



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105**

NPDES Appeal No. 20-01
*Region 9 Response To Motion For Partial Reconsideration Or,
In The Alternative, Motion For Leave To Amend Petition For Review*

June 8, 2020

Via Electronic Mail

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
WJC Building 1103M
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Dear Ms. Durr:

Pursuant to our discussion this morning, I am filing a corrected version of the Response Brief I filed on June 5, 2020 in Appeal No. NPDES 20-01. I served the correct brief on the parties via email on June 5, 2020 (attached to revised filing), but inadvertently attached the wrong filing. Please remove the June 5, 2020 filing from the docket and replace it with this filing.

I apologize for the error.

Sincerely,

/S/ Dustin Minor

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

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

**REGION 9 RESPONSE TO MOTION FOR
PARTIAL RECONSIDERATION
OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW**

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3. AR #140
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4. AR #144
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I. INTRODUCTION

The U.S. Environmental Protection Agency (“EPA”), Region 9 and the California Regional Water Quality Control Board, San Francisco Bay Region (“RWQCB”) issued a consolidated National Pollutant Discharge Elimination System (“NPDES”) Permit for the City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, NPDES No. CA0037681 / Order No. R2-2019-0028 (“Oceanside Permit”), pursuant to 40 C.F.R. § 124.4 (“Consolidation of permit processing”).

California issues NPDES permits for discharges into state waters pursuant to its EPA-authorized NPDES program. Pursuant to 33 U.S.C. § 1342(b), the State of California is authorized to administer the NPDES Program through the State Water Resources Control Board (“State Water Board”) and the nine RWQCBs.¹ The Oceanside Permit, Order No. R2-2019-0028, was adopted by the RWQCB on September 11, 2019, and became effective on November 1, 2019 (“State Permit”). AR #15 at 2. EPA Region 9 signed the Oceanside Permit, NPDES No. CA0037681, on December 10, 2019, AR # 17 at 3, and the uncontested provisions became effective on March 9, 2020 (“Federal Permit”).²

¹ See Approval of California’s Revisions to the State National Pollutant Discharge Elimination System Program, 54 Fed. Reg. 40,664 (Oct. 3, 1989); Discharges of Pollutants to Navigable Waters: Approval of State Programs, 39 Fed. Reg. 26,061 (July 16, 1974).

² The effective date of the Federal Permit was 30 days from the date of the notice of stay letter pursuant to 40 C.F.R. § 124.16 and § 124.60(b). See, February 7, 2020 Notice of Stay of Contested Conditions for NPDES Permit No. CA0037681 (“Notice of Stay of Contested Conditions”).

EPA issued the Federal Permit because San Francisco’s principal NPDES permitted outfall is more than three miles offshore in federal waters of the Pacific Ocean at Discharge Point 001. The RWQCB issued the State Permit because San Francisco may, when the system is not able to treat all of the influent because the volume exceeds both the treatment capacity of the plant and the storage capacity of system, discharge equivalent to primary treated sewage through seven (7) combined sewer discharge structures (“CSDs”) in state waters. EPA and the RWQCB worked together to issue consolidated State and Federal Permits, as was the case with the 2009 permit, so that San Francisco does not have conflicting permit terms in the Federal and State Permits.

In October and December of 2019, the City and County of San Francisco (“San Francisco”) challenged the State Permit before the State Water Board and then in Superior Court.³ On January 13, 2020, San Francisco filed a Petition seeking Environmental Appeals Board (“EAB” or “Board”) review of three conditions in the Federal Permit: 1) receiving water limitations at Section V. and Attachment G, Section I.I.1.; 2) the requirement to update the Long-Term Control Plan (“LTCP Update”) with current information at Section VI.C.5.d.; and 3) the reporting of sewer overflows at Section VI.C.5.a.ii.b.

EPA Region 9 informed San Francisco and the Board in the Notice of Stay of Contested Conditions that the contested provisions of the Federal Permit are stayed pending final agency action by the Board on the Federal Permit. However, since the State Permit was issued by the

³ See AR #140, October 11, 2019 Petition for Review of Order R2-2019-0028, Request for Stay and Hearing. See also AR #144, December 18, 2019 First Amended Petition for Writ of Administrative Mandate and Complaint for Declaratory Relief, Case No. RG19042575.

California RWQCB, EPA informed San Francisco that EPA's Notice of Stay of Contested Conditions had no effect on the State Permit or EPA's ability to enforce it.⁴

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 and Motion for Leave to Amend Petition for Review." On May 11, 2020, the Board issued an "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 ("May 11, 2020 Order")." On May 21, 2020, San Francisco filed a "Motion For Partial Reconsideration Or, In The Alternative, Motion For Leave To Amend Petition For Review ("San Francisco's Motion")."

As set forth below, 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. Neither the statute nor 40 C.F.R. § 124.4 require EPA to provide notice that Federal and State Permits are being consolidated or to require separate administrative records. The provisions of the Federal Permit were issued pursuant to EPA's authority under the CWA. San Francisco had notice of the Oceanside Permit provisions, the opportunity to

⁴ More specifically, EPA noted the following:

However, since 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, this stay has no impact on the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028. Since the RWQCB Oceanside Permit, Order No. R2-2019-0028, was issued pursuant to California's authorized NPDES program pursuant to 33 U.S.C. § 1342(b), U.S. EPA Region 9 retains authority to enforce it pursuant to 33 U.S.C. § 1342(i).

comment on them, and the ability to challenge both the Federal and State Permits, as it has indeed done.

As set forth below, the Board should deny San Francisco's Motion for Partial Reconsideration pursuant to 40 C.F.R. § 124.19(m) because 1) the Board's decision is not a final order subject to reconsideration under this Section; and 2) because the Motion does not establish demonstrable error by the Board in its May 2020 Order that warrants reconsideration as required by 40 C.F.R. § 124.19(m) and Board precedent. Similarly, the Board should deny San Francisco's Alternative Motion for Leave to Amend because San Francisco had the opportunity to raise all of these issues in its February 28, 2020 Motion for Leave to Amend and either failed to do so or the Board has already ruled upon these issues.

II. LEGAL BACKGROUND AND ARGUMENT

A. The EAB Correctly Noted That The CWA Provides that Authorized States May Issue NPDES Permits into State Waters But EPA Retains Authority to Issue Permits into Federal Waters.

The CWA establishes a framework of shared responsibility between EPA and the states. CWA Section 402(b), 33 U.S.C. § 1342(b), provides that EPA shall authorize states that meet the requirements set forth in the CWA to administer the NPDES permitting program. *Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, (2007). CWA Section 402(c)(1) provides that once a state has been authorized to issue NPDES permits, EPA must suspend issuance of permits into state waters. 33 U.S.C. § 1342(c)(1).

EPA has limited authority to issue NPDES permits in authorized states.⁵ EPA may issue permits through the objection process pursuant to CWA Section 402(d), or in limited circumstances such as discharges to federal waters more than three miles offshore. 33 U.S.C. § 1342(d). As the Board correctly noted,

“[T]his distinction between the state-authorized and the EPA-authorized discharges does not alter the fact that all of the discharges from the San Francisco facility are into the Pacific Ocean, which is considered “navigable waters” and falls under the scope of NPDES regulation for purposes of the CWA. See 33 U.S.C. § 1362(7), (8). The parties use the term “state waters” to refer to the “navigable waters” that are subject to California’s approved NPDES program and “federal waters” to refer to the “navigable waters” that are not part of California’s approved program and are instead under EPA’s NPDES authority.”

May 11, 2020 Order at footnote 2, page 3.

As noted in *SCAP*, “permits issued by the state are subject to administrative and judicial review in accordance with state law. *See, e.g.,* Cal. Water Code § 13330 (providing for review in California Superior Court of State Board decisions).”⁶ *SCAP* notes that “[b]y contrast, if jurisdiction returns to EPA and EPA issues a federal NPDES Permit, EPA’s decision may be appealed within EPA to the Environmental Appeals Board (EAB). 40 C.F.R. § 124.19(a)(1). A

⁵ *See, South’ Cal’ Alliance of Publicly Owned Treatment Works v. U.S. EPA*, 853 F. 3d 1076, 1078 (9th Cir., April 12, 2017) (*SCAP*)(noting the following:

‘If [NPDES permitting] authority is transferred, then state officials-not the federal EPA-have the primary responsibility for reviewing and approving NDPEs permits, albeit with continuing EPA oversight’ *Nat’l Ass’n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 650.

See also, SCAP at 1078-79 (summarizing EPA’s oversight authority in authorized states, including the ability to issue a permit if a state declines to address EPA’s comments).

⁶ *SCAP* at 1081.

final EPA permit approved by the EAB is subject to review in an appropriate circuit court of appeals. 33 U.S.C. § 1369(b)(1)(F).”⁷

Here, EPA issued the Federal Permit because San Francisco’s principal NPDES Discharge Point 001 discharges to federal waters more than three miles offshore. A state permit is also necessary because when the influent to the treatment plant exceeds the treatment and storage capacity of the system, San Francisco may discharge from seven (7) CSDs to state waters provided the applicable criteria are met. Accordingly, it was reasonable to consolidate the Federal and State Permits.

The Board’s *May 11, 2020 Order* found the following:

“The NPDES permitting regulations contemplate that the EPA and approved state permitting authorities may agree to coordinate decision making and jointly issue permits whenever a facility or activity requires an NPDES permit from both the EPA and an approved state. 40 C.F.R. §§ 123.24(b)(5), 124.4(c)(2). Consolidation promotes efficiency in the processing of permit applications (avoiding duplication and inconsistency) through joint preparation of the statement of basis or fact sheets, consolidation of the administrative record, coordination of the timing and submission of public comments, and jointly holding public hearings. *See* 40 C.F.R. § 124.4(a)(2), (b); *see also* Part 124 - Procedures for Decision making, 48 Fed. Reg. 14,264, 14,265 (Apr. 1, 1983) (“[T]his Part allows applications to be jointly processed * * * whenever EPA and a State agree to take such steps in general or in individual cases.”).”

See, May 11, 2020 Order at 4. San Francisco does not provide any authority that warrants revisiting the Board’s May 11, 2020 Order or demonstrating that the Board committed a demonstrable error of fact or law warranting reconsideration. Thus, San Francisco’s Motion should be denied.

B. Neither the CWA nor 40 C.F.R. § 124.4 Requires EPA to Provide Notice that Federal and State Permits Are Being Consolidated.

⁷ *SCAP* at 1079.

As the Board held in its May 11, 2020 Order, 40 C.F.R. § 124.4 does not require EPA to notify San Francisco that it is consolidating the Federal and State Permits or require any particular procedures to do so. The Board found that San Francisco misread the applicability of 40 C.F.R. § 124.4, and held that “Section 124.4, however, does not specify required procedures to consolidate; nor does Section 124.4 require any particular documentation of the agreement or intent to consolidate. The record in this case reflects EPA Region 9’s and the California RWQCB’s agreement and intent to consolidate their permit processes and to jointly issue their NPDES authorizations in one combined document.” May 11, 2020 Order footnote 4 at 5. San Francisco does not provide any authority that warrants revisiting the Board’s May 11, 2020 Order or demonstrating that the Board committed a demonstrable error of fact or law warranting reconsideration.

San Francisco claims that its due process rights were violated because EPA did not reference consolidation pursuant to 40 C.F.R. § 124.4 in the administrative record, but San Francisco had the opportunity to comment on and challenge all of the draft and final permit terms. There is no disagreement that the permit was jointly issued under separate federal and state authorities. San Francisco had the opportunity to question EPA’s authority for the challenged permit terms and did so. For example, San Francisco’s January 13, 2020 Petition challenges EPA’s authority to include the challenged permit provisions and asserts that EPA does not have authority to require them.⁸ EPA disagrees with San Francisco’s position on the

⁸ See Petition at 10 (citing San Francisco’s comments requesting that the Region “identify federal and state legal authority for each task and subtask in Table 7”); Petition at 11 (questioning “that the Region has a legitimate “need” to collect information about isolated sewer overflows or that it has authority to collect such information”); and Petition at 33 (arguing that the “Region Clearly Erred as a Matter of Law Because It Does Not Have Jurisdiction over Isolated Sewer Overflows

substance of these issues. However, the Petition demonstrates that San Francisco had the opportunity to challenge the legal authority of EPA pursuant to the CWA for the provisions in the Federal Permit. As the Board found in its May 11, 2020 Order, “[n]otwithstanding our acknowledgement of the permitting complexity here, the regulations authorizing the consolidation of two permitting processes does not expand or contract the authority of either the EPA or the approved state over the issued permit.” May 11, 2020 Order at 9. Thus, San Francisco had due process to comment upon and challenge the Federal Permit.

The Board also correctly found that it is not necessary to determine whether the Federal and State Permits are two separate permits or one joint permit. The May 11, 2020 Board Order found the following:

“We need not resolve [the two permit] 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 to authorize the discharges under the CWA and its implementing regulations. . . . 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.”

Id. at 11. The fact that EPA did not state that it consolidated the Federal and State Permits pursuant to 40 C.F.R. § 124.4 prior to San Francisco’s Petition makes no difference. San Francisco had the full opportunity to challenge the Federal and State Permits in the EAB and the relevant State fora, as it is doing. San Francisco’s Motion does not raise any new authority that warrants the Board reconsidering its prior

That Do Not Reach Surface Waters. The Permit is issued pursuant to the CWA as an NPDES permit for point source discharges from the Oceanside facility to surface waters”); *see also* Petition at 35, footnote 5 (noting that “San Francisco disputes that California has independent jurisdiction over discharges that do not reach surface waters. . . . However, because the extent of California’s authority is not relevant to EPA’s jurisdiction, arguments about the extent of California’s authority are not argued herein.”).

determination regarding the two permit issue or demonstrating that the Board committed a demonstrable error of fact or law warranting reconsideration.

C. The Interrelated Nature of San Francisco's Collection, Storage, and Treatment System and the Discharge into Federal Waters at Discharge Point 001 Support Inclusion of All of the Permit Terms in the Federal Permit and San Francisco Should Not Be Permitted to Amend Its Petition to Seek to Require EPA to Connect Each Permit Term to Discharge Point 001 in the Administrative Record.

The Board should deny San Francisco's request to amend its Petition to argue that EPA is required to provide support in the administrative record for EPA's authority for every provision in the Federal Permit based on its relationship to Discharge Point 001.⁹ As noted in Section E. below, San Francisco filed a previous Motion for Leave to Amend in February of 2020. San Francisco cannot use its May 21 Motion for Leave to Amend and Motion for Partial Reconsideration to raise issues it failed to raise in its February 2020 Motion for Leave to Amend. The Federal Permit includes all provisions of the Oceanside Permit because San Francisco's entire westside system is designed to maximize the amount discharged through the NPDES-permitted outfall at Discharge Point 001 into federal waters and minimize the amount discharged through the CSDs into state waters. There are no state-only provisions of the Oceanside Permit because of the interrelated nature of the actions onshore, the discharges from the CSDs to state waters, and the discharges from Discharge Point 001 to federal waters offshore.

San Francisco's Motion claims that "EPA Region 9's permitting authority extends only to "federal waters" — i.e., Pacific Ocean waters that are beyond three miles from shore . . . whereas

⁹ More specifically, San Francisco's Motion asserts "[i]f 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*, San Francisco's Motion at 9.

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")." *See*, San Francisco's Motion at 4. However, San Francisco's claim ignores the reality that the "Deepwater Outfall" is the principal NPDES permitted outfall and that all of the onshore collection, storage and treatment activities, including from CSDs, are required to maximize discharge from Discharge Point 001 and minimize discharges from the CSDs to state waters.

San Francisco's Motion acknowledges the interrelated nature of its onshore actions to the permitted outfall in federal waters and notes the following:

"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."¹⁰

The interrelated nature of onshore actions and the CSDs to the NPDES-permitted outfall in federal waters are illustrated by the Nine Minimum Controls (NMCs), which require maximizing storage and discharge to the federal outfall and minimizing discharges from the CSDs.¹¹

¹⁰ San Francisco's Motion at 4.

¹¹ Although San Francisco did not challenge the Federal Permit provisions noted below, the following provisions are illustrative examples of the interrelated nature of onshore actions to the permitted discharge into federal waters at Discharge Point 001.

The Federal Permit provides on page 6:

"D. Discharge to a water of the United States from any location other than Discharge Point No. 001 is prohibited, except from Discharge Point Nos. CSD-00 I, CSD-002, CSD-003, CSD-004, CSD-005, CSD-006, and CSD-007

San Francisco availed itself of the opportunity to challenge the Federal Permit and State Permit by filing separate challenges to the State Permit through the State Water Board and the Alameda Superior Court and the Federal Permit via its Petition to the EAB.¹² Given the interrelated nature of the onshore activities to the NPDES outfall at Discharge Point 001 in federal waters, San Francisco’s renewed Motion to amend its Petition to seek to require EPA to

during wet weather (as defined in Attachment A) in accordance with the requirements in this Order.”

In addition, the NMCs in the Federal Permit are designed to maximize the amount of sewage discharged from the permitted federal-waters outfall and minimize the amount discharged through the state-waters CSDs. For example, the Federal Permit provides on page 16 the following:

“Control No. 2: Maximize Use of Collection System for Storage

- a. The Discharger shall maximize use of the combined sewer system for in-line storage to reduce the magnitude, frequency, and duration of combined sewer discharges. At a minimum, the Discharger shall implement the following controls:
 1. Prevent intrusion of receiving waters into the combined sewer system;
 2. Use all facilities, including any inoperative or unused treatment facilities, to store or treat wet weather flows to the maximum extent practicable; and
 3. Implement programs to remove and prevent flow obstructions in the combined sewer system, including but not limited to catch basin cleaning; gravity sewer cleaning; fats, oils, and grease control; gravity sewer condition assessment”

Finally, the Federal Permit provides on page 18 the following:

“Control No. 4: Maximize Flow to Treatment Plant.

During wet weather, the Discharger shall maximize the volume of wastewater that receives treatment at the Oceanside Water Pollution Control Plant (i.e., secondary treatment for 43 MGD and primary treatment for an additional 22 MGD) and is discharged at Discharge Point No. 001.”

¹² See, AR #140, Petition for Review of Order R2-2019-0028, Request for Stay and Hearing, October 11, 2019 at 3. See also, AR #144 (containing San Francisco’s December 16, 2019 Petition for Writ of Mandate and Complaint for Declaratory Relief in Alameda Superior Court).

support in the administrative record how each provision of the Federal Permit is related to the federal outfall should be denied.

D. San Francisco's Motion for Partial Reconsideration Should Be Denied Because 1) the Board's May 11, 2020 Order Is Not a Final Disposition Pursuant to 40 C.F.R. § 124.19(m), and 2) Because San Francisco's Petition Does Not Establish That the Board Made A Demonstrable Error of Law Or Fact That Warrants Reconsideration.

San Francisco's Motion for Partial Reconsideration pursuant to 40 C.F.R. § 124.19(m) should be denied because the Board's May 11, 2020 Order is not a final disposition subject to reconsideration pursuant to 40 C.F.R. § 124.19(m).¹³ Alternatively, San Francisco fails to meet the high bar required for motions for reconsideration:

“The Board reserves reconsideration for cases in which the Board has made a demonstrable error, such as a mistake on a material point of law or fact. A party should not regard reconsideration “as an opportunity to reargue the case in a more convincing fashion.”¹⁴

San Francisco's Motion fails to set forth demonstrable error by the Board on a material point of law or fact and raises new issues that were not argued in its February 2020 Motion.

¹³ See, 40 C.F.R. § 124.19(m); see also, August 2013 EAB Practice Manual at 53.

¹⁴ See *In Re City of Taunton*, NPDES Appeal No. 15-08, at 1 (EAB June 16, 2016). See also, *Id.* at 1-2 (citing “*In re Town of Newmarket*, NPDES Appeal No. 12-05, at 1-2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (relying on well-established Board precedent for the standard for reconsideration). . . ; *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-1 through 10-05, at 2-3 (EAB Dec. 17, 2010)(Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay) (“[a] party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider”) (citations omitted).”

The Board's standard for motions for reconsideration is consistent with the standard used in Federal Courts. As the Board noted in *In Re City of Taunton* the bar in Federal Court is very high for motions for reconsideration:

“*See, e.g., Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006) (explaining that "[t]he granting of a motion for reconsideration is 'an extraordinary remedy that should be used sparingly'" (citation omitted). As the U.S. Court of Appeals for the First Circuit has explained, to obtain relief in a motion for reconsideration, "the movant must demonstrate either that newly discovered evidence (not previously available) has come to light or that the rendering court committed a manifest error of law." *Id.* (citation omitted). And, "[u]nless the court has misapprehended some material fact or point of law, such a motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected." *Id.* (citing *Jn re Sun Pipe Une Co.*, 831 F.2d 22, 24-25 (1st Cir. 1987)).”

San Francisco may not agree with the Board's reading of 40 C.F.R. § 124.4(a) & (c) in its May 2020 Order or the Board's determination regarding San Francisco's challenge to the “Two Permit Theory.” However, a disagreement by San Francisco regarding the appropriate reading of the regulations falls well short of the demonstrable error standard required pursuant to 40 C.F.R. § 124.19(m).

E. *San Francisco's Alternative Motion for Leave to Amend its Petition for Review Should Be Denied Because San Francisco Had the Opportunity To Raise These Issues In Its February 2020 Motion for Leave to Amend and It Failed to Do So Or the Board Previously Ruled Upon These Issues in Its May 2020 Order.*

San Francisco's Alternative Motion for Leave to Amend its Petition for Review should be denied because San Francisco had the opportunity to raise all of the issues in its prior February 28, 2020 Motion for Leave to Amend and it either failed to do so or the Board considered the issues raised and ruled upon them in its May 2020 Order. In addition, 40 C.F.R. § 124.19 does not provide for a “motion for leave to amend.” To the extent that San Francisco is asking the Board to reconsider the May 2020 Order pursuant to its Motion for Leave to Amend, it should be denied for the same reasons set forth above regarding San Francisco's Motion for

Partial Reconsideration; namely San Francisco failed to establish demonstrable error by the Board.

III. CONCLUSION

San Francisco's Motion should be denied because 1) the CWA provides that authorized states have authority to issue NPDES Permits into state waters while EPA retains authority to issue permits into federal-only waters, 2) the CWA and 40 C.F.R. § 124.4 do not require EPA to state that it is consolidating federal and state permits in the administrative record, and 3) San Francisco's sewage collection, storage, and treatment system is so integrated that EPA is not required to demonstrate that each permit term is solely connected to Discharge Point 001 in federal waters.

In addition, San Francisco's Motion For Partial Reconsideration should be denied because San Francisco has not established that the Board committed material demonstrable error of law or fact as required by 40 C.F.R. § 124.19(m) and Board precedent. San Francisco's Alternative Motion for Leave to Amend Petition for Review should also be denied because San Francisco had the opportunity to raise all of the issues in its February 2020 Motion for Leave to Amend that was denied by the Board's May 2020 Order.

In conclusion, after consultation with and concurrence by the Office of General Counsel, EPA Region 9 respectfully requests that the Board deny San Francisco's Motion.

June 5, 2020

Respectfully submitted,

For EPA

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response is less than 7,000 words, excluding the Table Of Authorities, Table of Attachments, Certificate of Service and this Statement of Compliance with Word Limitation.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached *Region 9 Response To Motion For Partial Reconsideration Or, In The Alternative, Motion For Leave To Amend Petition For Review* to be served via email upon the persons listed below. The parties have agreed to accept service of filings by electronic mail only pursuant to 40 C.F.R. 124.19(i)(3)(ii), with no hard copy service by mail or similar means.

June 5, 2020

Respectfully submitted,

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