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

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

EPA REGION 9'S RESPONSE TO SAN FRANCISCO'S PETITION FOR REVIEW OF OCEANSIDE NPDES PERMIT

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Attachment	AR #	*File Name* and Document Description
1	AR #17	*EPA Oceanside Permit* Final NPDES Permit CA0037681, signed by Tomás Torres, Water Division Director on December 10, 2019.
2	AR #15	*State Oceanside Permit* Final State NPDES Permit Waste Discharge Requirement Order R2-2019-0028, signed by Michael Montgomery, Executive Officer San Francisco Bay Regional Water Quality Control Board, September 12, 2019.
3	AR #140	*Petition for Review* San Francisco Public Utilities Commission, Petition for Review of Order R2-2019-0028, October 11, 2019.
4	AR #144	*State Petition SFPUC Complaint* First Amended Petition for Writ of Administrative Mandate and Complaint for Declaratory Relief, December 16, 2019.
5	AR #96	*CSO Control Policy* EPA Combined Sewer Overflow Control Policy. 59 Fed. Reg. 18,688-18,698, (April 19, 1994).
6	AR #95b	*EPA LTCP Guidance* Combined Sewer Overflows: Guidance for Long-Term Control Plan, EPA-832-B-95-002, 1995.
7	AR #94	*EPA PCCM Guidance* CSO Post Construction Compliance Monitoring Guidance, EPA-833-K-11-001, May 2012.
8	AR #101	*2019 Ocean Plan* State Water Resources Control Board, *Water Quality Control Plan – Ocean Waters of California, California Ocean Plan,* 2019.
9	AR #102	*1979 Exception* State Water Resources Control Board, Order No. 79-16: In the matter of the request for an exception to the 1978 Water Quality Control Plan for Ocean Waters of California.
10	AR #98b	*Basin Plan Approval Letter* Approval of Amendments to the Water Quality Control Plan for the San Francisco Bay Basin, July 2, 2019.
11	AR #98a	*Basin Plan* San Francisco Regional Water Quality Control Board (Region 2), Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), May 4, 2017.

12	AR #79a	*Bayside Permit* San Francisco Regional Water Quality Control Board, 2013 NPDES No. CA0037664, San Francisco Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater Collection System, Order R2-2013-0029.
13	AR #91	*LTCP Update Memo* EPA Memo to file – Bases for Requiring an Update of a Long-Term Control Plan, NPDES Permit No. CA0037681, April 15, 2019.
14	AR #63	*SFPUC 2014 Efficacy of CSO Controls* City and County of San Francisco, Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls, July 30, 2014.
15	AR #24	*January 2015 SFPUC Comments on Admin Draft* City and County of San Francisco Comments on administrative draft NPDES Permit, January 8, 2015.
16	AR #10a AR # 10b	*Response To Comments* San Francisco Regional Water Quality Control Board and EPA Response to Comments, August 30, 2019.
17	AR #146a	*EPA CWA 308 Request* Cover Letter for Request for information to SFPUC (Harlan) under Clean Water Act Section 308(a) - City and County of San Francisco Sewer System, February 16, 2016.
18	AR #145	*Monitoring and Reporting Requirements* Clarification of Monitoring Requirements and Requirement for Information, City and County of San Francisco, Oceanside Water Pollution Control Plant, Order No. R2-2009-0062, NPDES Permit CA0037681, November 29, 2017.
19	AR #88b	*LTCP Synthesis* San Francisco Wastewater Long-Term Control Plan Synthesis for the Bayside Permit (NPDES No. CA0037664) and the Oceanside Permit (NPDES No. CA0037681), March 30, 2018.
20	AR #85	*RB Letter RE LTCP Synthesis* San Francisco Regional Water Quality Control Board, Letter to SFPUC regarding San Francisco Wastewater Long-Term Control Plan Synthesis, September 7, 2018.
21	AR #14	*Transcript of San Francisco Regional Board Hearing* Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019.
22	AR #95c	*CSO Guidance for Permit Writers* CSO Guidance for Permit Writers, EPA 832-B-95-008, 1995.
23	AR #67b	Monitoring data from 2012 – 2019 for CSO discharges from the CSD structures for the Oceanside Permit.

24	AR #62	*1997-2012 SFPCU RMP SWOO Sixteen Year Summary* City and County of San Francisco, Southwest Ocean Outfall, Regional Monitoring Program Sixteen-Year Summary Report 1997-2012, April 3, 2014.
25	AR #88a	*SFPUC Sept 21, 2018 Letter RE LTCP Synthesis Comments* City and County of San Francisco Letter to RB2 regarding SFRWQCB Comments on San Francisco Wastewater Long Term Control Plan Synthesis & Update, September 21, 2018.
26	AR #95a	*CSO Guidance for Nine Minimum Controls* Combined Sewer Overflows Guidance for Nine Minimum Controls, EPA 832-B-95-003, 1995.
27	AR #69	*Westside Drainage Basin Urban Watershed Opportunities Technical Memorandum* Westside Drainage Basin Urban Watershed Opportunities Final Draft Technical Memorandum, February 2015.

I. INTRODUCTION

U.S. Environmental Protection Agency ("EPA" or "Region"), Region 9 and the California Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB") jointly issued a 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"), AR #17, pursuant to 40 C.F.R. § 124.4(c)(2). EPA and the RWQCB consolidated the Oceanside Permits because San Francisco discharges into federal waters in the Pacific Ocean more than three miles off shore and discharges into State waters through seven (7) combined sewer discharge structures ("CSDs"). California issues NPDES permits for discharges into State waters pursuant to its EPA-authorized NPDES program.[1]

The Oceanside Permit, Order No. R2-2019-0028, was adopted by the RWQCB on September 11, 2019, and became effective as to discharges to State waters on November 1, 2019.[2] AR #15. EPA Region 9 signed the Oceanside Permit, NPDES No. CA0037681, on December 10, 2019, AR #17, and the uncontested provisions will be effective as to discharges to federal waters on March 9, 2020, 30 days from the date of the notice of stay letter pursuant to 40 C.F.R. § 124.16 and § 124.60(b).

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[1] Pursuant to 33 U.S.C. § 1342(b), the State of California is authorized to implement the NPDES Program through the State Water Resources Control Board ("State Water Board") and the nine RWQCBs. *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] Petitioner has challenged the Oceanside Permit in State proceedings, initially with the State Water Board and then in Superior Court. AR #140, Petition for Review of Order R2-2019-0028, Request for Stay and Hearing, October 11, 2019. *See also* AR #144, First Amended Petition for Writ of Administrative Mandate and Complaint for Declaratory Relief, December 18, 2019, Case No. RG19042575.

On January 13, 2020, the City and County of San Francisco ("Petitioner" or "San Francisco") filed a petition (the "Petition") seeking Environmental Appeals Board ("EAB" or "Board") review of three conditions in the Oceanside 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. On February 7, 2020, the Region notified Petitioner and the Board that these contested provisions are stayed pending final agency action by the Board on the Oceanside Permit.

II. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19, Petitioner bears the burden of demonstrating that Board review is warranted.

A. Petitioner Must Show that EPA's Findings of Fact or Conclusions of Law Are Clearly Erroneous.

Under 40 C.F.R. § 124.19(a)(4), the Board will deny review of a permit decision unless the petition demonstrates that each challenge is based on 1) a clearly erroneous finding of fact or conclusion of law, or 2) an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. *In re City of Sandpoint,* 17 E.A.D. 763, 772 (EAB 2019).

B. Petitioner May Not Merely Reiterate Comments but Must at a Minimum Substantively Address EPA's Responses.

Pursuant to 40 C.F.R. § 124.19(a)(4), a petitioner must specifically state its objections to the permit and explain why the permit issuer's response to those comments was clearly erroneous or otherwise warrants review. *In re City of Irving,* 10 E.A.D. 111, 129-30 (EAB 2001), review denied sub nom. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). A petition may not merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit.

See, e.g*., In re City of Pittsfield,* NPDES Appeal No. 08-19, at 7 (EAB Mar. 4, 2009) (Order Denying Review), aff'd, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass*, 9 E.A.D. 1, 4 (EAB 2000) ("instead they must demonstrate why the permitting authority's response to those objections warrants review"); *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) ("a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review."). To meet this requirement, petitioners must provide a specific citation to the relevant comment and response and explain why the response to the comment was clearly erroneous or otherwise warrants review. *In re Town of New Market, New Hampshire,* 16 E.A.D. 182, 187 (EAB 2013).

C. To Demonstrate Error on a Technical Issue, Petitioner Must Demonstrate Clear Error, not Merely a Preference for an Alternative Technical Theory.

A petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). "When the Region has responded to objections made by the petitioner, a petitioner must 'demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review.'" *Id*. (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997) ("Petitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review."). "[C]lear error or a reviewable exercise of discretion is not established simply because [a] petitioner presents a difference of opinion or alternative theory regarding a technical matter." *Id.* In a challenge to scientific or technical issues, a petitioner must present the Board with references to studies, reports, or other materials that provide relevant, detailed, and

specific facts and data about permitting matters that were not adequately considered by a permit issuer. *See, e.g., In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005).

III. STATUTORY AND REGULATORY BACKGROUND

A. Clean Water Act

The Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq.*, prohibits the discharge of any pollutant into navigable waters except as authorized by specified Sections. 33 U.S.C. § 1311(a). One of those provisions, Section 402, establishes the National Pollutant Discharge Elimination System ("NPDES"). Under Section 402 of the Act, 33 U.S.C. § 1342, EPA may issue NPDES permits "for the discharge of any pollutant, or combination of pollutants" if the permit conditions assure that the discharge complies with certain requirements, including those of Section 301 of the CWA. Section 301(b) of the Act provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations ("WQBELs"). 33 U.S.C. § 1311(b). With respect to the latter, Section 301(b)(1)(C) of the Act requires that NPDES permits include effluent limits more stringent than technology-based limits whenever "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C).

CWA Section 303(c), 33 U.S.C. § 1313(c), requires each State to adopt water quality standards ("WQS") for its surface waters. WQS consist, in relevant part, of designated uses that identify the uses for the water body and water quality criteria that identify the levels of protection sufficient to protect those uses. *See* 40 C.F.R. § 131.2. CWA regulations expressly authorize States to establish either numeric or narrative water quality criteria, or both. *See* 40 C.F.R. §§ 131.3(b), 131.11(b). Once EPA has approved a State's WQS, they become the applicable

standards for purposes of the CWA. *Alaska Clean Water Act Alliance v. Clarke,* 1997 WL 446499 (W.D. WA 1997).

On April 11, 1994, EPA issued the *Combined Sewer Overflow (CSO) Control Policy* ("*CSO Control Policy*") to set forth a national approach for controlling combined sewer discharges and overflows.[3] AR #96, 59 Fed. Reg. 18,688-18,698 (April 19, 1994). The Wet Weather Water Quality Act of 2000 amended the CWA to add Section 402(q), which requires that permits for combined sewer systems "shall conform" to the *CSO Control Policy*. 33 U.S.C. § 1342(q)(1). The *CSO Control Policy* makes clear that "CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA." AR #96 at 18,688; 18,695. The *CSO Control Policy* was designed to present an approach to eliminate dry weather overflows immediately and "to ensure that the remaining CWA requirements are complied with as soon as practicable." *Id*. at 18,688.

The *CSO Control Policy* establishes Nine Minimum Controls ("NMCs") as the minimum technology-based requirements for combined sewer systems pursuant to 40 C.F.R. § 125.3. AR #96 at 18,688; 18,695. The relevant NMCs here include: proper operation and maintenance; maximum use of the collection system for storage; maximization of flow to the Publicly Owned Treatment Works ("POTW") for treatment; public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and monitoring to effectively characterize CSO impacts and the efficacy of CSO controls. *Id.* at 18,691. *See* AR #95a, *NMC Guidance*, *Combined Sewer Overflows, Guidance for Nine Minimum Controls* (EPA 832-B-95-003, May 1995).

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[3] A combined sewer system has one set of pipes that transports both sewage and stormwater. In a separate sewer system one set of pipes transports sewage and a separate set of pipes transports stormwater.

The *CSO Control Policy* requires permittees with combined sewer systems to develop and implement a Long-Term Control Plan ("LTCP") that will ultimately result in compliance with the CWA, including CWA Section 301(b)(1)(C). *Id*. at 18,688; 18,691. A primary objective of the LTCP is "to meet WQS, including the designated uses through reducing risks to human health and the environment by eliminating, relocating or controlling CSOs to the affected waters." *Id*. at 18,694. As described in the *CSO Control Policy*, the LTCP should be designed to allow cost-effective expansion or cost-effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses. *Id*. at 18,693.

Development of an initial LTCP requires that a permittee thoroughly understand its sewer system in order to evaluate control alternatives to reduce overflows and increase capture and treatment of combined sewage. *Id*. at 18,691; 18,693. Phasing of implementation of CSO controls is authorized under the *CSO Control Policy*, but the initial LTCP should also include all pertinent information to develop a construction and financing schedule. *Id*. at 18,694. The schedules should reflect the relative importance of adverse impacts on WQS as well as a permittee's financial capability. *Id.* Finally, the initial LTCP must also include a Post-Construction Compliance Monitoring Program adequate to verify compliance with WQS as well as to ascertain the effectiveness of CSO controls. *Id*. *See also* AR # 95b, *Combined Sewer Overflows: Guidance for Long-Term Control Plan*. EPA-832-B-95-002, 1995. EPA has published a specific guidance for post-construction monitoring of CSOs. *See* AR #94, *CSO Post Construction Compliance Monitoring Guidance,* EPA-833-K-11-001, May 2012.

The *CSO Control Policy* acknowledges that some communities such as San Francisco had substantially completed construction of CSO controls that were designed to meet WQS

when the *CSO Control Policy* was issued in 1994. In those cases, the *CSO Control Policy* provides that those communities are "not covered by the *initial* planning and construction provisions in this Policy; however, the operational plan and post-construction monitoring provisions continue to apply." AR #96 at 18,690 (emphasis added). If WQS are not being met, those permittees should be required to submit a revised LTCP that will attain WQS after implementation. *Id*.

The *CSO Control Policy* also describes permitting requirements for permittees that have completed development of a LTCP, referring to these as Phase II Permits.[4] Phase II permits should contain: 1) requirements to implement the technology-based controls, including the NMCs, determined on a best professional judgment ("BPJ") basis; 2) narrative requirements that ensure that the selected CSO controls are implemented, operated, and maintained as described in the LTCP; 3) WQBELs requiring compliance with the numeric performance standards for the selected CSO controls, based on average design conditions; 4) a requirement to implement, with an established schedule, the approved post-construction water quality assessment program, including requirements to monitor and collect sufficient information to demonstrate compliance with WQS, including protection of designated uses, as well as to determine the effectiveness of CSO controls; 5) a requirement to reassess overflows to sensitive areas where elimination or relocation of the overflows is not physically possible and economically achievable, which should be based on consideration of new or improved techniques to eliminate or relocate overflows or changed circumstances that influence economic achievability; 6) requirements for maximizing the treatment of wet weather flows at the POTW treatment plant; and 7) a reopener clause

[4] Under the *CSO Control Policy,* San Francisco's Oceanside Permit is best described as a Phase II permit because San Francisco had "completed construction and commenced operation of its combined system three years after" the publication of the *CSO Control Policy.* Pet. at 1.

authorizing the NPDES authority to reopen and modify the permit upon a determination that the CSO controls fail to meet WQS, including protection of designated uses. AR #96 at 18,688; 18,696.

CWA Section 308, 33 U.S.C. § 1318, provides broad information gathering authority, for example:

> (A) *the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports*, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) and (v) *provide such other information as he may reasonably require. . . .*"

33 U.S.C. § 1318 (emphasis added).

Additionally, CWA Section 402(a)(2), 33 U.S.C. § 1342(a)(2), requires monitoring and reporting requirements in all NPDES permits. "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." 33 U.S.C. § 1342(a)(2).

B. NPDES Permitting Regulations

EPA has implemented the technology-based and WQBELs provisions of CWA §§ 301 and 402 through numerous regulations, which specify when the NPDES permitting authority must include technology-based permit conditions, WQBELs, and/or other requirements in NPDES permits. With respect to WQBELs, for example, 40 C.F.R. § 122.4(d) prohibits issuance of an NPDES permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." NPDES regulations also require that permits include limits necessary to achieve State WQS, requiring that "the level of water

quality to be achieved by limits on point sources… is derived from, and complies with all applicable water quality standards." 40 C.F.R. § 122.44(d)(1)(vii)(A).

All NPDES permittees are subject to specific monitoring and reporting requirements. *See* 40 C.F.R. §§ 122.41(j) ("Monitoring and records"), 122.41(l) ("Reporting requirements"), 122.41(m) ("Bypass"), and 122.41(n) ("Upset"). Significantly, under 40 C.F.R. § 122.41(l)(6)(i), permittees shall report within 24 hours any noncompliance that may endanger health or the environment.

In addition, all NPDES permittees are subject to standard conditions that require proper operation and maintenance. 40 C.F.R. § 122.41(e) provides that the permittee "shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." AR #17, Permit Standard Conditions at D-1 and Regional Standard Conditions at G-2.

C. Applicable Water Quality Standards

1. California Ocean Plan

The State Water Board adopted WQS in the *Water Quality Control Plan for Ocean Waters of California, California Ocean Plan* ("Ocean Plan") in 1972 and has amended them several times, most recently in 2019. EPA approved the new or revised WQS in the Ocean Plan on March 22, 2019, at which time they became the applicable WQS for the CWA.[5] The Ocean Plan establishes water quality objectives and a program to protect beneficial uses of the Pacific Ocean within the territorial waters of the State, which end three miles from shore. 33 U.S.C. §

[5]California generally refers to designated uses as beneficial uses and criteria as objectives. *See e.g.,* AR #101, *Water Quality Control Plan for Ocean Waters of California, California Ocean Plan, Chapter II.*

1362(8). The relevant portions of the Ocean Plan for this appeal are chapter I (Beneficial Uses) and chapter II (Water Quality Objectives), which are WQS.

2. 1979 Exception, State Water Board Order No. WQ 79-16

In 1979, the State Water Board granted San Francisco a limited exception to the Ocean Plan during wet weather. State Water Board Order No. WQ 79-16, ("1979 Exception") AR #102. The 1979 Exception sets forth the applicable WQS for discharges during wet weather from Discharge Point Nos. CSD-001, CSD-002, CSD-003, CSD-004, CSD-005, CSD-006, and CSD-007 and includes the following conditions:

- Except for the bacteriological standards, to the greatest extent practical, San Francisco is to design, construct, and operate facilities to conform to the remaining standards set forth in Chapter II and Chapter III, Sections A and B of the 1978 Ocean Plan. These standards relate to physical, chemical, biological characteristics, and radioactivity. AR #102 at 17.
- The Discharger is to design and construct facilities to contain all stormwater runoff beyond that associated with an average of eight combined sewer discharges per year. AR #102 at 18.[6]
- Beaches affected by combined sewer discharges are to be posted with warning signs beginning when the discharge commences until analysis indicates that water quality meets Ocean Plan bacteriological standards for recreation. AR #102 at 17.
- The Discharger is to implement a self-monitoring program in accordance with RWQCB specification. *Id.*

The 1979 Exception also states that the RWQCB may require construction of additional facilities or modification of existing Facility operations if it finds (1) changes in the location, intensity, or importance of affected beneficial uses, or (2) demonstrated unacceptable adverse impacts result from Facility operations as currently constructed. AR #102 at 19.

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[6] The design assumptions in planning Petitioner's system are not terms of the Oceanside Permit. AR #10a, RTC B.5. at 16.

3. San Francisco Bay Basin Plan

The RWQCB adopted amendments to WQS in the *Water Quality Control Plan for the San Francisco Bay Basin* ("Basin Plan") on April 11, 2018. EPA approved the new or revised WQS in the Basin Plan on July 1, 2019, AR #98b, 2019 EPA Approval of Basin Plan Amendment, at which time they became the applicable WQS for the Act. The Basin Plan designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies. AR #98a, 2017 Basin Plan. The objectives are the equivalent of water quality criteria and can be found in Chapter 3 of the Basin Plan. *Id.* Other applicable requirements appear in Chapter 2 (for beneficial uses) and Chapter 4 (for implementation programs). *Id.*

IV. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Oceanside Wastewater Treatment Plant and Collection System

San Francisco's Oceanside Water Pollution Control Plant ("the Plant") is located at 3500 Great Highway, San Francisco. AR #17, Permit at 1 and Fact Sheet at F-3. The Plant provides wastewater treatment for western San Francisco with a service area population of approximately 250,000.[7] *Id.*, Fact Sheet at F-4. The wastewater collection system is located throughout the western side of San Francisco and consists of approximately 250 miles of pipe, one major pump station (Westside Pump Station), six minor pump stations, and three large transport/storage structures that provide a combined storage capacity of about 71 million gallons. *Id.*, Fact Sheet at F-4 and F-5.

[7] San Francisco also operates another treatment plant and wet weather facilities that discharge to the San Francisco Bay, including an 85.4 million gallons per day ("MGD") dry weather design flow capacity treatment plant, a 150 MGD wet weather treatment facility, and 29 CSDs. Those discharges are authorized under a separate NPDES permit No. CA0037664 issued by California ("Bayside Permit"). AR #79a, Fact Sheet at F-3.

The Plant is designed to provide secondary treatment during dry weather and has a maximum secondary treatment design capacity of about 43 MGD. AR #17, Fact Sheet at F-5. During wet weather, the Plant is designed to provide primary treatment for about an additional 22 MGD, which is then combined with the secondary-treated effluent prior to discharge for a total treatment capacity at the Plant of 65 MGD. *Id.*

During wet weather, as the Plant approaches its treatment capacity, the Westside Pump Station pumps flow of up to 133 MGD directly from the Westside transport/storage structure to Discharge Point No. 001 in federal waters. *Id.* Together, the Plant and Westside transport/storage structure are designed to discharge up to 198 MGD through Discharge Point No. 001. *See id.* Flows that exceed the treatment and storage capacities of the Plant and combined sewer system capacity discharge from Discharge Point Nos. CSD-001, CSD-002, CSD-003, CSD-004, CSD-005, CSD-006, and CSD-007. *Id.*

B. Planning and Permitting

San Francisco was one of the first cities in the United States to start planning for CSO controls, starting in the 1970s. *See* AR #91. EPA acknowledges the work that San Francisco did in the 1980s and 1990s to construct the Oceanside facilities as well as the evaluation of those controls it has done since then. *Id*. Currently, San Francisco is engaged in a multi-year effort to improve its wastewater system, called the Sewer System Improvement Program ("SSIP"). The SSIP began in 2011, after issuance of the 2009 Oceanside Permit, as a 20-year, citywide investment to enhance system reliability and performance. *Id*. at 5. San Francisco has also conducted various studies to analyze collection system improvements, including the 2015 Westside Drainage Basin Urban Watershed Opportunities Technical Memorandum, which was designed to help San Francisco meet the challenge of reducing combined sewer discharges while

minimizing flooding and backups. *See id*. at 11; *see also* AR #69 at 2-24, 3-6, and A-48. Based on modeling, San Francisco estimates that over 196 million gallons of combined sewage are discharged from outfalls located on public beaches or in near-shore waters in a typical year. AR #88b at 8. This is a significant amount, especially as the combined sewage is discharged to public recreational areas and is only minimally treated using weirs and baffles within the combined sewer system. *See* AR #17 Fact Sheet at F-5.

EPA has worked with San Francisco for more than six years on Oceanside Permit reissuance. The Permit is modeled after the more recent NPDES permit California issued to San Francisco for the 2013 Southeast Water Pollution Control Plant, North Point Wet Weather Facility, and Bayside Wet Weather Facilities (NPDES No. CA0037664 or "Bayside Permit"). The 2013 Bayside Permit includes similar receiving water limitations, a requirement to submit an LTCP synthesis, and reporting of excursions, or sewer overflows from the combined sewer system. *See* AR #79a.[8] These provisions were not challenged in 2013.

Shortly after the Bayside Permit was issued, EPA and California began work on reissuance of the Oceanside Permit. EPA shared an early administrative draft with San Francisco in December 2014 and received comments from the Petitioners a month later, in January 2015. AR #24. The permit reissuance process was put on hold while EPA and California sought additional information. After receiving reports that "raw sewage mixed with stormwater was overflowing from the City and County of San Francisco's ("City") combined wastewater collection system into streets, sidewalks, residences and businesses," EPA sent an information

[8] In the Response To Comments ("RTC"), the Region stated, "[t]he Regional Water Board addressed the applicability, appropriateness, and clarity of receiving water limitations during the reissuance of San Francisco's NPDES permit for discharges from the Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater Collection System…" AR #10a, RTC B.1 at 11, note 2.

request to San Francisco in February 2016. AR #146a at 1, 2016 EPA CWA 308 Request. EPA also explained that "[a]dequate documentation is critical to understanding the extent of the problem and developing measures to protect the public from exposure to harmful pollutants" and thus asked for information related to sewer overflows from the combined sewer system (e.g. spills, excursions, and property backups). *Id.*

In November 2017, California sent the San Francisco a request for additional wet weather monitoring data at the Oceanside wastewater treatment plant to better understand the quality of the wet weather discharges. AR #145. On March 30, 2018, San Francisco submitted the *San Francisco Wastewater Long Term Control Synthesis* ("*Synthesis")* pursuant to the 2013 Bayside Permit. San Francisco developed the *Synthesis* to address San Francisco's entire combined sewer system, including the Oceanside facilities. As explained in the *Synthesis*, "[t]he process of planning for, designing, and constructing projects to minimize and control wet weather discharge was iterative and extended for nearly two decades. As a result of this early effort, no single report describes the analyses and assumptions underlying the construction of the City's current facilities." AR #88b at 4. Notably, California found that the *Synthesis* did not adequately address the minimum required elements. AR #85. To date, San Francisco has not submitted a revised *Synthesis* addressing California's comments. *See also*, AR #88a.

In October 2018, EPA and California shared another administrative draft with San Francisco. 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. AR #14 at 47, September 11, 2019 Transcript of San Francisco Bay Regional Water Quality Control Board Hearing. Where appropriate, EPA and California revised the draft permit to reflect site-specific conditions in San Francisco.

V. ARGUMENT

Petitioner seeks Board review of the following Permit provisions: 1) receiving water limitations at Section V. and Attachment G, Section I.I.1.; 2) the requirement to update the LTCP with current information at Section VI.C.5.d.; and 3) the reporting of sewer overflows at Section VI.C.5.a.ii.b. Contrary to Petitioner's assertion, Pet. at 10-11, the Region provided adequate justification for these provisions in the Permit and Fact Sheet, *see* AR #17, and fully responded to all of San Francisco's significant comments in its Response to Comments ("RTC"), *see* AR #10a and AR #10b. San Francisco may not agree with EPA's decision to move forward despite San Francisco's opposition, but that does not mean the Region erred. In fact, Petitioner ignores the full factual Record, fails to explain why the Region's responses were inadequate, and generally reiterates its earlier comments without substantively addressing the Region's responses. *See* Pet. at 16, 18, 19, 21, 25, 26-27, 33, 35, 38, and 42. Further, Petitioner fails to demonstrate that the appealed Permit provisions are based on a clearly erroneous finding of fact or conclusion of law or involve a matter of policy or exercise of discretion that warrants review. Petitioner also fails to demonstrate clear error on technical issues regarding the LTCP Update, Pet. at 23-31, and the sewer overflows reporting requirements, Pet. at 31-44, for which the Region should be granted substantial deference.

A. The Region Appropriately Included Narrative WQBELs in the Permit to Ensure Discharges Are Controlled as Necessary to Meet WQS, as Required by the CWA.

1. CWA Section 301(b)(1)(C) and the *CSO Control Policy* Require the Permit to Include Limits Necessary to Achieve Compliance with WQS, Including Protection of Designated Uses.

Petitioner argues that EPA is prohibited from including narrative WQBELs expressed as receiving water limitations because the Oceanside Permit contains other specific WQBELs and a

provision that allows the Permit to be re-opened. *See* Pet. at 13-20. There is no support for this position in the CWA, implementing regulations, or EPA guidance.

As explained in the RTC, AR #10a and AR #10b, Section 301(b)(1)(C) of the CWA requires that NPDES permits include effluent limits more stringent than technology-based limits whenever "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). In addition, EPA's 1994 *CSO Control Policy*, codified by Congress in 2000 at Section 402(q), 33 U.S.C. § 1342(q), makes clear that CSO discharges are subject to the water quality-based requirements of the Act, including the requirement to protect designated uses and other WQS. AR #96 at 18,688; 18,695. NPDES regulations also prescribe that permits include any more stringent limitation necessary to achieve water quality standards, 40 C.F.R. § 122.44(d)(1), specifying that in developing WQBELs, permit writers must ensure that "the level of water quality to be achieved by limits on point sources… complies with all applicable water quality standards." 40 C.F.R. § 122.44(d)(1)(vii)(A). NPDES regulations at 40 C.F.R. § 122.4(d) also prohibit the issuance of an NPDES permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

Pursuant to the statutory and regulatory requirements discussed above, the Region included permit limits necessary to achieve the applicable WQS, including protection of designated uses. Here, the WQS applicable to these discharges are the Ocean Plan, including the 1979 Exception, and the Basin Plan. The Region included specific WQBELs for CSO discharges, expressed in terms of the LTCP implementation, AR#17, Fact Sheet at F-20 and F-25, and narrative WQBELs, expressed in terms of receiving water limitations, that refer to the

applicable WQS, AR #17, Permit at 9 and Fact Sheet at F-26.[9] These narrative WQBELs require that the discharge "not cause or contribute to a violation of any applicable water quality standard" and not "create pollution, contamination or nuisance, as defined by California Water Quality Code 13050." AR #17, Permit at 9 and Attachment G Section I.I.1 at G-2.[10] The purpose of the narrative WQBELs is "to ensure compliance with applicable water quality standards in accordance with the CWA and regulations adopted thereunder." AR #17, Fact Sheet at F-26 and AR #10a, RTC B.1 at 11. *See e.g.,* 40 C.F.R. § 122.44(d)(1)(vii)(A) (requiring that permit writers ensure "that the level of water quality to be achieved… complies with all applicable water quality standards").

The Region's approach to developing WQBELs for San Francisco's combined sewer system is in accordance with the *CSO Control Policy*, which makes clear that "CSOs are point sources subject to NPDES permit requirements including both technology-based *and water quality-based requirements* of the CWA." AR #96 at 18,695 (emphasis added). Moreover, the *CSO Control Policy* specifically acknowledges that permits initially should require compliance with applicable WQS "expressed in the form of a narrative limitation." AR #96 at 18,696. Further, EPA's *CSO Guidance for Permit Writers* also states that, "*[i]n addition to performance standards*… the permit writer should include narrative permit language providing for the attainment of applicable water quality standards." AR #95c at 4-27 (emphasis added). This is exactly what the Region did.

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[9] Contrary to Petitioner's assertion, Pet. at 10, the Region explained the connection between receiving water limitations and WQBELs in its RTC: "Receiving water limitations are directly derived from the applicable water quality standards." AR #10a, RTC B.1 at 11.

[10] The Region also has the authority to include Attachment G, Section I.I.1 as it is a "more stringent limitation […] established under […] State law or regulations in accordance with Section 301(b)(1)(C) of CWA." 40 C.F.R. § 122.44(d)(5).

2. Narrative WQBELs have been Upheld by the Courts.

Petitioner argues that the CWA and its regulations do not allow the use of "generic" narrative WQBELs because they do not translate the WQS and calculate a pollutant-specific effluent limit. Pet. at 14. This translation is simply not required by the Act. *See PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology* (1994) 511 U.S. 700, 716 ("The Act permits enforcement of broad, narrative criteria"). Indeed, the Act defines "effluent limitation" as "*any restriction*…on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged…."). 33 U.S.C. § 1362(11) (emphasis added). *See also Citizens' Coal Council v. EPA*, 447 F.3d 879, 895-96 (6th Cir. 2006) (upholding EPA's interpretation that the term "effluent limitations" is not limited to numeric limits but encompasses "any restriction on discharges"). In addition, EPA's implementing regulations specifically recognize that WQBELs need not be numeric or end-of-pipe limitations. *See e.g.,* 40 C.F.R. § 122.44(k)(3) and (4).

As explained in the RTC, courts have routinely upheld narrative WQBELs as valid and enforceable limits under the CWA. AR #10a, RTC B.1 at 13. In fact, the Ninth Circuit has previously recognized with respect to municipal storm water discharges that "[b]ecause the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would 'ensure that the gross amount of pollution discharged [would] not violate water quality standards.'" *NRDC v. County of Los Angeles*, 636 F.3d 1235, 1249 (9th Cir 2011), citing *PUD No. 1 of Jefferson County v. Washington Dept of Ecology,* 511 U.S. 700, 998-90 (1994). Accordingly, "only by enforcing the water quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated."

Id. This is precisely what the Region has done in the Oceanside Permit – establish narrative effluent limits expressed in terms of the WQS themselves.

In a case involving a narrative WQBEL almost identical to the one at issue here,[11] the Ninth Circuit rejected the municipality's argument that narrative WQBELs cannot be enforced unless they have been translated into pollutant-specific effluent limits, finding that "the statutory language, legislative history, and case law authorize citizens to enforce permit conditions stated in terms of water quality standards." *Northwest Env. Advocates v. City of Portland*, 56 F.3d 979, 990 (9th Cir. 1995). *See also NRDC v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205 (enforcing California permit requirement prohibiting "discharges...that cause or contribute to the violation of the Water Quality Standards or water quality objectives").

In addition, the Fourth Circuit has recently upheld a State's incorporation of WQS into NDPES permit terms using broad narrative WQBELs, finding that such provisions do indeed impose obligations on permit holders. *Ohio Valley Env. Coalition v. Fola Coal Co.*, 845 F.3d 133, 141-142 (4th Cir. 2017). In that case, environmental groups alleged that the permittee violated a permit condition that incorporated by reference a West Virginia regulation requiring that "[t]he discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards…." *Id.* at 136. The Fourth Circuit upheld the district court's finding that the permittee violated this provision by discharging ions and sulfates in sufficient quantities to cause increased conductivity, which resulted in a violation of the State's narrative WQS. *Id.* at 137-138.

[11] The narrative WQBEL at issue in that case stated: "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards…" 56 F.3d at 985.

In doing so, the Court relied on EPA's position, as expressed in its amicus brief, that the narrative WQBEL was an enforceable permit term, noting that "EPA's view as to the reach of [this provision] has been consistent, as has the acceptance by courts of EPA's view when interpreting similar water quality provisions." *Id.* at 141. The Court went on to note that some of the NPDES permits that EPA itself has issued include narrative WQBELs like those in the West Virginia permit at issue (citing EPA NPDES Permit No. NH0100099 for the Town of Hanover, New Hampshire, pt. I.A.2, .3 and .6; and EPA's 2015 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, pt. 2.2.1.). *Id.* at 142, note 5.

Petitioner tries to distinguish this consistent line of case law by noting that those cases involved enforcement actions, Pet. at 15, but that is irrelevant. In each of these cases, the courts found that WQS can be implemented through narrative WQBELs expressed as receiving water limitations, and that these narrative WQBELs constitute enforceable terms of the permit. In particular, *Fola Coal*, by upholding the district court's methodology for determining whether the discharge violated the narrative WQBEL, confirmed that narrative WQBELs can in fact be implemented and enforced. *See Fola Coal,* 45 F.3d. at 141-142. This holding strongly supports the proposition that narrative WQBELs are authorized under the Act and NPDES regulations and can be appropriately included in a permit.

3. The Factual Information Submitted by San Francisco Regarding Protection of Designated Uses and Other WQS Does Not Undermine the Region's Finding That Narrative WQBELs Were Appropriate.

Petitioner argues that the Region failed to consider the current performance of the system, Pet. at 11, San Francisco's specific data and information, Pet. at 17, or otherwise consider information San Francisco submitted during the comment period, Pet. at 19. The Region properly considered all the factual information in the Record, including information submitted by

Petitioner, and concluded that there were sufficient facts overall to support the inclusion of the receiving water limitations to ensure protection of designated uses and other WQS. Specifically, the Region considered and properly rejected Petitioner's request for an affirmative statement in the Permit that its current operations ensure protection of designated uses. AR #10a, RTC B.5 at 15-16.

As explained in the Record, compliance with the specific WQBELs in the LTCP section of the Permit, while designed to control discharges to prevent exceedances of WQS, does not necessarily "achieve" or "ensure compliance with" applicable WQS. AR #10a, RTC B.4 at 15 ("While we agree that the long-term control plan requirements in Provision VI.C.5.c are designed to ensure attainment of applicable water quality standards, compliance with these requirements in isolation will not necessarily achieve water quality standards. For this reason, compliance with receiving water limitations is also required."). In fact, the *CSO Control Policy* contemplates that implementation of a LTCP may not be enough to meet WQS and that revisions to LTCPs and expansion or retrofitting of controls may be necessary to meet WQS. *See* AR #96 at 18,691; 18,693; AR #10a, RTC B.4 at 15.

Petitioner argues that the Region did not respond or explain how the current operations fail to protect "beneficial uses" or address the findings in the 2009 Oceanside permit that the discharges "would not compromise beneficial uses." Pet. at 18 (citing 2009 Fact Sheet at F-34). The statement in the 2009 Oceanside permit is more than ten years old. In issuing the current Oceanside Permit, EPA reviewed more current data and determined that it was not appropriate to include a statement indicating that solely implementing the LTCP would result in compliance with WQS. AR #91 at 6-8. In making this finding, and contrary to Petitioner's assertion, the

Region reviewed over ten years of data when drafting the Oceanside Permit, which revealed as follows:

- Since November 2012, the monitoring data for the CSO discharges shows that copper concentrations exceeded the copper daily maximum water quality objective over 96% of the time and that zinc concentrations exceed the zinc daily maximum water quality objective over 67% of the time. *See* AR #67b, CIWQS data spreadsheet.

- Pollutant concentrations in combined sewer discharges exceed certain WQS. For example, the average copper and zinc concentrations are 29 µg/L and 118 µg/L, with maximum concentrations of 59 µg/L and 274 µg/L. AR #63, 2014 *Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls*, Appendix A at 2-3. The applicable water quality objectives are 3 µg/L as a six-month median, 12 µg/L as a daily maximum, and 30 µg/L as an instantaneous maximum for copper; and 20 µg/L as a six-month median, 80 µg/L as a daily maximum, and 200 µg/L as an instantaneous maximum for zinc. AR #101, Table 3 at 9.

- According to San Francisco's reported data, between July 2012 and June 2013, San Francisco's main recreational beach (Ocean Beach) was posted with "No Swimming" signs for 17 days due to combined sewer discharge events. AR #62, 1997-2012 Southwest Ocean Outfall Regional Monitoring Program Summary Report, April 3, 2014 at 3-13.

- Additionally, San Francisco's data indicate that 20 percent of recreational users were in contact with receiving water during or immediately after CSDs.[12] San Francisco also noted that combined sewer discharges that occur in the early Fall or Spring potentially impact more users since recreational use increases when days are longer and the duration of storm events is typically shorter, which may contribute to good surf conditions. AR #62 at ii.

Petitioner argues that it commented that "there was no factual support for Section V and Attachment G.I.I.1" and the "Region failed to respond to San Francisco's comment." Pet. at 17. As demonstrated above, this is not true. Thus, while Petitioner may not agree with the outcome of EPA's consideration of all the factual information about water quality impacts, it was not clear

[12] Contrary to San Francisco's assertion, Pet. at 27, the Region did not incorrectly cite the data in AR #63. The report explicitly says "[m]ost (80 percent) users observed were engaged in noncontact nonwater recreation, and fewer recreational users were observed when posting – which occurs during or shortly after a CSD – then when de-posting, which typically occurs one to two days after a CSD." AR #63 at 3-14. In the percentage of total recreational users (bottom row of table 3-3), 15% of use observations are in the full contact users column and 5% of use observations are in the partial contact users column. *See id.*

error for the Region to include narrative WQBELs, expressed as receiving water limitations, to ensure protection of WQS, including designated uses. Additionally, under the EAB's standard of review described above, the Region should get deference on the technical considerations supporting the receiving water limitations. Contrary to Petitioner's contentions. Pet. at 18, while previous permits had arguably less stringent receiving water limitations, nothing precludes the Region from revisiting and revising findings from 2009, let alone 2003.

4. The Narrative WQBELs Are Not Vague and Do Not Deprive San Francisco of Fair Notice.

Petitioner argues that the narrative WQBELs are "so vague and unclear" that they fail to provide fair notice to San Francisco of its legal obligations under the CWA. Pet. at 20. However, the narrative WQBELs, expressed as receiving water limitations in the Oceanside Permit, provide adequate notice of what is required and do not violate due process for the reasons discussed below.

First, the narrative WQBELs require compliance with a known endpoint – i.e., the State WQS – which are readily and publicly available.[13] While Petitioner opines that the receiving water limitations in the Oceanside Permit make only "an oblique reference to water quality standards" Pet. at 14, in fact the RTC identifies the exact portions of the applicable WQS. *See* AR #10a, RTC B.13 at 21 ("the Basin Plan, the Ocean Plan, and State Water Board Order No. WQ 79-16 set forth applicable water quality standards, including beneficial uses and water quality objectives to protect beneficial uses (see Fact Sheet sections III.C.1 and III.C.2).") This clearly directs Petitioner to which standards apply to its discharges, thus providing "a reasonable opportunity to know what is prohibited." *See Grayned v. City of Rockford*, 408 U.S. 104, 108

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[13] AR #101 and #98a. These State WQS are publicly available. *See* https://www.waterboards.ca.gov/water_issues/programs/ocean/docs/oceanplan2019.pdf and https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html.

(1972) (explaining that due process requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and "provide explicit standards for those who apply them").

It may be harder to assess the levels of pollutant discharges that would comply with receiving water limitations than with end-of-pipe effluent limitations, but there are certainly reasonable means to do so. As evidenced by the *Fola Coal* decision, courts can interpret "generic" narrative WQBELs requiring compliance with State WQS to require pollutant-specific limits on a particular discharge. *Fola Coal,* 845 F.3d. at 141. This demonstrates that the narrative WQBEL in the *Fola Coal* permit[14] was not too vague to implement, as the district court engaged in a fact-specific inquiry to determine what levels of pollutants would result in a non-attainment of the narrative WQS and found that the permittee's discharge had caused or contributed to such non-attainment, in violation of the narrative WQBEL in its permit. *Id.* at 138. Significantly, the permittee in *Fola Coal* had raised fair notice claims, which the Court specifically rejected. *See id* at 44. Indeed, the *Fola Coal* case demonstrates that narrative WQBELs "can be applied to a set of individuals without infringing upon constitutionally protected rights" and therefore undermines Petitioner's argument as to the unconstitutionality of the WQBELs in its permit. *Rust v. Sullivan,* 500 U.S. 173, 183 (1991), citing *U.S. v. Salerno*, 481 US 739, 745 (1987) (involving a facial constitutional challenge to a regulation, noting that "the challenger must establish that no set of circumstances exists under which the [regulation] would be valid").

[14] In *Fola Coal*, the WQBEL at issue was itself a narrative, i.e. requiring compliance with the WQS, but the end point (the WQS) were also a narrative. These WQS prohibited discharges that "cause…or materially contribute to…[m]aterials in concentrations…harmful, hazardous or toxic…," a condition that "adversely alters the integrity of the waters of the State," or any "significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." (W.Va. Code R. 47-2-3.2e, 3.2i). The *Fola Coal* court found that the narrative WQBEL was enforceable and did not violate due process.

Petitioner has not explained why it could not engage in an assessment similar to that of the district court's in *Fola Coal* to determine the discharge limits needed to comply with WQS, and therefore has failed to demonstrate that the narrative WQBEL in the Oceanside Permit violated due process. Moreover, should Petitioner face an enforcement action based on an alleged violation of a narrative WQBEL, it would have a chance in court to dispute that its discharge caused or contributed to an exceedance of the WQS, thus further mitigating any possible due process concerns.

Finally, Petitioner has a much higher standard to meet here, where it is not asserting that constitutionally protected conduct is at stake.[15] *See Richmond Boro Gun Club, Inc. v. New York,* 97 F.3d 681, 684 (2nd Cir. 1996) ("Courts rarely invalidate a statute on its face where it does not relate to a fundamental constitutional right (usually first amendment freedoms) and if the statute provides 'minimally fair notice' of what the statute prohibits"); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982) ("In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct"). Petitioner's concern here is not with constitutionally protected conduct but with economic regulation, such as potential civil liability from enforcement actions and the costs of complying with the narrative WQBELs. As the Supreme Court has explained, "economic regulation is subject to a less strict vagueness test because its subject matter is more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of a

[15] Most cases concerning vagueness and fair notice arise in the context of challenges to statutes or regulations. They are nonetheless illustrative as to whether permit conditions are vague or fail to provide adequate notice of what is required.

regulation by its own inquiry, or by resort to an administrative process." *Flipside*, 455 U.S. at 498. Here Petitioner can consult easily accessible WQS to determine what is prohibited, is a sophisticated entity capable of assessing the discharge limits that would meet those standards, and has the opportunity for review in any enforcement action taken based on an alleged violation of the narrative WQBELs. Accordingly, Petitioner has not demonstrated that the WQBELs fail to provide fair notice or violate Constitutional due process.

B. The LTCP Update Requirement, Permit Section VI.C.5.d, Is Authorized by the CWA and Supported by the Record.

1. The CWA and *CSO Control Policy* Authorize the LTCP Update Requirement to Protect Sensitive Areas and Comply with WQS.

Petitioner claims that the Region "clearly erred" by requiring the LTCP Update because the *CSO Control Policy* provisions concerning LTCPs do not apply to San Francisco and the LTCP Update requirement is "contrary to law." Pet. at 24. Petitioner's claims are based on its misinterpretation of the *CSO Control Policy* and rely on decades-old planning to argue that it has no further obligations. Pet. at 24. While Section I.C. of the *CSO Control Policy* may have allowed San Francisco to avoid the initial planning requirements applicable to other CSO permittees, *see* AR #10a, RTC B.7 at 17, Petitioner ignores language in the same section of the *CSO Control Policy* requiring ongoing assessment of the control programs: "Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy." AR #96 at 18,690.

The LTCP Update requirement is also specifically authorized by the *CSO Control Policy* provisions regarding discharges to sensitive areas, which identify the ongoing need to assess impacts to sensitive areas. *See* AR #96 at 18,692 and 18,696. The *CSO Control Policy* states that the re-assessment should be based on consideration of "*new or improved techniques* to eliminate or relocate [flows], or on changed circumstances that influence economic achievability." *Id*. at

18,692 (emphasis added). These techniques are included in Table 7 of the Oceanside Permit. AR #17 at 21-22, *see* AR #10a, RTC B.8 at 17 and 18. Here, six of the seven CSDs discharge to sensitive areas in State waters. *See* AR #17 at 22. The Region noted that the LTCP Update requirement, as explained in detail in Table 7 of the Permit, requires Petitioner "to complete a sensitive area analysis that evaluates, prioritizes, and proposes control alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of discharges to sensitive areas. As a result, it may be necessary for San Francisco to revisit some of the planning it initially undertook and construct improvements consistent with San Francisco's updated long-term control plan." AR #10a, RTC B.7 at 17.

In the RTC, the Region specifically identified authority in the *CSO Control Policy* noting, "[a]s explained in Fact Sheet Section VI.C.5.d, there are several bases for the requirement, including but not limited to Sections IV.B.2.b., IV.B.2.d., IV.B.2.e., and IV.B.2.f. of the Combined Sewer Overflow (CSO) Control Policy ("Phase II Permits-Requirements for Implementation of a Long-Term CSO Control Plan"); State Water Board Order No. WQ 79-16; 40 C.F.R. § 122.44(d) . . . ." AR #10a, RTC B.7 at 16. The Region's reliance on the *CSO Control Policy* is also consistent with the EPA's *Combined Sewer Overflows: Guidance for Long-Term Control Plan,* AR #95b, and with EPA's implementation of the *CSO Control Policy* where EPA has required LTCP updates in consent decrees for other combined sewer systems. *See* 68 Fed. Reg. 68651-01 (Dec. 9, 2003) (requiring Hamilton County and City of Cincinnati to update LTCP and implement comprehensive "basement backup" program to avoid sewage overflows into basements). AR #10a, RTC B.7 at 17.

Petitioner argues that it is entitled to an exemption from re-evaluating how its discharges impact designated uses and other WQS because the 1979 Exception's design assumptions (that

beneficial uses and other WQS would be protected) somehow, *ipso facto*, makes it so today. *See* Pet. at 5-6. Petitioner reads too much into the 1979 Exception. In 1979, neither EPA nor California determined that the Westside Facilities' proposed design and construction would protect beneficial uses and other WQS in perpetuity. *See* AR #10a, RTC B.13 at 20 and 21. Rather, the 1979 Exception itself "contemplates progress towards attaining designated uses and water quality objectives, except for bacteria. Specifically, it requires that to 'the greatest extent practical,' the Discharger designs, constructs, and operates facilities to conform to the remaining standards set forth in chapter II, except for bacteriological standards, and chapter III of the 1978 Ocean Plan." AR #10a, RTC B.13 at 21.

2. The Record Supports the Region's Findings that the LTCP Update Was Warranted.

Petitioner asserts that the Region identified no relevant factual findings supporting the requirement to update the LTCP and failed to identify any factual finding that beneficial uses are not currently protected. Pet. at 23 and 26. This is simply wrong. The Region has consistently stated that the LTCP Update requirement is necessary to ensure that San Francisco's LTCP is based on the most current information to assist EPA in assessing whether WQS are being met. AR #17, Fact Sheet at F-30; *see* AR #10a, RTC B.7 at 17. In fact, the facilities have changed since construction was completed in 1997. For example, San Francisco discharges from seven CSDs, not eight as originally designed. AR #91 at 6, note 9; AR #10a, RTC B.7 at 17, note 3.

Petitioner mischaracterizes the LTCP Update requirement at Permit Section VI. C.5.d., implying that it mandates an unduly onerous "re-examination of the Westside Facilities." Pet. at 23. Contrary to Petitioner's assertion, Pet. at 25, the Region took into consideration that San Francisco had already completed or substantially completed construction of CSO control facilities, so initial planning and construction provisions would not apply to San Francisco. AR

#10a, RTC B.7 at 17. The Region noted that the LTCP Update requirement "reflects this when it allows San Francisco to 'use previously completed studies to the extent that they accurately provide the required information.'" *Id.* However, San Francisco has provided many documents over the years, but as the Region stated identifying which documents constitute its current LTCP and "which are outdated is difficult." *Id.* The Region noted that Petitioner's "current LTCP is a collection of documents, developed over the course of two decades, dating from 1971. It is not a single document, as is the case with most combined sewer systems, but a number of documents and supplements, whose relationship is not entirely clear." AR #91 at 5. The Region also explained that Petitioner's combined sewer system, the sewershed, and the management approach have changed, as documented in San Francisco's SSIP, "which may or may not be part of the Discharger's LTCP." *Id.* Significantly, "these planning documents have not been submitted to the EPA as part of a LTCP and have been developed by different departments within SFPUC. Therefore, EPA is unsure whether these documents have been vetted and approved by SFPUC management since each plan is a piece of the broader planning effort. An updated LTCP will coordinate, and integrate, findings of such existing planning efforts given that circumstances have changed since the original LTCP was first developed in the 1970s and implemented in 1997." *Id.*

Petitioner states that its LTCP is adequately described in the *San Francisco Wastewater Long Term Control Synthesis* (March 30, 2018) ("*Synthesis")* Pet. at 4; *see* AR #88b. However, this document incorporates documents such as the early 1970s *San Francisco Master Plan for Waste Water Management* and the 1974 Environmental Impact Report and Statement that modified it, as well as some of the construction projects in the SSIP. *See* AR #88b. EPA notes that the most recent document in the *Synthesis* for the Oceanside facilities is a 1990 revision of a

1988 document. *See* AR #88b at A-2. Thus, the *Synthesis* does not provide the Region a basis on which to analyze San Francisco's current LTCP and whether it is adequate to ensure that San Francisco's CSO discharges meet WQS. *See* AR #91.[16]

Further, "[t]he disjointed and historic nature of the LTCP is confounded by State Board Order No. WQ 79-16, which granted the Discharger's eight wet weather diversion structures an exception to the Ocean Plan's prohibition against discharges or by-passes not conforming to standards. This exception has been in continuous effect for nearly four decades and has not been revised to reflect the current combined sewer system." AR #91 at 6. The Region found that "an updated LTCP will ensure that future permit requirements, especially wet weather operations and wet weather performance-based requirements, are based on the most recent and appropriate information." *Id*. The finding is adequately supported in the Record, as the Region described the specific changes in the system and management approach that warrant an LTCP Update and cited impacts on some of the beneficial uses and other WQS at issue, based on San Francisco's own documents. AR #91 at 11 and 13.

The Region explained that other cities have updated LTCPs, due to the "need to achieve specific water quality standards, update control commitments, update system requirements based on capital improvements, include additional green infrastructure controls, minimize impacts associated with combined sewer discharges, and clarify technology-based and water quality-

[16] The Region's determination is bolstered by the fact that California also found this *Synthesis* to be inadequate. Petitioner submitted the *Synthesis* pursuant to the 2013 Bayside NPDES Permit CA0037664, Order No. R2-2013-0029, Provision VI.C.5.c.v., which like the Permit at issue here, required it to obtain current information about San Francisco's system. On September 7, 2018, California sent Petitioner a letter noting that the *Synthesis* did not comply with the Bayside Permit requirements, in part because the *Synthesis* did not reflect current circumstances. AR #85. Petitioner has not addressed California's findings to date. *See also* AR #88a.

based permit requirements." *Id*. at 13. Petitioner has failed to show how these findings constitute "clear error."

3. The Region Adequately Responded to San Francisco's Significant Comments on the LTCP Update Requirement.

Petitioner argues that the Region failed to address two comments regarding the LTCP Update requirement. First, San Francisco says that the Region did not "identify federal and State legal authority for each task and sub-task in Table 7." Pet. at 10. Second, San Francisco argues that the Region failed to explain why it had departed from the position that the Section I.C.2 exemption in the *CSO Control Policy* applies to San Francisco. *Id*. Both assertions are incorrect.

As stated above in Section V.B.1., the Record, including the RTC, identified the legal bases for the LTCP Update requirement in the *CSO Control Policy.* The Region also responded to the comment regarding Section I.C.2, clarifying that while Section I.C.2 "recognized that some permittees had already completed construction," this meant that "*initial* planning and construction provisions would not apply to all dischargers" (citing 59 Fed. Reg. 18,688; 18,690) (emphasis added). AR#10a, RTC B.7 at 17. Thus, the LTCP Update requirement allows San Francisco to "use previously completed studies to the extent that they accurately provide the required information." *Id*. (citing Provision VI.C.5.d). However, as the Region noted, the *CSO Control Policy* "does not exempt San Francisco from planning requirements in perpetuity…. As a result, it may be necessary for San Francisco to revisit some of the planning it initially undertook and construct improvements consistent with San Francisco's updated long-term control plan." *Id*.

4. The LTCP Update Provisions Are Not Vague and Do Not Deprive San Francisco of Fair Notice.

Petitioner argues that the LTCP Update provision fails to provide notice of what is necessary to comply. Pet. at 30. Like Petitioner's fair notice claim regarding WQBELs (*see*

Section V.A.4 above), the Oceanside Permit provides adequate notice of what is required and does not violate due process, as described below.

The Permit clearly describes the tasks necessary for the LTCP Update. Specifically, San Francisco must submit a "Consideration of Sensitive Areas Report that evaluates, prioritizes, and proposes control alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of discharges to sensitive areas." AR #17 at 22. Petitioner is required to evaluate different control technologies to determine their effect on the quality of CSO discharges. *See id*. at 22. Far from being vague, the Permit sets outs in Table 7 specific tasks on how to achieve compliance with the LTCP Update requirement. As explained in the RTC, "[t]he tasks in Table 7 are detailed and concrete, although they also provide flexibility for San Francisco to determine the precise means of compliance." AR #10a, RTC B.7 at 17. The tasks are consistent with the *CSO Control Policy*, EPA's guidance document *Combined Sewer Overflows, Guidance for Long-Term Control Plan* (EPA 832-B-95-002), and "San Francisco's most recent planning efforts (e.g., Sewer System Improvement Program and the 2010 master planning efforts)." *Id*.

These provisions clearly identify the tasks Petitioner must complete, thus providing "a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)) (explaining that due process requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and "provide explicit standards for those who apply them").

Petitioner should have been well aware that the *CSO Control Policy* itself made clear in 1994 that the LTCP should be revised and updated when necessary. The *CSO Control Policy* is explicit when it requires a reassessment of CSO discharges to sensitive areas every permit term and allows for modification of CSO controls to ensure protection of beneficial uses. AR #96 at

18,696. The LTCP Update requirement seeks information about the *current* nature of the discharges to sensitive areas and their impacts and allows Petitioner the opportunity to propose how to address them, while also providing information to the permitting authorities about the current status of the LTCP.

Petitioner's argument that the LTCP Update requirement fails to provide fair notice ignores the clear tasks set forth in the Oceanside Permit, focusing instead on protection of beneficial uses. As with Petitioner's fair notice argument regarding WQBELs, protection of beneficial uses and other WQS clearly reference readily available standards set forth in the Ocean Plan and the Basin Plan. *See* Section V.A.4, above. Here, where the Permit clearly describes discrete tasks to be accomplished and where Petitioner is a sophisticated entity capable of completing the tasks required, Petitioner has failed to demonstrate that the LTCP Update requirement fails to provide fair notice or violate Constitutional due process.

C. The Permit Requirement to Report All Sewer Overflows is Authorized by the Act and Supported by the Record.

Petitioner challenges the Oceanside Permit's reporting requirements for sewer overflows, particularly those that do not reach jurisdictional waters, as beyond the CWA's reach, asserting that the Region failed to identify any authority for this requirement. Pet. at 31-32. However, Petitioner implicitly concedes there is both authority and record support for reporting overflows related to operation and maintenance, regardless of whether they reach surface waters. *See* Pet. at 39, note 7. In fact, Petitioner acknowledged that reporting the occurrence, cause and location of sewer overflows from the combined sewer system is necessary "to facilitate EPA, Regional Water Board, and the public's evaluation of the effectiveness of the City's operation and maintenance of the collection system." AR #10b, RTC Attachment 1 A.9 at 5. Petitioner also

mischaracterizes the nature of the reporting requirement, envisioning wholesale regulation of design parameters. Pet. at 36.

What the Permit actually requires is just to report whenever sewage or sewage mixed with stormwater exits the system, whether in streets, business, residences, or discharges to surface waters. AR #17 at 17. As explained below, such data gathering is well within the Agency's authority under the Act. Further, the Record shows that the Region adequately identified authority for this reporting requirement, pointing to standard NPDES regulatory requirements as well as the *CSO Control Policy.* In terms of the reasonableness of reporting, the Region adequately discussed the factual bases for its conclusions that complete reporting provides important information about the proper operation and maintenance of Petitioner's combined sewer system. Thus, the Permit's sewer overflow reporting requirements are both authorized under the Act and reasonable, even if the overflows do not reach surface waters.

1. Sections 308 and 402 of the CWA Provide Authority to Require Reporting of All Sewer Overflows Regardless of Whether They Reach Surface Waters.

The sewer overflow reporting requirements are authorized under Sections 308 and 402 of the Act. As noted above in Section III.A. in addition to the broad information gathering authority in Section 308, Section 402(a)(2) provides specific authority to require reporting under the NPDES program: "[t]he Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting and such other requirements as he deems appropriate," 33 U.S.C. § 1342(a)(2). *See also* 40 C.F.R. § 122.43(a) (authorizing Director to establish permit conditions to assure compliance with the CWA and regulations). Thus, by their plain terms Sections 308 and 402 of the CWA authorize information collection, such as complete sewer

overflow reporting, to ensure compliance with the Act, including Section 402(q)'s requirement that permits "shall conform" to the *CSO Control Policy.* 33 U.S.C. § 1342(q).

The *CSO Control Policy* requires implementation of NMCs as the minimum technology-based controls to be achieved by all combined sewer systems. AR #96 at 18,688; 18,695. As discussed above, NMCs require "proper operation and regular maintenance programs for the sewer system," "maximum use of the collection system for storage," and "maximization of flow to the [plant] for treatment." *Id.* at 18,691. The Region clearly identified the bases for its authority to require reporting of all overflows in its Response to Comments. "Failing to monitor and report some overflows would hamper efforts to evaluate implementation of the Nine Minimum Controls and ensure permit compliance." AR#10a, RTC C.3 at 22. The Region identified the relationship between combined sewer overflow reporting and the implementation of the *CSO Control Policy,* "including to determine the following:

- whether San Francisco's operations and maintenance activities are adequate (*Combined Sewer Overflows Guidance for Nine Minimum Controls*, May 1995) (NMC Guidance) at pp. 2-3 – 2-4; EPA, *Report to Congress: Impacts and Control of CSOs and SSOs*, Aug. 2004 (2004 Report to Congress);

- whether measures to maximize storage within the collection system are functioning properly (*see* NMC Guidance, at pp.3-2, 3-4; 2004 Report to Congress at pp. 8-12, STR-2);

- whether flows to the treatment works have been maximized without causing sewer backups (*see* NMC Guidance, at 5-2, 5-3; 2004 Report to Congress, at pp. 8-6, CSC-2 – CSC-4, CSC-11);

- whether dry weather overflows are being controlled (*see* NMC Guidance, at pp. 6-2 - 6-3);

- whether actions to minimize floatables are not causing backups (*see* NMC Guidance, at pp. 7-3, 7-8 – 7-10, 7-14); and

- whether pollution prevention activities (e.g., fats, oil, and grease programs and antilittering campaigns) are effective (*see* NMC Guidance, at pp. 8-1 – 8-3; 2004 Report to Congress, p. O&M-14)."

AR #10a, RTC C.3 at 23. The Petitioner disagrees with the Region's use of the NMC Guidance as support for the reporting provisions, Pet. at 38, however, Petitioner ignores the underlying authority in the *CSO Control Policy* that the NMC Guidance reflects.

In addition to ensuring compliance with the NMC requirements in the *CSO Control Policy*, reporting of all sewer overflows is important for adequate characterization of the sewer system's operations to assist in developing a LTCP, *see* AR #96 at 18,691. Here, as noted above, Petitioner and the permitting authority will be able to use this data to inform the LTCP Update. *See* AR #91 at 10; AR #17, Permit Table 7 at 22. Understanding the location and frequency of overflows will help with maximizing treatment at the POTW because if the overflows are reduced, then a larger proportion of the combined wastewater and stormwater would be sent and treated at the POTW. *See* AR #91 at 4. Finally, the Region noted that "[e]xcluding capacity-related overflows from monitoring and reporting requirements would also risk under-reporting problems in areas with known capacity constraints and arguably the most need for collection system rehabilitation." AR #10a, RTC C.3 at 23.

2. NPDES Permitting Regulations Also Support the Requirement to Report All Sewer Overflows.

In addition to the reporting and operation and maintenance requirements under the *CSO Control Policy,* EPA's standard permit regulations for all NPDES permittees provide further support for this requirement. Under 40 C.F.R. § 122.41(e), an NPDES permittee "shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." *See* AR #17, Permit Standard Conditions at D-1 and Regional Standard Provisions at G-2. EPA regulations at 40 C.F.R. § 122.43(a) state that "in addition to

conditions required in all permits […], the Director shall establish conditions, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements of the CWA and regulations." Further, 40 C.F.R. § 122.41(h) requires permittees to furnish "any information which the Director may request […] to determine compliance with this permit." Monitoring and reporting all sewer overflows is an essential component of ensuring adequate operation and maintenance, as explained above and acknowledged in Petitioner's brief. AR #10a, RTC C.1 at 22; Pet. at 39, note 7.

3. The Region Had a Reasonable Basis Supported by the Record for the Requirement to Report All Sewer Overflows and Adequately Responded to Comments About this Requirement.

Petitioners question whether the Region abused its discretion or exercised considered judgment in requiring reporting of overflows that do not reach surface waters. Pet. at 38-44. The Region explained that the provisions requiring reporting of all overflows "are necessary because understanding the causes of overflows is vital to determining whether and what corrective actions might be appropriate." Pointing to Petitioner's own comment (A.16 at AR #10b, RTC Attachment 1 at 11), the Region explained that:

> frequency, cause, and location of sewer overflows from the combined sewer system are useful metrics to evaluate the effectiveness of collection system operations and maintenance. In fact, without such monitoring and reporting, determining whether a particular sewer overflow from the combined sewer system arises solely from capacity constraints would be difficult, if not impossible, particularly when dealing with a collection system as old and complex as San Francisco's collection system.

AR #10a, RTC C.3 at 22.

The reporting requirement also is necessary so that Petitioner assesses the combined sewer system capacity, as Petitioner is required by the Permit's Regional Standard Provisions to operate the collection system "in a manner that precludes public contact with wastewater." AR #17 at G-3. The Region explained that "limiting the definition as suggested [exclude overflows

that occur as a result of storms that exceed system capacity] would deprive U.S. EPA, the Regional Water Board, and the public of information needed to evaluate the sufficiency of San Francisco's system as designed and constructed." AR #10a, RTC C.5 at 24. When Petitioner commented that "[t]here is no material benefit in collecting data on sewer overflows from the combined sewer system that occur as a result of storms exceeding the system's level of service because it is known in advance that they will occur," the Region responded that "without monitoring and reporting we cannot know the frequency or severity of such events (and cannot evaluate the accuracy of any models used to predict the frequency or severity of such events)." AR #10a, RTC C.6 at 24. The Region also stated that "[a]t a minimum, monitoring and reporting of actual overflows is needed to determine the accuracy of any model or other engineering evaluation completed." AR #10a, RTC C.7 at 25.

Further, inclusion of this reporting requirement addresses the public's concerns, reflected in numerous comments, that such overflows pose a threat to human health.[17] One commenter stated, "[w]hat San Francisco has been allowed to do for decades is reprehensible, indefensible, and possibly criminal, and U.S. EPA and the Regional Water Board must stop San Francisco from putting raw sewage into residents' homes." AR #10a, RTC Bachelor, Dunseth, and Hooper Comment 1 at 2. The Region responded that EPA and California "agree that the release of raw sewage into homes is a serious health concern" and noted that the draft Permit required "reporting and notification of sewer overflows from the combined sewer system." *Id.* at 2 and 3.

Citizens also brought up other overflows that do not reach waters of the U.S. and yet clearly present danger to the public health and the environment. "It is not uncommon for 250-

[17] The information gathering authority in Section 308 of the Act, 33 U.S.C. § 1318, specifically references CWA section 504, which relates to concern for public health. *See* 33 U.S.C. § 1364. While Section 504 does not provide independent authority for imposing permit conditions, it is reasonable for the Region to have used section 308 authority to gather information related to public health concerns.

pound manhole covers to blow off the street, sending geysers of sewage into the air. These manhole covers could hit and kill someone, and the dislodged covers leave open holes in the streets." AR #10a, Bachelor, Dunseth, and Hooper Comment 3 at 3. The Region responded that it agrees "that dislodged manhole covers pose a safety concern. Manhole safety is an aspect of proper facility operations and maintenance, and the [draft NPDES Permit] requires San Francisco to properly operate and maintain its facilities (see Attachment D Section I.D and Provision VI.C.5.a.i)." *Id.*

Citizens called for accountability, asking that the Region "[h]old San Francisco responsible for its sewer flooding, which is polluting my neighborhood. Make them report their sewer flooding to authorities and the public, and post notices appropriately." AR #10a, Gelini Comment 1 at 8. The Region explained that "San Francisco is required to report information about its discharges, operations, and violations" (citing Attachment E, Section VII.B and Attachment G Section V.C. Provision VI.C.5.a.ii(b)). *Id.*

Petitioner argues that the Region failed to respond to its significant comment where it objected to the "unqualified" assertion that such reporting was needed. Pet. at 11. This is contradicted by the responses described above, which show that the Region provided both legal and factual support for requiring the monitoring and reporting of all sewer overflows. Petitioner cannot show clear error regarding the Region's decision to require reporting of all sewer overflows.

VI. CONCLUSION

For the reasons stated above, the Region requests that the Board deny San Francisco's Petition.

Respectfully submitted,

<u>For EPA</u>

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

In accordance with 40 C.F.R. §§ 124.19(d)(1)(iv) and (d)(3), I hereby certify that this Response does not exceed 14,000 words. Not including the caption, table of contents, table of authorities, figures, signature block, table of attachments, statement of compliance with word limitation, and certification of service, this Response contains 12,248 words.

Certificate of Service

I hereby certify that I caused a copy of the attached *Response to San Francisco's Petition for Review of Oceanside NPDES Permit,* NPDES Appeal No. 20-01, to be served via email upon the persons listed below.

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