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	)	
	)	

CITY AND COUNTY OF SAN FRANCISCO'S MOTION FOR PARTIAL RECONSIDERATION
OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

I. INTRODUCTION

The City and County of San Francisco ("San Francisco") respectfully submits this motion in connection with the Environmental Appeals Board's ("Board") May 11, 2020, *Order Denying Motion to Stay or, in the Alternative, to Remand Notice of Stayed Contested Permit Conditions and Denying Motion for Leave to Amend Petition for Review* ("Order"). In accordance with 40 C.F.R. § 124.19(m), San Francisco seeks a partial reconsideration of that Order solely with respect to the Board's denial of the Motion for Leave to Amend Petition for Review ("Denial"). In issuing the Denial, the Board failed to address San Francisco's request to challenge the Two Separate Permits Theory as it substantively relates to this appeal, and erroneously denied the Motion to Amend by incorrectly assuming that: (1) the request to amend related to whether the contested conditions of San Francisco's National Pollution Discharge Elimination System ("NPDES") permit no. CA0037682 ("Oceanside Permit" or "Permit") were stayed; (2) Region 9 of the Environmental Protection Agency ("EPA Region 9") acted within the scope of its authority regardless of whether there is one Permit or two, and (3) EPA Region 9's purported consolidation of the Permit under 40 C.F.R. § 124.4(c)(2) was properly executed. To the extent the Board determines that a Motion for Reconsideration under 40 C.F.R. § 124.19(m) is not the appropriate avenue to seek the leave to amend requested herein – if, for example, the Board concludes that its May 11 Order is not a "final disposition" subject to reconsideration – San Francisco alternatively files this pleading as a Motion for Leave to Amend the Petition.

II. BACKGROUND

On January 13, 2020, San Francisco filed a Petition for Review of San Francisco's Oceanside Wastewater Treatment Plant's NPDES Permit Issued by EPA Region 9 ("Petition") (Dkt. No. 1) with the Board. The Petition challenged three terms in the final Permit: (i) the generic water quality based effluent limitations ("WQBELs") at Section V and Attachment

G.I.I.1; (ii) the "LTCP Update" at Section VI.C.5.d; and (iii) the reporting and other regulation of isolated sewer overflows at Section VI.C.5.a.ii.b. At the time that San Francisco filed the Petition, it had no idea EPA Region 9 was going to articulate the novel Two Separate Permits Theory and contend the Oceanside Permit was two separate permits. *See, e.g.*, *Id.* at 2, n.1 (Permit was "jointly issued by [the] California [San Francisco Bay Regional Water Quality Control Board] and EPA.").

On February 3, 2020, San Francisco sent a letter to Tomas Torres, Director of the Water Division for EPA Region 9, expressing concern that the Region had not issued an automatic stay for the terms challenged by the Petition. *See* Dkt. No. 5, Att. 2 at 3. In response, by letter dated February 7, 2020, EPA Region 9 issued a Notice of Stay of Contested Permit Conditions ("Notice of Stay") (Dkt. No. 2). In doing so, for the first time since beginning the process for issuance of San Francisco's Permit almost six years ago, EPA Region 9 raised the Two Separate Permits Theory. Dkt. No. 2 at 1-2. Although the relevance of the Two Separate Permits Theory in the Notice of Stay was ostensibly to support EPA Region 9's argument to stay only the conditions in the "federal" permit (as opposed to a separate, identical "State" permit), it represented a revolution in the characterization of EPA Region 9's multi-year permit process as reflected in the administrative record.

In response, on 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 Motion for Leave to Amend Petition for Review ("Motion to Amend") (Dkt. No. 5) that (i) argued that the limited scope of the Notice of Stay was contrary to law, and (ii) separately asked for leave to amend the Petition to substantively challenge EPA Region 9's novel Two Separate Permits Theory first raised on

February 7, 2020. Region 9 filed a Response on March 16, 2020 (Dkt. No. 8) and San Francisco filed a Reply on April 16, 2020 (Dkt. No. 13).

The Board's Order of May 11, 2020 denied San Francisco's Motion to Stay, finding, in part, that "EPA Region 9 can only stay the contested provisions to the extent that it has the authority to do so, i.e., to the extent EPA Region 9 is the relevant NPDES authority. . ." Order at 11. Based solely upon its finding that whether the Permit should be considered as one permit or two "need not [be] resolve[d] . . . to dispose of San Francisco's Motion or this appeal," the Board also denied San Francisco's Motion to Amend." *Id.*

As the Board acknowledges, the unique nature of the discharges regulated under the Oceanside Permit results in substantial "permitting complexity." Order at 8, 9. This complexity is not only the result of San Francisco being subject to the NPDES permitting authority of both the San Francisco Regional Water Quality Control Board ("California RWQCB") and EPA Region 9 (Order at 3-4), but is also due to the procedural approach that the agencies took in adopting the Permit, their failure to distinguish between "state" and "federal" permit terms in the Permit, the timing of their respective adoptions of the Permit, and the belated assertion of the Two Separate Permits Theory after taking final agency action approving the Permit. In fact, the confusion resulting from the permitting process, as reinterpreted by the Notice of Stay, resulted in the Board suggesting to the permitting authorities that there was need to "provide greater clarity for permittees in future permitting decisions." Order at 12, n.10.

Under the delegated federal program pursuant to the Clean Water Act, the California RWQCB's permitting authority is limited to "state waters" — *i.e.*, nearshore waters which include waters of the Pacific Ocean less than three miles from shore. *Id*. at 3. Conversely, EPA Region 9's permitting authority extends only to "federal waters" — *i.e.*, Pacific Ocean waters

that are beyond three miles from shore. *Id*. For purposes of the Oceanside Permit, California RWQCB's permitting authority therefore extends to the seven nearshore combined sewer discharge ("CSD") structures that discharge into state waters, *i.e.* CSD-001— CSD-007, and any other nearshore releases to surface waters, whereas EPA Region 9's permitting authority is solely limited to Discharge Point No. 001, a deepwater ocean outfall that originates at the Oceanside Treatment Plant and discharges roughly 3.9 miles offshore in the Pacific (the "Deepwater Outfall"). *Id*. at 4. Although the agencies have distinct jurisdictional authority over San Francisco's discharges, the design and operation of San Francisco's Westside Facilities are not designed, nor do they operate, according to a "state" and federal" distinction. As described in San Francisco's Petition, the Westside Facilities operate as one combined system; discharges occur at the nearshore CSD structures only after the quantity of treated wastewater discharging through the Deepwater Outfall, via the treatment plant, is maximized. Dkt. 1 at 3-7.

Despite this "permitting complexity," throughout the six years San Francisco worked with the California RWQCB and EPA Region 9 on the Oceanside Permit, neither agency raised the notion of issuing separate permits to San Francisco or the public. *See* Dkt. No. 13 at 4. Although it was evident that the two agencies were "jointly" cooperating in developing the Permit, every indication was that the end result would be a single, solitary "Permit" (and not two separate "federal" and "State" permits). This is evident on the face of the Permit, where the cited legal authority for action by EPA Region 9 and the State is characterized as follows:

> 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.

AR #17 at 5 (emphasis added); *see* Dkt. No. 5 at 8; *see also* AR #17 at F-4 ("The Discharger is authorized to discharge subject to the WDRs and NPDES permit requirements in this Order at the discharge locations described in Table 2 of this Order") (emphasis added). A representative of EPA Region 9 provided sworn testimony before the California RWQCB in September 2019, that further described issuance of the Oceanside Permit as follows:

> As explained earlier today, EPA is here because the permit would authorize discharges to federal and state waters. Therefore, the permit is jointly issued by the Board and EPA. EPA has worked closely with your staff during permit development and have responded jointly to all public comments.

AR #14 at 47 (emphasis added); *see also id.* at 6 (California RWQCB representative stating that the State "issue[s] this permit jointly with EPA because the plant discharges to federal waters that are beyond State jurisdiction"). As detailed in the Motion to Stay and Motion to Amend, the administrative record is devoid of any reference to the agencies issuing two separate permits. To the contrary, the only evidence is that a single Permit was issued by EPA Region 9 and the California RWQCB. *See* Dkt. No. 5 at 4-10; Dkt. No. 13 at 8-9.

As the Board itself recognizes, the first indication that the California RWQCB or EPA Region 9 claimed that the Oceanside Permit was two separate permits came months *after* each agency approved the Oceanside Permit. Order at 11, n. 10 (the California RWQCB, in the face of Region 9's delay of its approval of the Oceanside Permit, waited roughly six weeks after adoption of the Permit to raise the concept of two separate permits; EPA Region 9 waited almost two months after issuance before raising the Two Separate Permits Theory). EPA Region 9's failure to provide any indication prior to issuance of the Oceanside Permit that its action were intended to result in the issuance of a separate "federal-only" permit through a consolidated process with the California RWQCB is integrally relevant to an evaluation of the substantive and

procedural validity of the Region's action in adopting the contested permit conditions. San Francisco files this Motion requesting an opportunity to amend its Petition to raise how the belatedly novel Two Separate Permits Theory – first articulated in the Region's Notice of Stay after the Petition was filed – merits remand of the Oceanside Permit.

III. ARGUMENT

A. The Board Should Reconsider Its Denial of San Francisco's Motion for Leave to Amend the Petition to Challenge the Two Separate Permits Theory Because It Improperly Linked the Motion to Stay and the Motion to Amend.

Under 40 C.F.R. § 124.19(m), a party may file a motion for reconsideration or clarification within 10 days of service of the Board's final disposition. The Board has ruled on motions for reconsideration relating to orders issued on motions. *See 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 re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 (Order Denying Motion for Reconsideration of Order Denying Motion for Leave to Supplement Briefing) (EAB Mar. 16, 2011). Such a motion must set forth the matters claimed to have been erroneously decided by the Board and the nature of the alleged errors. 40 C.F.R. § 124.19(m).

San Francisco respectfully submits that the Board's decision to deny San Francisco's Motion to Amend was erroneous. The Denial was incorrectly predicated on an assumption that the Motion to Amend was substantively linked to the Motion to Stay and had no independent basis. As such, the Board failed to consider how the 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.

In the Order, the Board made an erroneous assumption that its findings with respect to the Motion to Stay necessarily warranted a denial of the Motion to Amend. Specifically, the Board stated:

> San Francisco argues that if the permit is one permit, it "would not be required to comply with [contested permit provisions]" and on that same basis San Francisco also seeks to amend its petition to argue whether the permit should be considered as one permit or two (citation omitted). We need not resolve that issue to dispose of San Francisco's Motion or this appeal. Whether the permit authorizations in this case are considered as contained in one or two permits ultimately cannot change the authority of either the State or EPA . . . EPA Region 9 can only stay the contested provisions to the extent it has the authority to do so . . . As such, there is no need to allow San Francisco to amend its petition or for us to characterize the jointly issued NPDES authorization as one permit or two.

Order at 10-11.

San Francisco's request to amend its Petition was related to the Motion to Stay to the extent that the relevant set of facts forming the foundation of both issues arose via the same February 7, 2020 Notice of Stay. That letter announced, for the first time, the Region's Two Separate Permits Theory and then relied upon the novel concept to narrowly issue a stay while reserving the right to enforce the same permit terms adopted via the California RWQCB's *separate* permit. However, beyond the shared nexus with the Notice of Stay, the request to amend the Petition sought relief separate and apart from the remainder of the Motion to Stay. While the Motion to Stay asked the Board for expedited entry of an order either staying the undisputed, contested permit terms or remanding the Notice of Stay to EPA Region 9 to issue a revised notice that complies with 40 C.F.R. §§ 124.16(a) and 124.60(b)(1), San Francisco separately requested leave to amend its Petition to address the cascading consequences of Region

9's belated claim that issuance of the Permit relied upon the Two Separate Permits Theory.[1] Specifically, San Francisco explained that it sought:

> [L]eave to amend its January 13, 2020 Petition for Review in order to add a substantive challenge to this "two permit" theory recently adopted by the Region. 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. 40 C.F.R. § 124.19(a)(4)(i)(A),(B).

Dkt. 5 at 16.

San Francisco could not have raised the deficiencies resulting from EPA Region 9's Two Separate Permits Theory in its original Petition, because the Region announced its position roughly *two months after* adoption of San Francisco's Oceanside Permit and almost *one month after* San Francisco filed its Petition. San Francisco, therefore, filed its request to amend along with its Motion to Stay "because it was the first opportunity it had to do so." Dkt. No. 13 at 17.

Although San Francisco's concerns with the Two Separate Permits Theory were raised in the context of the Motion to Stay, the Board erred by falsely assuming that the scope and nature of the relief associated with the Motion to Amend were linked and reliant upon the Motion to Stay. The Board should therefore grant San Francisco's request to reconsider its Denial of San Francisco's Motion to Amend based on the implications of the Two Separate Permits Theory that are distinct from the issues raised with respect to San Francisco's Motion to Stay, as described in Sections III.B and C., *infra*.

[1] The Motion was styled as a "Motion to Stay . . . and a Motion for Leave to Amend Petition for Review" and San Francisco made a separate request for the relief sought with respect to the Motion for Leave to Amend.

B. The Board Erred by Failing to Consider how EPA Region 9's Failure to Raise the Two Separate Permits Theory in the Administrative Record Impacted the Scope and Content of San Francisco's Petition.

San Francisco should not be penalized because EPA Region 9 belatedly asserted the Two Separate Permits Theory after the Permit was issued and after San Francisco's Petition was filed. Rather, the Board should grant San Francisco's request to amend the Petition and afford San Francisco the opportunity to address the basic administrative procedural deficiencies with, and due process violations of, EPA Region 9's action.

1. The Board Failed to Consider the Deficiencies in the Administrative Record.

As the Board recognized in response to EPA Region 9's arguments supporting its opposition to the Motion to Stay citing the Two Separate Permits Theory, the Region's permitting authority in this matter is limited to the Deepwater Outfall. Order at 4, 10. If there is a standalone, separate EPA Region 9 permit approval solely tied to discharges from the Deepwater Outfall, the administrative record must explain the Region's basis and authority for inclusion of each of the contested 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. 387, 417 (EAB 1997) (the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the critical facts in reaching those conclusions); *In re Upper Blackstone Water Pollution Abatement Dist*., 14 E.A.D. 577, 589–90 (EAB 2010) (remanding permit for failure to articulate basis for the permit provision in the administrative record); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (remand necessary when rationale for a particular permit decision was articulated for first time on appeal).

In issuing the Permit, EPA Region 9 failed to adequately explain how the basis for each of the contested permit terms – related to isolated sewer overflows, the LTCP Update, and the generic WQBELs – are tied to regulation of the Deepwater Outfall. Alternatively, EPA Region 9 explicitly relied upon data and information in supporting adoption of the contested permit terms that is clearly irrelevant to regulation of the Deepwater Outfall. As a result, San Francisco must be allowed to amend its Petition to allege these deficiencies and request remand to EPA Region 9 to adequately support the contested permit terms in light of the narrow scope of its regulatory authority in approving the "federal-only" permit. The following paragraphs illustrate some of the evident deficiencies as examples of the types of arguments that San Francisco must be permitted to raise in an amended Petition.

For example, the isolated sewer overflows subject to this Petition do not reach offshore federal waters. Dkt. No. 1 at 31-35. Under the Two Separate Permits Theory, the administrative record for a "federal-only" permit must provide an explanation for the nexus between regulation of isolated sewer overflows – which do not even reach shallow coastal waters – and discharges from the Deepwater Outfall. San Francisco must be provided the opportunity to show that no such explanation was provided by EPA Region 9 in the administrative record.

Similar deficiencies are evident when evaluating EPA Region 9's stated basis for the contested permit term addressing the generic WQBELs. For example, in its response to the Petition, EPA Region 9 justifies 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 generic WQBELs in a "federal-only" permit have a

direct nexus with the Deepwater Outfall. Under the Two Separate Permits Theory, the administrative record would need to explain how these nearshore concerns support or are otherwise directly relevant to the inclusion of the generic WQBELs in a permit that is limited to addressing the Deepwater Outfall.

EPA's claimed basis for imposing contested permit terms requiring an LTCP Update suffers from the same deficiencies. For example, the updated LTCP required by the Permit must include "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 21. All seven of these CSD outfalls are near-shore. San Francisco must be provided an opportunity to argue that there is nothing in the administrative record explaining why regulation of the Deepwater Outfall by EPA supports or requires submission of a report addressing a reduction in the magnitude or frequency of discharges to near-shore waters located 3.9 or more miles from the off-shore outfall.

The administrative record contains no reference to the Two Separate Permits Theory. *See* Order at 11, n. 10 ("Neither the Permit nor the Fact Sheet describe two permits being issued . . . and all of the descriptions in these two documents appear as though one permit is being jointly authorized.").[2] As a result, the record fails to adequately explain how the contested permit conditions in a standalone "federal" permit allegedly issued by EPA Region 9 are tied to, or relevant to the regulation of the Deepwater Outfall.

[2] EPA Region 9's Notice of Stay issued by letter in February 2020 (Dkt. No. 2), where it first articulated the Two Separate Permits Theory, occurred almost two months after its December 2019 issuance of the Oceanside Permit (AR #17,18). This letter is not part of the administrative record and cannot provide a basis to support the Region's claim of two separate permits. *See* 40 C.F.R. § 124.18(c) ("the [administrative] record shall be complete on the date the final permit is issued.").

These infirmities in the administrative record violate basic administrative procedure requirements. For example, 40 C.F.R. § 124.10 requires that EPA Region 9's public notice of the draft Oceanside Permit include "any additional information considered necessary or proper." 40 C.F.R. § 124.10(d)(1)(x). This disclosure obligation extended to both the notice of the Two Separate Permits Theory and how the theory – that EPA Region 9 is only regulating discharges to the Pacific Ocean via the Deepwater Outfall – supports inclusion of the contested permit conditions in EPA Region 9's standalone permit. Absent such notice, interested parties lacked sufficient notice of the Region's position. *See National Resources Defense Council v. United States Environmental Protection Agency* ("*NRDC v. EPA*"), 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'").

Relevant case law emphasizes that EPA must fairly inform the public of all relevant issues prior to finalization of a permit. For example, in *NRDC v. EPA*, EPA issued a draft permit where the proposed "zone of deposit" was limited to one acre. In the final permit, issued without further notice or opportunity for comment, EPA applied "entirely new constructs" for the zone of deposit, including expanding it to an area larger than one acre. *NRDC v. EPA*, 279 F.3d at 1188. Because "interested parties are entitled to be fairly apprised of the subjects and issues before the agency *in the permitting process*" and the interested parties had no notice of the change in scope of the applicability of the zone of deposit, the Ninth Circuit remanded the permit to EPA for further proceedings. *Id*. at 1188-89 (emphasis added). Here, *during the permitting process*, neither San Francisco nor the public had any notice whatsoever of either the Two Separate

Permits Theory or how the contested Permit conditions in a resulting standalone "federal" permit issued by EPA Region 9 were specifically justified or explained in connection with regulation of the Deepwater Outfall. San Francisco must be provided the opportunity to amend its Petition to raise these procedural deficiencies and explain why the *post hoc* Two Separate Permits Theory requires remand to ensure that EPA Region 9 adequately explains the basis for the contested permit terms in the context of its narrow regulation of the Deepwater Outfall (as opposed to the regulation of the near-shore discharges via the California RWQCB permit that EPA Region 9 argues was separately adopted via the Two Separate Permits Theory).

As the Board notes, EPA Region 9's permitting authority does not change regardless of whether there are two separate permits or a single jointly issued permit. Order at 10. The scope of EPA Region 9's permitting authority does not, however, justify denying San Francisco the ability to amend its Petition. San Francisco is not a mind reader. When filing its Petition, it had no reason to believe EPA Region 9 would rely on the Two Separate Permits Theory to justify its claim that the Region had issued its own independent NPDES permit. Because San Francisco had no inkling of the Two Separate Permits Theory, it also had no basis for raising the deficiencies in the administrative record as noted above. Accordingly, San Francisco should be granted leave to amend the Petition to raise these, and similar, procedural deficiencies.

2. The Board Failed to Consider the Violations of San Francisco's Due Process Rights.

Because EPA Region 9 waited until after issuance of the final Permit and the filing of San Francisco's Petition to raise the Two Separate Permits Theory, San Francisco had no opportunity to challenge the Theory, or raise its concerns over deficiencies in the administrative record during the permitting process or at the time the Petition was filed in January 2020. San Francisco sought leave to amend its Petition to raise these concerns to the Board because it was

its first opportunity to do so. The Board's Denial of San Francisco's Motion to Amend is erroneous as it 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.'") (citation omitted); *Cleveland Board of Education 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 Education*). Absent the Board granting leave to amend, San Francisco will be denied the opportunity to have its challenges to the ramifications of the Two Separate Permits Theory heard in this appeal while EPA will proceed as if there is a valid "federal-only" permit, as is evident by in the Notice of Stay, despite the lack of properly noticing the Theory during the adoption process for the Permit.

C. The Board Erred by Failing to Consider the Procedural Deficiencies Caused by EPA Region 9's Purported "Consolidation" of the Permit.

San Francisco agrees that EPA Region 9 and the California RWQCB jointly worked together in issuing the Oceanside Permit. For example, the agencies issued a single Fact Sheet, held a single public hearing and jointly responded to comments. Order at 5; Dkt No. 5 at 4-9; Dkt. No. 13 at 8-9. Rather, San Francisco disputes the Board's erroneous conclusion that the agencies properly noticed that they were engaged in a "consolidated" issuance process and adhered to the permit consolidation requirements of 40 C.F.R. §§ 123.24(b)(5) and 124.4(c)(2), and thereby "consolidated the permitting process for the NPDES permit issued to San Francisco." Order at 4-5. The Board's citation to 40 C.F.R. § 123.24(b)(5) is unavailing because both the California RWQCB and EPA Region 9 are issuing NPDES permits under the Clean Water Act, and this provision only applies when the agencies are issuing permits "*under different*

programs." 40 C.F.R. § 123.24(b)(5) (Memorandum of Agreement between EPA and California requires "provisions for joint processing of permits by the State and EPA for facilities or activities *which require permits from both EPA and the State under different programs*.") (Emphasis added).

The Board's reference to 40 C.F.R. § 124.4(c)(2) fares no better. Under this provision, "[t]he Regional Administrator and the State Director(s) may agree to consolidate draft permits whenever a facility or activity requires permits from both EPA and an approved State." 40 C.F.R. § 124.4(c)(2). According to the Board, the agencies could consolidate under this provision without any indication in the administrative record that they were consolidating because Section 124.4 "does not specify required procedures to consolidate; nor does Section 124.4 require any particular documentation of the agreement or intent to consolidate." Order at 5, n. 4.

The consolidation process under Section 124.4 facilitates the issuance of *separate permits*. *See* 40 C.F.R. § 124.4(a)(2) (consolidating the permitting procedures can result in "the final *permits*" being issued jointly or separately). However, as the Board acknowledges, the record is silent on the issuance of two separate permits. Order at 11, n. 10 ("Neither the Permit nor the Fact Sheet describe two permits being issued; the Permit is identified with both an EPA and a Regional WQB identification number; and all of the descriptions in these two documents appear as though one permit is being jointly authorized."). To the extent that separate permits were being issued, EPA Region 9 had an obligation to make this clear to the public during its adoption process, including in the Fact Sheet. *See* Dkt. No. 1, Att. 13 at 11.2.2 ("A fact sheet is a document that briefly sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit."). Because

consolidation applies when separate permits are issued, and the extensive six-year record leading up to the issuance of the Oceanside Permit contains *no* reference to separate permits, the Board erroneously concluded that the agencies followed the consolidation process envisioned by Section 124.4.[3]

As outlined in Section III.B., *supra*, EPA Region 9's failure to reference consolidation anywhere in the administrative record violated both basic administrative procedure requirements and San Francisco's due process rights. Because San Francisco did not know EPA Region 9 was ostensibly relying on the consolidation process under Section 124.4, San Francisco had no ability to challenge the Two Separate Permits Theory, the applicability of the contested permit terms to EPA Region 9's apparent standalone permit, or the proposed format of the final "federal-only" permit that would result from the consolidated process. EPA Region 9's failure to delineate between "federal-only" permit terms, and State-only terms in the final issued permit also violated 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).

D. The Board Should Grant San Francisco's Motion for Leave to Amend the Petition to Challenge the Two Separate Permits Theory.

If the Board cannot consider the Motion for Partial Reconsideration because it finds that the Order is not a "final disposition" under 40 C.F.R. § 124.19(m), or if the Board is unwilling to reconsider its narrow interpretation of San Francisco's Motion to Amend which led to the Denial, then San Francisco requests, in the alternative, that it be granted leave to amend the

[3] The Board's conclusion regarding consolidation in accordance with Section 124.4 is also inconsistent with the Board's position that it "need not resolve whether San Francisco's NPDES authorizations constitute one permit or two." Order at 11, n. 10.

Petition to add the substantive arguments that stem from the Two Separate Permits Theory, as described in Section III.B. and C., *supra*, of this Motion. As discussed above, the Two Separate Permits Theory has substantive implications on the content and scope of San Francisco's Petition. Administrative law principles and the governing regulations at 40 C.F.R. Part 124 support the Board granting San Francisco the opportunity to amend the Petition to raise the issues stemming from the Two Separate Permits Theory.

IV. REQUEST FOR RELIEF

The Board should grant San Francisco leave to amend its Petition and allow San Francisco the opportunity to raise the host of issues caused by EPA Region 9's belated adoption of the Two Separate Permits Theory, which include, but are not limited to, the following claims: (i) EPA Region 9's Two Separate Permits Theory is a clearly erroneous finding of fact and conclusion of law; (ii) EPA Region 9 failed to provide proper notice and comment about the Two Separate Permits Theory; (iii) EPA Region 9's failure to adequately explain in the record the basis for adopting the contested terms to the scope of a "federal-only" permit tied to regulating discharges from the Deepwater Outfall; (iv) denying San Francisco the opportunity to challenge EPA Region 9's "federal permit" violates San Francisco's due process rights; (v) EPA Region 9 failed to properly consolidate the permit under 40 C.F.R. § 124.4(c)(2); (vi) EPA Region 9's failed to support, in the record, its purported consolidation of the Permit and how that resulted in two separate permits; and (vii) and adopting the final permit, as issued, without clearly delineating federal-only and State-only terms violates fair notice.

V. CONCLUSION

For the reasons outlined above, San Francisco respectfully requests that the Board reconsider its Denial of San Francisco's Motion to Amend Petition for Review, or in the alternative, grant San Francisco's Motion for Leave to Amend Petition for Review.

VI. STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

In accordance with 40 C.F.R. §§ 124.19(d)(1)(iv) & (f)(5), the undersigned counsel hereby certify that this Motion does not exceed 7,000 words. Not including the transmittal letter, caption, table of contents, table of authorities, signature block, statement of compliance with the word limitation, and certification of service, this Motion contains 5,676 words.

VII. CERTIFICATE OF CONFERENCE

In accordance with 40 C.F.R. § 124.19(f)(2), the undersigned counsel conferred with counsel for EPA Region 9 to ascertain whether it concurs or objects to this Motion. Dustin Minor, counsel for EPA Region 9, confirmed by email on May 20, 2020 that "Region 9 is not willing to stipulate to allow San Francisco to amend its petition."

Dated: May 21, 2020

Respectfully submitted,

/S/ J. Tom Boer

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

Diana Pfeffer Martin
Hunton Andrews Kurth LLP
550 S. Hope Street, Suite 2000
Los Angeles, California 90071
Telephone: (213) 532-2162
Email: martindp@hunton.com

John Roddy
Office of City Attorney Dennis Herrera
City and County of San Francisco
1 Dr. Carlton B Goodlett Pl.,
San Francisco, California 94102
Telephone: (415) 554-3986
Email: John.S.Roddy@sfcityatty.org

Estie Kus
Office of City Attorney Dennis Herrera
City and County of San Francisco
1 Dr. Carlton B Goodlett Pl.,
San Francisco, California 94102
Telephone: (415) 554-3924
Email: Estie.Kus@sfcityatty.org

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, a true and correct copy of the foregoing Motion was filed electronically using the EAB eFiling System and was served on the parties by electronic mail at the addresses specified below:

Dustin Minor
Office of Regional Counsel (ORC-3)
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415) 972-3888
Email: Minor.Dustin@epa.gov

Marcela von Vacano
Office of Regional Counsel (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415) 972-3905
Email: Vonvacano.Marcela@epa.gov

Peter Z. Ford
Office of General Counsel
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Telephone: (202) 564-5593
Email: Ford.Peter@epa.gov

Jessica Zomer
Office of General Counsel
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Telephone: (202) 564-3376
Email: Zomer.Jessica@epa.gov

/S/ J. Tom Boer

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