilities as designed, San Francisco must discharge to the Deepwater Outfall and, when conditions so necessitate, from the CSDs. Given the inherent design of San Francisco's combined sewer system, since 1979, the Westside Facilities have operated pursuant to a NPDES Permit jointly issued by Region 9 and the RWQCB that has never distinguished between "State" and "federal" terms.

III. PROCEDURAL HISTORY

The following dates and events are pertinent to this Supplement.

- January 13, 2020: San Francisco filed its Petition understanding the Permit was a single Permit, jointly issued by Region 9 and the RWQCB. Dkt. No. 1; *see* AR #17 at 5 ("This Order serves as WDRs pursuant to California Water Code article 4, chapter 4, division 7 ... This Order is also issued pursuant to federal Clean Water Act (CWA) section 402 ...").
- February 3, 2020: Region 9 was required to notify San Francisco "as soon as possible after receiving notification from the EAB of the filing of [the] petition" of "the uncontested (and severable)" Permit conditions. 40 C.F.R. § 124.16(a)(2)(ii). San Francisco sent a letter to Region 9 expressing concern that it had not received the

required notice after 21 days had passed following the filing of the Petition. *See* Dkt. No. 5, Att. 2.

- February 7, 2020: Region 9 issued a Notice of Stay of Contested Permit Conditions. Dkt. No. 2. The notice stayed only the "federal Oceanside Permit, NPDES No. CA0037681" and claimed the "the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028, is currently in effect for all discharges to State waters pursuant to issuance by the RWQCB, and this stay has no impact on the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028." *Id.* at 2. This is the first time in the roughly six-year permitting process that Region 9 raised the Two Separate Permits Theory and asserted, unilaterally and without any review or comment, that there are two separate NPDES permits (a federal and a State permit) rather than a single, jointly issued NPDES Permit. *Id*. Although the relevance of the Two Separate Permits Theory was ostensibly to support Region 9's argument to stay only the conditions in the "federal" permit (as opposed to the allegedly separate, identical "State" permit), it represented a revolution in the characterization of Region 9's multi-year permit process.
- February 28, 2020: San Francisco filed a Motion to Stay Contested Permit Conditions Pending Appeal or, in the Alternative, Motion to Remand Notice of Stayed Contested Permit Conditions (Motion to Stay), and a Motion for Leave to Amend Petition for Review (Motion to Amend) that separately asked for leave to amend the Petition to substantively challenge the Two Separate Permits Theory. Dkt. No. 5.
- March 16, 2020: Region 9 filed a Response to San Francisco's Motion to Stay and Motion to Amend. Dkt. No. 8. In its Response, the Region claimed, for the first time in

the nearly six-year permitting process, that the Permit was consolidated under 40 C.F.R. § 124.4. *See* Dkt. No. 8 at 1, 3, 6-8, 10.

- May 11, 2020: The Board denied San Francisco's Motion to Stay and Motion to Amend. Dkt. No. 14.
- May 21, 2020: San Francisco filed a motion seeking partial reconsideration of the Board's May 11 Order solely with respect to denial of the Motion to Amend or, in the alternative, leave to amend the Petition to raise the host of issues caused by Region 9's belated adoption of the Two Separate Permits Theory. Dkt. No. 15.
- June 8, 2020: Region 9 filed a response to San Francisco's May 21 motion. Dkt. No. 16. In part, it argued "the Board should deny San Francisco's Motion because the Oceanside Permit is both a Federal Permit and a State Permit by operation of law and has a consolidated administrative record." *Id.* at 3.
- June 18, 2020: The Board granted San Francisco leave to supplement its petition, to brief new issues "pertaining to any potential consequences allegedly arising from the Region's post-petition characterization of the Oceanside Permit as two permits." Dkt. No. 18 at 6.
- June 22, 2020: Region 9 filed a Notice of Errata, absent meaningful explanation, requesting that the Board delete the statement included in the Region's response to San Francisco's Motion for Partial Reconsideration (Dkt. No. 16 at 3), that the agencies issued a "consolidated record" for the Permit. Dkt. No. 19.

IV. STANDARD OF REVIEW

The Board may grant review of a "permit condition or other specific challenge to the permit decision" when the petitioner shows the action was based on either "a finding of fact or conclusion of law that is clearly erroneous," or "an exercise of discretion or an important policy

consideration that the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a)(4)(i)(A),(B).

When evaluating a challenged permit decision for clear error, the Board examines the record to determine whether Region 9 exercised "considered judgment." *In re Steel Dynamics, Inc*. 8 E.A.D. 165, 191 (EAB 2000); *In re Ash Grove Cement Co*., 7 E.A.D. 387, 417-18 (EAB 1997). The Region must articulate with reasonable clarity the reasons supporting its conclusions and the significance of the crucial facts it relied on when reaching its conclusions. *In re Ash Grove*, 7 E.A.D. at 417. The record must demonstrate that the Region "duly considered the issues raised in the comments" and followed an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.,* 10 E.A.D 323, 342 (EAB 2002). When a "permitting authority provides inconsistent or conflicting explanations for its actions, the Board frequently concludes that the Region's rationale is unclear and remands for further clarity." *In re Chukchansi Gold Resort*, 14 E.A.D. 260, 280 (EAB 2009). Notably, when the Region's rationale for a permit decision is articulated for the first time on appeal and the record contains no factual evidence supporting such rationale, the Board is unable to determine whether the decision is proper; thus, remand is necessary for the Region to "provide a detailed explanation" or "reopen the permit proceedings to supplement the administrative record with such information." *In re Amoco Oil Co*., 4 E.A.D. 954, 964 (EAB 1993).

In reviewing the exercise of discretion by Region 9, the Board applies an abuse of discretion standard. *In re Guam Waterworks Auth*., 15 E.A.D. 437, 443, n.7 (EAB 2011). The Region must include an explanation for any discretionary act in the record. *See In re Ash Grove*, 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified."); *see also*

Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner ...").

V. ARGUMENT

Two months after Permit issuance, Region 9 first articulated its Two Separate Permits Theory, claiming the Permit is purportedly two separate standalone permits, a "State-only" permit and a "federal-only" permit. Dkt. No. 2. The Region's *post hoc* reframing relies on clearly erroneous findings of fact and conclusions of law. Additionally, the Region's post-Permit issuance actions violate San Francisco's due process rights. Finally, the Region's untimely Two Separate Permits Theory involves an exercise of discretion and important matters of policy that merit the Board's attention. Because the Region never raised its Two Separate Permits Theory or claimed there was a standalone "federal-only" permit until after San Francisco filed its Petition, San Francisco had no opportunity to challenge this characterization, and its egregious consequences, prior to filing this Supplement. Faced with the extensive errors resulting from the Region's *post hoc* actions, the Board has two options: (i) determine the Permit is a single, joint permit; or (ii) remand the Permit with direction to the Region to develop the record to properly support the issuance of a standalone federal permit.

A. Region 9's Claim of Two Separate Permits is Based on Clearly Erroneous Findings of Fact.

Region 9 and the RWQCB jointly issued a single Permit. While the agencies approved the Permit on different dates, both adopted the same permit. *Compare* AR #15 *with* AR #17. The agencies' actions during the permitting process and the plain language of the adopted Permit unequivocally demonstrate their intent to issue a single, joint permit. The agencies' lack of agreement regarding how to characterize the Permit, and the Region's inconsistent characterization of the Permit after its adoption, further establish the clear error of the Region's

post hoc claim of two separate permits. Because the Region's claim was first articulated after adoption of the Permit, it was impossible for San Francisco to challenge the characterization, and its consequences, during the comment period. *See* 40 C.F.R. §§ 124.13, 124.19(a)(4).

1. The Pre-Adoption Record Clearly Demonstrates a Single Permit was Jointly Issued.

Region 9 and RWQCB staff worked hand-in-hand to jointly (i) draft the Permit, (ii) meet with San Francisco during the Permit development process, (iii) review and respond to comments, and (iv) support the Permit at the adoption hearing. At no time during the Permit issuance process did either agency describe the Permit as separate standalone permits, raise the notion of issuing a separate permit for the Deepwater Outfall, or make any distinction between federal-only and State-only terms. As outlined below, the pre-adoption record is clear: the agencies issued one joint Permit.

- April 20, 2019: After almost six years of working with San Francisco on a revised Permit, and with no reference to two separate permits, the agencies noticed a joint draft Permit and sought comments. AR #6 ("EPA and the [RWQCB] Board prepared *a draft National Pollutant Discharge Elimination System permit (CA0037681) for the above discharger* in accordance with the Clean Water Act (CWA) and Porter-Cologne Water Quality Control Act.") (Emphasis added).
- August 30, 2019: The agencies issued a single Response to Comments. AR #10a. The response makes no distinction between "federal-only," "State-only," and "joint" terms. In fact, without fail, the responses use the term "we" to refer jointly to Region 9 and the RWQCB. *See, e.g.*, AR #10a at 1 ("*[W]e* summarized the comments ... *we* responded in the same tabular format ..."), at 14 ("*We* disagree that these permit terms should be limited to dry weather. ... *We* agree that this section sets forth water-quality based effluent

limitations for the Discharge Points in Table 2."), at 15 ("*We* do not make compliance determination through NPDES permits."), and at 16 ("*We* confirm that the receiving waters associated with Discharge Point Nos. CSD-001 through CSD-007 are not impaired by any pollutant, including bacteria.") (emphasis added); *see also* AR #10b (consistent use of "we" in Response column).

- September 11, 2019: The agencies conducted a single hearing to receive oral comments and consider Permit approval. AR #12–14. Region 9 representatives made public statements during the adoption hearing expressing support for the jointly issued Permit. *See* AR #14 at 47:10-14 (statement by EPA representative explaining, "EPA is here because *the permit* would authorize discharges to federal and state waters. Therefore, *the permit is jointly issued by the [Regional Water] Board and EPA*.") (Emphasis added). Similarly, the RWQCB made multiple statements about joint issuance of a single ("this") permit. *See, e.g.*, *id.* at 6:7-10 (statement by RWQCB representative explaining, "… *we issue this permit jointly* with EPA because the plant discharges to federal waters that are beyond State jurisdiction"); Dkt. No. 1, Att. 11 at 1 ("Since *this permit* covers discharges to both State and federal waters, we have worked closely with U.S. EPA to facilitate joint reissuance.").
- December 10, 2019: Region 9 adopted the exact same Permit as previously approved by the RWQCB; the only difference was an additional page with a different effective date (February 1, 2020) and approval signature (Director Tomas Torres). *See* AR #17 at 3. Neither the Permit nor the Region's adoption letter mention two separate permits, or make any distinctions between "federal-only," "State-only," and "joint" terms. *See* AR #17, 18.

During the Permit drafting and issuance process, the agencies never distinguished between State and federal permits, or different State and federal terms. The record, including the draft permit, Response to Comments, and the agencies' statements at the adoption hearing confirm the joint issuance of a single Permit. Despite multiple opportunities during this appeal, Region 9 has yet to point to evidence in the record supporting the issuance of separate permits because no such evidence exists. Accordingly, the Region's belated claim of separate permits is clearly erroneous. *In re Shell Offshore*, 13 E.A.D. 357 386 (EAB 2007) (rationale must be "adequately explained and supported" in the record). For this reason alone, the Board must either (i) determine the Permit is a single, joint permit; or (ii) remand the Permit with direction to the Region to develop the record to properly support the issuance of a standalone federal permit.

2. The Plain Language of the Permit Clearly Demonstrates a Single Permit was Jointly Issued.

Having failed to mention any intent to adopt two separate permits during the roughly six-year permit issuance process, Region 9 proceeded to approve the Permit in December 2019. The Permit's terms and conditions account for the dual permitting authorities — *i.e.*, the Deepwater Outfall discharges to offshore waters and the CSD structures discharge to nearshore waters — but do not mention separate permits subject to enforcement by each respective permitting authority or any state/federal distinction within the terms. The Permit's plain language and structure confirm that the agencies adopted a single permit:

- "The following Discharger is authorized to discharge ... in accordance with the waste discharge requirements (WDRs) *and* federal National Pollutant Discharge Elimination System (NPDES) *permit* requirements set forth in this Order." AR #17 at 1 (Emphasis added).

- "The Regional Water Board and U.S. EPA notified the Discharger and interested agencies and persons of their *intent to jointly issue* WDRs and NPDES permit requirements ..." *Id*. at p. 5 (Emphasis added).

- "The Regional Water Board intends that joint issuance of *this Order* with U.S. EPA will serve as its certification under CWA section 401 that discharges pursuant to *this Order* comply with 33 U.S.C. sections 1311, 1312, 1313, 1316, and 1317." *Id.* (Emphasis added).

- "The Discharger shall comply with all 'Standard Provisions' included in Attachment D" in which "references to 'Regional Water Board' shall be interpreted as 'Regional Water Board and U.S. EPA,' and references to 'Regional Water Board Executive Officer' shall be interpreted as 'Regional Water Board Executive Officer and U.S. EPA." *Id.* at p. 9.

- "The Discharger shall comply with all applicable provisions of the 'Regional Standard Provisions, and Monitoring and Reporting Requirement' (Attachment G)," which are regional- and State-specific permit terms that are applied to all discharges and aspects of the Westside Facilities, including discharges into federal waters via Discharge Point No. 001. *Id.* (*i.e.*, Attachment G's applicability is not limited to "state-only" terms).

- "*This Order* serves as WDRs pursuant to California Water Code article 4, chapter 4, division 7 (commencing with § 13260). *This Order* is also issued pursuant to federal Clean Water Act (CWA) section 402 and implementing regulations adopted by U.S. EPA and Water Code chapter 5.5, division 7 (commencing with § 13370). *It shall serve as a National Pollutant Discharge Elimination System (NPDES) permit authorizing the Discharger to discharge into waters of the United States as listed in Table 2 subject to the WDRs and NPDES permit requirements in this Order*." *Id.* at p. 5 (Emphasis added).

The Board has agreed that the plain language of the Permit reflects the issuance of a single permit: "Neither the Permit nor the Fact Sheet describe two permits being issued; ... all descriptions in these two documents appear as though one permit is being jointly authorized." Dkt. No. 14 at 11, n. 10

EPA knows how to identify federal-only terms in a permit issued with a state and relying on separate state authority. For example, under the Clean Air Act where jointly issued permits are routine, EPA explicitly identifies federal permit terms. *See* 40 C.F.R. § 70.6(b)(2) ("[T]the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act ..."). In contrast, here, Region 9 did not identify any federally enforceable provisions or make any distinctions between "federal-only," "State-only," and "joint" terms. *See* AR #17, 18.

As the Board recognized, Region 9 waited until after San Francisco filed its Petition before first characterizing the Permit as two permits. *See* Dkt. No. 18 at 6 (acknowledging the "Region's *post-petition* characterization of the Oceanside Permit as two permits.") (Emphasis added). This belated characterization confirms the Region's purported claim of separate permits is nothing more than an arbitrary, *post hoc* clearly erroneous finding of fact which merits remand provided the Board does not find that the Permit is a single, jointly issued permit. *In re City of Taunton*, NPDES Appeal No. 15-08 (EAB Oct. 30, 2015) (Order at 3) (remand necessary where "Board cannot ascertain from the record the basis for the Region's decision [or] the Region's rationale in support").

3. The Post-Adoption Record Clearly Demonstrates Region 9's Inconsistent Characterization of the Permit.

Even after Region 9 first disclosed its Two Separate Permits Theory in its Notice of Stay (Dkt. No. 2), it has continued, throughout this appeal, to alternatively reference the Permit as a single permit. The Region's continued references to a single permit reveals an inconsistent and conflicting explanation for the nature of the final permit(s) by undermining its claim of separate standalone State and federal permits.

In its response to San Francisco's Petition, Region 9 nevertheless continues to refer to a single Permit. *See, e.g.*, Dkt. No. 6 at 1 ("The Oceanside Permit ... was adopted by the RWQCB on September 11, 2019 ... EPA Region 9 signed the Oceanside Permit ... on December 10, 2019"), at 13 ("EPA has worked with San Francisco for more than six years on Oceanside Permit reissuance."), and at 14 ("Between October 2018 and December 2019, EPA and California met nine times with San Francisco to engage in in-depth discussions about draft permit conditions."). Likewise, in its response to San Francisco's Motion for Partial Reconsideration, the Region claims that "EPA issued the Federal Permit" and the California "RWQCB issued the State

Permit" but then states that "the Oceanside Permit [singular] is both a Federal and a State Permit." Dkt. No. 16 at 3. The Region then maintains that San Francisco "had the opportunity to comment on and challenge all of the draft and final permit terms" and "[t]here is no disagreement that the permit was jointly issued under separate federal and state authorities" using the singular "permit" without differentiating between a federal and State permit. *Id.* at 7; *see also* Dkt. No. 18 at 5 (Board Order pointing out the Region's inconsistency).

Region 9's admission of the issuance of a single, joint Permit and its inability to support its claim of two separate permits in this appeal, let alone anywhere in the record, reveals the clear error in its *post hoc* re-characterization of the Permit as separate permits.

Likewise, Region 9's repeated statements in this appeal that there are no standalone State-only permit terms undermine the basis for the Region's Two Separate Permit Theory. *See* Dkt. No. 8 at 9 ("There are no State-only provisions of the Oceanside Permit"); Dkt. No. 16 at 9 (repeating the same statement). The Region cannot possibly rely on post-Permit adoption statements to support the purported issuance of separate permits and simultaneously proclaim there are "no State-only provisions." A State-only permit would necessarily require State-only provisions; otherwise a "State-only" permit would have been unnecessary and wholly redundant of the "federal" permit. The Region's inconsistent positions and rationales demonstrate the clear error of its two separate permits claim.

Given Region 9's clearly erroneous findings of fact, the Board should either (i) determine that the Permit is a single, joint permit; or (ii) remand the Permit with direction to the Region to develop a proper record. *In re Amoco Oil Co*., 4 E.A.D. at 964 (remand necessary when rationale for permit decision is articulated for first time on appeal); *In re Chukchansi Gold Resort*, 14 E.A.D. at 280 (When a "permitting authority provides inconsistent or conflicting

explanations for its actions, the Board frequently concludes that the Region's rationale is unclear and remands for further clarity.").

B. Region 9's Purported Issuance of Two Separate Permits is Based on Clearly Erroneous Conclusions of Law.

Alternatively, even if the Board determines that Region 9 intended separate standalone State and federal permits during the public notice and comment process, the Region's clearly erroneous conclusions of law mandate the Board either (i) determine the Permit is a single, joint permit; or (ii) remand the Permit with direction to the Region to develop the record to properly support issuance of a standalone federal permit.

Region 9 unquestionably erred. It failed to (i) tie its federal permitting authority to the Permit terms, (ii) comply with basic procedural requirements mandated under 40 C.F.R. Part 124, and (iii) properly consolidate the alleged permits under 40 C.F.R. § 124.4. To the extent the Board does not find that the Permit was a single, jointly issued permit, each of these clearly erroneous matters of law individually warrant remand of the Permit. *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.,* 10 E.A.D at 346 (remanding permit because Region failed to explain how the permit comports with regulatory requirements).

As the Board has recognized, the record is silent as to the issuance of separate permits, let alone any reference to the Two Separate Permits Theory. *See* Dkt. No. 14 at 10, n. 11; Dkt. No. 18 at 6. This absence of any reference to separate permits in the record, combined with Region 9's first articulation of the Two Separate Permits Theory after San Francisco filed its Petition, made it impossible to raise the Region's clearly erroneous matters of law prior to filing this Supplement. *See* 40 C.F.R. §§ 124.13, 124.19(a)(4).

1. Region 9 Failed to Justify Implementation of the Permit Conditions Based on Its Limited Permitting Authority.

As the Board acknowledges, Region 9's permitting authority is limited to the Deepwater Outfall. *See* Dkt. No. 14 at 3, 11. If accurate, the record for the purported standalone "federal-only permit" the Region now claims was issued must explain the Region's basis and authority for inclusion of each of the conditions in the context of regulating the Deepwater Outfall. *See, e.g.*, 40 C.F.R. § 124.8(b)(4) (the fact sheet is required to contain "[a] brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record"); *see also In re Ash Grove*, 7 E.A.D. at 417 (Region must articulate with reasonable clarity the reasons for its conclusions and the significance of the critical facts in reaching those conclusions); *In re Amoco Oil Co.*, 4 E.A.D. at 964 (remand necessary when rationale for permit decision is articulated for first time on appeal).

In issuing the Permit, Region 9 failed to explain how each of the contested permit terms — the generic water quality based effluent limitations ("WQBELs"), the Long Term Control Plan ("LTCP") Update, and isolated sewer overflows — as well as other CSD-specific requirements are tied to regulation of the Deepwater Outfall. The Region also explicitly relied upon data and information to support adoption of the contested permit terms that is irrelevant to regulation of the Deepwater Outfall. As a result, unless the Board finds that the Permit is a single, jointly issued permit, the Board must remand the Permit to the Region and require the Region to adequately support the Permit terms in the context of its narrow regulation of the Deepwater Outfall.

Generic WQBELs. Region 9's attempted adoption of the generic WQBELs (Attachment G, section I.I.1) is solely supported by State law that is irrelevant to the Deepwater

Outfall. In its Response to Comments, the Region states, "[r]egarding Attachment G, section I.I.1 ... [t]his tentative order is intended to serve as waste discharge requirements under State law and complies with [California] Water Code section 13263(a) by requiring that neither the treatment nor the discharge of pollutants may create pollution, contamination, or nuisance." AR #10a at 13. The Region, therefore, cites *California law*, as the basis for imposing generic WQBELs.

Further, in its response to San Francisco's Petition, Region 9 tried to justify imposing generic WQBELs by arguing: (i) "San Francisco's main recreational beach (Ocean Beach) was posted with 'No Swimming' signs for 17 days due to combined sewer discharge events" and (ii) "20 percent of recreational users were in contact with receiving water during or immediately after CSDs." Dkt. No. 6 at 22. Neither of these explicitly claimed bases for imposing the challenged generic WQBELs in a "federal-only" permit have a nexus to the scope of the Region's authority in issuing the Permit. Rather than pertaining to the regulation of the Deepwater Outfall, these factual bases pertain exclusively to discharges to nearshore waters. As a result, these facts cannot provide a justification for the adoption of generic WQBELs in a stand-alone "federal-only" permit and the Region's reliance on the facts to justify its permitting action is erroneous.

LTCP Update. Region 9 does not provide any justification tied to federal jurisdiction for Task 3 in the LTCP Update, which requires San Francisco to submit a "Consideration of a Sensitive Areas Report that evaluates, prioritizes, and proposes control of alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of discharges to sensitive areas from Discharge Points Nos. CSD-001, CSD-002, CSD-003, CSD-005, CSD-006, and CSD-007." AR #17 at 22. The identified CSD outfalls are nearshore discharges, not the Deepwater Outfall.

However, nothing in the record explains why the Region's regulation of the Deepwater Outfall requires submission of a report addressing a reduction in the magnitude or frequency of discharges to nearshore waters located 3.8 or more miles from the offshore outfall. *See* AR #9, Att. B, at 9 (San Francisco inquiring about the Region's jurisdiction of the LTCP update because "it is not clear what element(s) is being cited and it is not clear what specific element or authority the Regional Board and EPA is relying on for the position they have the legal authority for each task and sub-task in Table 7"); *see also* AR #10a at 16-17 (Region's response fails to explain the relationship between each task in Table 7 of the LTCP Update and its limited federal authority over the Deepwater Outfall). The Region, therefore, failed to articulate a legitimate basis in the record for imposing Task 3 in the LTCP Update in a "federal-only" permit.

Isolated Sewer Overflows. The record lacks any explanation for the nexus between regulation of isolated sewer overflows — which do not even reach shallow coastal waters, let alone offshore federal waters — and discharges from the Deepwater Outfall. Rather, when San Francisco argued in its comments on the draft Permit that neither "EPA or the State has jurisdiction over discharges within the combined sewer system that do not reach surface waters," (AR# 9, Att. A at 7-8), the Region responded that "*the State does have 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." AR #10b at 11 (Emphasis added). Region 9 provided no explanation of how its limited jurisdiction of discharges from the Deepwater Outfall authorizes it to implement permit terms concerning isolated sewer overflows. In fact, the Region tries to justify inclusion of these terms by exclusively relying upon State law. That is an erroneous basis for including the challenged terms in a "federal-only" permit and effectively

concedes that the Region does not have independent jurisdiction to regulate the challenged permit terms targeting isolated sewer overflows in a "federal-only" permit.

Other Provisions. Other conditions implemented in the Permit solely relate to discharges to State waters. For example:

- Section VI.C.5.a.v requires San Francisco to submit information regarding duration, cause, corrective actions taken or planned for each prohibited dry weather discharge from CSD-001—CSD-007. AR #17 at 18;
- Section VI.C.5.a.vi requires San Francisco to "implement measures to minimize the volume of solid and floatable materials in combined sewer discharges" which includes discharges to CSD-001—CSD-007. *Id*;
- Section VI.C.5.a.viii requires San Francisco to inform the public of the location of CSD outfalls, the actual occurrences of CSDs, the possible health and environmental impacts of CSDs, and the recreational or commercial activities affected as a result of CSDs. *Id*; and
- Section VI.C.8 requires San Francisco to submit a report to the agencies evaluating the quality of the CSDs and the efficacy of the CSD controls during wet weather. *Id.* at 23-24.

All of these terms — which include those contested in the Petition and those otherwise described above — are tied to nearshore discharges via the CSD structures. The record is devoid of any rationale explaining how these Permit conditions are applicable to Region 9's permitting authority over the Deepwater Outfall. Even if the Board concludes that the agencies intended to issue two separate permits, and did so in a manner consistent with law, the Board must remand and direct the Region to supplement the record with "applicable statutory or regulatory

provisions and appropriate supporting references to the administrative record" supporting its permitting authority over these conditions. 40 C.F.R. § 124.8(b)(4); *In re San Jacinto River Auth.*, 14 E.A.D. 688, 701 (EAB 2010) (permit remanded because "administrative record lacks a complete and cogent analysis of how the Region applied the [state WQS] to the permitting decision at issue."); *In re Amoco Oil Co.*, 4 E.A.D. at 964.

2. Region 9 Failed to Comply With Basic Administrative Procedures Mandated Under 40 C.F.R. Part 124.

Region 9's belated claim of two separate permits violates basic administrative procedures mandated by Part 124, which outlines the procedural prerequisites to issuance of a final permit. Part 124 requires the Region to develop a fact sheet explaining the rationale for the permit, publicly notice the draft permit and provide access to the record for it, receive and respond to public comment, and base its permitting decision on the underlying record. 40 C.F.R. §§ 124.7–124.11, 124.17, 127.18.

"Neither the Permit nor the Fact Sheet describe two permits being issued; ... all of the descriptions ... appear as though one permit is being jointly authorized." *See* Dkt. No. 14 at 11, n. 10. Rather, the "Region's post-petition characterization of the Oceanside Permit as two permits" arose roughly two months after it issued the Permit and a month after San Francisco filed its Petition for Review. Dkt. No. 18 at 6.

For example, 40 C.F.R. § 124.10 requires that Region 9's public notice of the draft Permit include "any additional information considered necessary or proper." 40 C.F.R. § 124.10(d)(1)(x). Section 124.10 also envisions that the public notice "describe more than one

permit or permit actions." *Id.* at § 124.10(a)(3).[3] These obligations mandated notice of the purported issuance of separate State and federal permits.

Region 9's issuance of a single, jointly issued Permit imposes numerous requirements anchored to what was purported to be a single "effective date" during the public comment process. Examples include:

- Implementation of new notification and reporting requirements for sewer overflows "within six months of the effective date ..." AR #17 at 17.
- Requirement to submit a System Characterization Report, San Francisco's completed and planned public participation efforts, and a Consideration of Sensitive Areas Report "[w]ithin 48 months of this Order's effective date." *Id.* at 21-22.
- Requirement to submit a Wet Weather Operations Report "[w]ithin 24 months of this Order's effective date" to be used to update San Francisco's Operation and Maintenance Manual "[w]ithin 90 days of receiving written concurrence from the Regional Water Board Executive Officer and U.S. EPA." *Id*. at 22.
- Requirement to prepare and submit an initial toxicity reduction evaluation work plan "within 90 days of the effective date of this Order." *Id.* at E-13–E-14.

The imposition of different deadlines for these requirements — due to different "effective dates" in separate "federal" and "State" permits — is clearly "additional information [] necessary or proper" that needed to be disclosed during the permitting process. 40 C.F.R. § 124.10(d)(1)(x). However, no mention of the consequences of two separate permits, on the deadlines for deliverables or in the Permit terms, were identified in the Fact Sheet or the Response to Comments.

[3] *See* Section V.B.3.b, *infra*, for a discussion of fact sheet requirements. San Francisco incorporates this discussion herein by reference as if set forth in full.

Attachment F, Section I.B. of the Permit, and applicable federal regulations at 40 C.F.R § 122.46, also "limit the duration of NPDES permits to a fixed term not to exceed five years." AR #17 at F-4. Conflicting expiration dates by the Region and the RWQCB create an irreconcilable conflict in both the duration of the Permit and the timing for permit reapplication. This conflict is but one demonstration of the consequences "arising from the Region's post-petition characterization of the Oceanside Permit as two permits." Dkt. 18 No. at 6.

Moreover, San Francisco is not a mind reader and cannot discern which Permit conditions the agencies maintain belong in the "State-only" and "federal-only" permits. Had the Region raised the concept of separate permits prior to final Permit issuance, San Francisco would have sought clarity on the conditions applicable to each permit.

Not knowing of Region 9's Two Separate Permits Theory or its claimed issuance of a standalone federal-only permit, San Francisco never had the opportunity to raise the administrative burdens and unnecessary duplicative expenditures of taxpayers' funds caused by purported issuance of separate permits. Absent such information, San Francisco (and other interested parties) lacked sufficient notice of the Region's position. *See e.g.*, *Natural Res. Defense Council v. U.S. E.P.A.*, 279 F.3d 1180, 1187 (9th Cir. 2002) (adequate notice depends upon "whether interested parties reasonably could have anticipated the final rulemaking from the draft permit") (citation omitted); *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) ("the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table'") (citations omitted); *In re Ash Grove*, 7 E.A.D. at 417 (Region must articulate with reasonable clarity the reasons for its conclusions); *In re Upper Blackstone*, 14 E.A.D. 577, 589–90 (EAB 2010) (remanding permit for failure to

articulate basis for the permit provision in the record); *In re Amoco Oil Co.*, 4 E.A.D. at 964 (remand necessary when rationale for permit decision is articulated for first time on appeal).

Because neither San Francisco nor the public had notice of the Two Separate Permits Theory or the claimed issuance of separate permits at any time during the permitting process, the Board should either (i) determine that the Permit is a single, joint permit; or (ii) remand the Permit to Region 9 to properly develop the record to support the issuance of a standalone federal permit.

3. Region 9 Failed to Properly Consolidate the Permit under 40 C.F.R. § 124.4.

Attempts by Region 9 to rely on permit consolidation under 40 C.F.R. § 124.4 to justify its untimely claim of two separate permits is clearly erroneous as a matter of law. To the extent the Region seeks to rely on consolidation under Section 124.4, and the Board does not rule that the Permit is a single, jointly issued permit, the Board must remand the Permit and require that the Region develop a proper record to support consolidation.

a) *Consolidation is Not Applicable to the Oceanside Permit.*

Consolidation under Section 124.4 envisions the issuance of two physically separate permits. For example, "[t]he first step in consolidation is to prepare *each* draft permit at the same time" and agencies must coordinate on the "draft *permits*" during the administrative process. 40 C.F.R. § 124.4(a)(1) (Emphasis added). Similarly, the section recognizes that consolidation can result in "the final *permits*" being issued jointly or separately. *Id.* at § 124.4(a)(2) (Emphasis added). The section also allows consolidation "so that *all permits* expire simultaneously." *Id.* at § 124.4(b) (emphasis added).[4] The record, however, is silent with

[4] *See* Section V.B.2, *supra*, discussing burdens resulting from the purported issuance of separate permits with different effective dates, cutting against the purpose of consolidation; *see also* 40 C.F.R. § 124.1(f) (allowing for "coordinate[d] decisionmaking when different permits will be issued by EPA and approved State programs").

respect to issuance of two separate permits (Dkt. No. 14 at 11, n. 10), confirming the inapplicability of consolidation here.

The consolidation provision at 40 C.F.R. § 124.4 falls within subpart A of Part 124. This placement further confirms Region 9's obligation to raise consolidation during the permitting process. Subpart A "describes the steps EPA will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits. Subpart A also covers assembling an administrative record, responding to comments, issuing a final permit decision, and allowing for administrative appeal of the final permit decisions." 40 C.F.R. § 124.1(b). The Board should not endorse any attempts by the Region to turn the provisions of subpart A of Part 124 on their head, and use them as a basis to defend the Region's failure to comply with its administrative obligations, rather than as road map for the Region to follow during the permitting process.[5]

Moreover, Region 9's own actions refute any claim of consolidation. First, the Region informed the Board that the record was a single, consolidated record. Dkt. No. 16 at 3. Faced with the RWQCB's rejection of a consolidated record (Dkt. No. 17, Att. 1), the Region disavowed its claim of a consolidated record. *See* Dkt. No. 19 at 2 (Region and RWQCB "did not consolidate our administrative records"). This action conflicts with Section 124.4's direction that "the administrative records ... on those [consolidated] permits should also be consolidated." 40 C.F.R. § 124.4(a)(2). The Region's rejection of its prior claim of a joint record is evidence that the Region's *post-hoc* characterization is not supported by either the law or the facts. It also

[5] Consolidation is generally intended to address situations where "a facility ... requires a permit under *more than one statute* covered by these regulations"— a fact pattern not present here where the CWA is the only relevant statute. 40 C.F.R. § 124.4(a)(1) (Emphasis added). *See also id.* at § 123.24(b)(5) (State/EPA Memorandum of Agreement to address "joint processing of permits ... for facilities or activities which require permits from both EPA and the State under different programs.").

suggests the Region is willing to say or do anything to avoid acknowledging the fundamental errors it made during the permitting process. Second, the Region claims that the agencies "consolidated the Federal and State Permits pursuant to 40 C.F.R. § 124.4 to avoid any inconsistencies in the Federal and State Permits." Dkt. No. 8 at 8. The different effective dates of November 1, 2019 and February 1, 2020, adopted by the RWQCB and the Region, respectively, unquestionably demonstrate that there are in fact significant inconsistencies at issue here. The Board must hold the Region to account for its attempt to side-step compliance with mandated Part 124 requirements.

b) *Region 9 Failed to Follow the Procedures Required for Permit Consolidation.*

Even if section 124.4 were applicable, Region 9 erred as a matter of law by failing to follow any of the procedures required for permit consolidation.

Importantly, the record contains no reference to consolidation. An electronic search of the Permit, Fact Sheet, and other attachments reveals not one reference to Section 124.4 or the term "consolidated." The Region has been unable to provide anything to bridge this gaping hole in the record. The Region first raised consolidation when opposing San Francisco's February and May 2020 motions seeking leave to amend its Petition to address the Two Separate Permits Theory. However, the Region's oppositions fail to cite to a single reference to consolidation in the record because none exists. *See* Dkt. No. 8 and Dkt. No. 16.

Region 9 could only consolidate the allegedly separate State and federal permits if both the Region and the RWQCB agreed to consolidate. *See* 40 C.F.R. § 124.4(c)(2) (permit consolidation allowed where Regional Administrator and State Director "*agree* to consolidate draft permits whenever a facility or activity requires permits from both EPA and an approved

State.") (Emphasis added).[6] While this provision does not "specify required procedures to consolidate" or "require any particular documentation of the agreement or intent to consolidate" (Dkt. No. 14, at 5, n. 4), it cannot excuse the Region's failure to reference consolidation at any point. Further, at this late stage, the Region and the RWQCB do not even agree on whether the record was "consolidated" or not. *See* Dkt. No. 17, Att. 1; Dkt. No. 19 at 2.

The Board cannot turn a blind eye to Region 9's failure to raise consolidation during the permitting process. This is particularly true given the mandates for fact sheets under 40 C.F.R. § 124.8. Section 124.8 requires, at a minimum, that the fact sheet contain the following:

- A description of "the principal facts and the significant factual, *legal*, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8(a) (emphasis added);
- A "brief summary of the basis for the draft permit conditions including *references to applicable statutory or regulatory provisions* and appropriate supporting references to the administrative record required by § 124.9 ..." *Id.* at § 124.8(b)(4) (emphasis added); and
- "A description of the procedures for reaching a final decision on the draft permit ..." *Id.* at § 124.8(b)(6).[7]

The failure to include a discussion of consolidation in the Fact Sheet violated the regulatory requirement that the Region provide information on the legal basis, regulatory provisions, and procedures relevant to a final permit.

In fact, to provide adequate notice, Region 9 was obligated to raise consolidation during the permitting process. *See e.g.*, *Natural Res. Defense Council v. U.S. E.P.A.*, 279 F.3d at 1187 (adequate notice depends upon "whether interested parties reasonably could have anticipated the final rulemaking from the draft permit") (citation omitted); *Am. Med. Ass'n v. United States*, 887

[6] Consolidation is also permissible when the permit applicant recommends consolidation, which San Francisco did not do. *Id.* at § 124.4(c)(3).

[7] *See also id*. at § 124.10(d)(1)(x) (public notice to include "[a]ny additional information considered necessary or proper.").

F.2d at 768 ("the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table'") (citation omitted).

The Board also cannot ignore Region 9's belated claims of consolidation that occurred after its issuance of the Permit. Despite raising the Two Separate Permits Theory in its Notice of Stay, the notice is silent with respect to consolidation. Similarly, the Region's Response to San Francisco's Petition fails to addresses consolidation.[8] Had the Region truly relied upon consolidation to support its Two Separate Permits Theory, it should have raised it before having to oppose San Francisco's challenge of the theory on appeal.

Region 9 acted erroneously by failing to inform San Francisco or the public it was pursuing consolidation of two separate permits during the public notice period. Any attempt by the Region to raise consolidation now is mere gamesmanship and the Board should not condone the Region's efforts to disregard the procedural mandates under Part 124. Rather, the Board should either (i) determine that the Permit is a single, joint permit; or (ii) remand the Permit to the Region to develop a proper record and, to the extent the Region seeks to rely on consolidation to support its claim of separate permits, require the Region to properly notice its consolidation effort in accordance with the mandates of Part 124. *See In re Amoco Oil Co.*, 4 E.A.D. at 964.

4. Region 9 Failed to Adhere to the Procedures Mandated Under the Memorandum of Agreement Between EPA and California

The *NPDES Memorandum of Agreement between the United States Environmental Protection Agency and the California State Water Resources Control Board* ("MOA") outlines procedures for the RWQCB's issuance of NPDES permits under its delegated authority. These

[8] The Region's 39 page Response fleetingly references 40 C.F.R. § 124.4(c)(2) and the "consolidated" Permit in the Introduction buts fails to cite any support for these passing references. Dkt. No. 6 at 1.

procedures specify that (i) the RWQCB provide the Region with a pre-notice copy of its proposed permit for review, (ii) the Region provide comments/objections within a specified timeframe, (iii) the RWQCB respond to the Region's comments, (iv) the RWQCB provide the Region with a draft permit and fact sheet as part of the public notice process, and (v) the RWQCB provide the Region with a copy of the final adopted permit. Dkt. No. 13, Att. 1 at 11-25. Despite claims that the Permit is two separate permits, there is nothing in the record documenting the agencies' compliance with the MOA mandated procedures for issuance of a "State-only" permit. To the extent the Board does not rule that the Permit is a single, jointly issued permit, the Board should remand the Permit and direct the Region to ensure compliance with the MOA prior to the issuance of separate standalone State and federal permits.

C. Region 9's *Post Hoc* Two Separate Permits Theory Violates San Francisco's Due Process Rights, Including its Right to Fair Notice.

Region 9's failure to raise the issuance of separate permits or to notify San Francisco of its Two Separate Permit Theory until months after issuance of the final Permit and the filing of San Francisco's Petition violates San Francisco's due process rights. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citations omitted); *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case."') (citation omitted); *see also In re Gen. Elec. Co*., 4 E.A.D. 615, 627, n.11 (EAB 1993) (citing *Cleveland Board of Educ.*). The Region's failure to delineate between "federal-only" permit terms, and State-only terms in the final issued Permit also violates the Region's obligation to provide "fair notice" in issuing a final NPDES permit. *See, e.g., U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (an

agency has an obligation to promulgate clear and unambiguous standards). To ensure protection of San Francisco's due process rights, the Board should remand the Permit and direct the Region to comply with all applicable requirements related to issuance of a standalone federal permit.

The circumstances here are precisely what the fundamental concepts of due process and fair notice intend to safeguard against — two months *after* the Permit was issued, Region 9 first claimed the issuance of separate permits triggering unforeseen consequences without any evidence in the record to support its claims and no opportunity for San Francisco to comment or object. Whether the departure from these core Constitutional requirements was intentional or not, it is a textbook example of poor governance that cannot be allowed to stand.

D. Region 9's Two Separate Permits Theory is an Exercise of Discretion and Raises Important Policy Considerations that Warrant Board Review.

1. Region 9 Abused Its Discretion When Re-Characterizing the Jointly Issued Permit as Separate Permits Months After Permit Adoption.

When articulating its Two Separate Permits Theory on February 7, 2020, and claiming the single, jointly issued Permit was really two separate permits, Region 9 exercised its discretion; it did not simply re-iterate the facts and law. *Supra*, Section V.A, B (describing the Region's clearly erroneous findings of fact and conclusions of law). In doing so two months after issuing the Permit, however, the Region abused its discretion. *See In re Guam Waterworks Auth*., 15 E.A.D. at 443, n.7 (Board applies an abuse of discretion standard in reviewing discretionary actions and will only uphold Region's reasonable exercise of discretion if it is "cogently explained and supported in the record.").

As noted above, the record is bereft of any reference to separate permits, including any discussion of how the Permit terms are tied to Region 9's permitting authority over the Deepwater Outfall. The Region's process violates mandates under Part 124 as well as San

Francisco's due process rights. *See* Sections V.B, C, *supra*. Tellingly, the Region provides no explanation for its actions despite multiple opportunities during this appeal to do so. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. at 48 ("[A]n agency must cogently explain why it has exercised its discretion in a given manner ..."); *In re Ash Grove*, 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified.").

Because the record contains no justification for Region 9's exercise of discretion in claiming two separate permits exist, and provided the Board does not rule that the Permit is a single, jointly issued permit, the Board must remand the Permit and direct the Region to explain the basis for this discretionary act. 40 C.F.R. § 124.19(a)(4)(i)(B); *In re Desert Rock*, 14 E.A.D. 484, 530, 539–40 (EAB 2009) (concluding that Region abused its discretion and remanding permit).

2. The Board Should Address the Important Policy Considerations Raised by the Purported Issuance of Two Separate Permits.

Region 9's post-Permit actions raise a host of "important policy consideration[s]" warranting Board review. 40 C.F.R. § 124.19(a)(4)(i)(B).

- Different effective dates create havoc, uncertainty, and unnecessary expenditures of taxpayer funds *i.e*., requiring submittal of identical reports to Region 9 and the RWQCB for review and approval, but at different times. Similarly, the different effective dates trigger different permit reapplication and termination dates. *See* Section V.B.2, *supra*.
- The alleged issuance of separate permits despite any delineation of separate "federal-only" versus "State-only" terms, and no explanation of such action in the fact sheet, violates basic administrative procedure and San Francisco's due process rights. *See* Section V.B.2-3, V.C, *supra*. If the Region's intended

outcome was separate permits, the Board should require that the Permit clearly identify that fact *before* adoption, delineate the separate provisions, and identify the appropriate support for each provision within the corresponding agency's jurisdiction.[9] Because the Region failed to comply with any of these requirements, Board intervention is necessary to ensure the Region "provide[s] greater clarity for permittees in future permitting decisions." Dkt. No. 14 at 12, n. 10.

- The purportedly separate permits create a risk that challenged conditions pending before the Board could be subject to interpretation in federal court before final agency action via the Board as a result of either an EPA enforcement action of the "State-only" permit or a citizen suit. Likewise, to the extent that there are no "State-only" terms, as argued by the Region, an unnecessary risk arises that federal and state courts will interpret the same terms in the two separate permits differently in the event of enforcement by state or federal authorities.

These important policy considerations merit the Board's review and remand of the Permit. 40 C.F.R. § 124.19(a)(4)(i)(B); *see also In re Desert* Rock, 14 E.A.D. at 539–40. The Board should require that the Region specify early in the permitting process whether the agencies are issuing a single, jointly issued permit or separate standalone permits. In doing so, the Region must identify which conditions it is implementing and provide support in the record that explains how such conditions are tied to its permitting authority.

[9] *See* Section V.A.2, *supra*, citing Clean Air Act requirements to identify federally enforceable terms. 40 C.F.R.§ 70.6(b)(2)

VI. REQUESTED RELIEF

In addition to the relief requested in its original Petition, San Francisco respectfully requests that the Board do all of the following:

- Find that Region 9's Two Separate Permits Theory is based on clearly erroneous findings of fact and conclusions of law, violates San Francisco's due process rights, and fails to provide fair notice;
- Find that Region 9 abused its discretion in belatedly articulating and imposing the Two Separate Permits Theory;
- Find that the Two Separate Permits Theory raises important policy considerations that merit the Board's review;
- Make a determination as to whether the Permit is a single, jointly issued permit or separate standalone permits and provide support, including reference to the record, for its ruling. If the Board cannot make such a determination, that alone is a sufficient basis for the Board to remand the Permit with direction to the Region to properly supplement the record to allow for a such a determination to be made; and
- If the Board rules the Permit is in fact separate permits, or makes no ruling as to whether the Permit is one or two permits, remand the Permit and direct Region 9 to comply with the procedural requirements of Part 124. At a minimum, the Board should require that the Region (i) provide proper notice and comment about the Two Separate Permits Theory, (ii) clearly delineate the "federal-only," "State-only," and joint permit conditions, (iii) explain the basis for adopting the all "federal-only" and joint Permit conditions relative to the EPA's jurisdiction

to regulate discharges from the Deepwater Outfall, and (iv) to the extent the Region relies on consolidation, properly consolidate in accordance with 40 C.F.R. § 124.4 and related Part 124 requirements.

VII. CONCLUSION

For the reasons outlined above, the Board should either (i) determine the Permit is a single, jointly issued permit; or (ii) remand the Permit with direction to Region 9 to develop a record that properly supports the issuance of a standalone federal permit.

VIII. STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

In accordance with the Board's Order, the undersigned counsel hereby certify that this Supplement to Petition for Review does not exceed 10,000 words. Not including the caption, table of contents, table of authorities, signature block, statement of compliance with the word limitation, and certification of service, this Supplement to Petition for Review contains 9,972 words.

Dated: June 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, a true and correct copy of the foregoing Supplemental Petition for Review was filed electronically using the EAB eFiling System and was served on the parties by electronic mail at the addresses specified below:

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