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

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

# CITY AND COUNTY OF SAN FRANCISCO'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW OF SAN FRANCISCO'S OCEANSIDE WASTEWATER TREATMENT PLANT'S NPDES PERMIT ISSUED BY EPA REGION 9

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# I. INTRODUCTION

The City and County of San Francisco ("San Francisco") has demonstrated that the Region's issuance of the challenged terms in NPDES Permit No. CA0037681 ("Permit") was based on clearly erroneous findings of fact and conclusions of law. The Environmental Protection Agency ("EPA"), Region 9's ("Region") Response fails to demonstrate otherwise. On that basis, the Environmental Appeals Board ("Board") must remand the Permit.

In retrospect, it is unsurprising that the Region violated the required procedure and blindly pursued fatally-flawed Permit terms. Issuance of this Permit is tainted due to EPA's unprecedented politicization of the process, unwarranted intervention of Headquarters in permitting decisions, and a baseless animus towards San Francisco. This is evident via:

- Administrator Wheeler's September 26, 2019 correspondence to the Governor of California, AR#125 – full of falsehoods about San Francisco's system and compliance history, AR#128 – announcing the Administrator's direct involvement in "all options to bring the City into compliance."
- The unilateral elevation of permitting decisions in October away from the Region to the Principal Deputy Assistant Administrator at the Office of Water in Headquarters without explanation. Att.17.
- The politicization resulting in joint Correspondence from Senators Feinstein and Harris to the EPA Inspector General on October 3 requesting an investigation, now underway, into EPA's permitting and enforcement decisions targeting San Francisco. AR#129; Att.18, 19.
- The Region's six week delay in responding to San Francisco's December 27 letter requesting information about the Permit's effective date until issuing the February 7, 2020 letter first announcing the Region's untenable "Two Separate Permit Theory" (subject to a separate motion). Att.20; AR#20.b.
- Administrator's Wheeler February 27, 2020 testimony to Congress repeating falsehoods about San Francisco, evidencing the Administrator's continued involvement in the

permitting process, and mischaracterizing the pursuit of San Francisco's rights via this appeal as a "delay" tactic intended to "game the system." Att.21.

San Francisco asks that the Board uphold its original mandate of "inspiring confidence in the fairness of Agency adjudications," 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992), by shining a light on this unprecedented political interference and remanding the Permit to the Region solely on the legal merits of this appeal.

## II. ARGUMENT

### A. The Region Clearly Erred by Failing to Adequately Respond to Significant Comments

The Region must "respond to all significant comments on the draft permit," 40 C.F.R. §124.17(a)(2), and "must address the issues raised in a meaningful fashion." *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004). This standard was not satisfied.

- San Francisco inquired about the distinction between receiving water limitations and water quality based effluent limitations ("WQBELs"). AR#9, Att.B at 2. The Region failed to address the core issue, instead pointing to a single conclusory statement about receiving water limitations' "connection" to "the applicable water quality standards ["WQS"]." Response at 17, n.9.
- San Francisco requested legal authority for each requirement in Table 7 (AR#9, Att.B at 9). The Region's inadequate response relied upon inapplicable CSO Policy requirements (i.e. Phase II, not *post*-Phase II), and failed to explain how the cited authorities applied.
- The Region provided no responses for applying Section I.C.2. of the CSO Policy to San Francisco via Table 7, despite its affirmation that San Francisco was exempt from planning and construction requirements because its program was substantially complete. *Id.* at 9–10.
- The Region does not point to anything in the Administrative Record ("AR") demonstrating a *meaningful* response to San Francisco's comment about the system's protection of beneficial uses and its failure to provide fair notice. AR#9, Att.B at 5-7, 11-12.

The Region's failure to comply with 40 C.F.R. §124.17(a) is clear error.

### B. The Region Clearly Erred by Including Generic WQBELs at Section V and Attachment G.I.I.1

The Region's rationales for the generic WQBELs at Section V and Attachment G.I.I.1 in the Response – like the Permit – are grossly deficient and based on clearly erroneous findings of fact and conclusions of law. The Region failed to portray San Francisco's arguments accurately; failed to demonstrate that it followed NPDES regulations; failed to identify any case law supporting an argument that it can ignore NPDES regulatory requirements when establishing WQBELs; failed to identify or consider post-construction monitoring data to justify the WQBELs; and failed to provide any response to the important policy considerations that these WQBELs raise for a post-Phase II combined system. Therefore, the Permit must be remanded.

#### 1. The Region's Rationale for Generic WQBELs Is Inconsistent and Unsubstantiated

The Region provided no clear rationale for the challenged WQBELs. In fact, the Region's positions in the AR are conclusory, unsubstantiated, and in conflict with each other. On the one hand, the Region argues it "has consistently stated that the [permit terms are] necessary . . . to assist EPA in assessing whether WQS are being met." Response at 28, 30 (claiming it lacks data to conclude *whether* "San Francisco's CSO discharges meet WQS"). However, the Region also argues that the generic WQBELs are necessary because the existing permit terms *will not* "achieve water quality standards."[1] Response at 21 (citing AR#10.a at 15). It cannot be both.

The Region explained that the WQBELs "serve as backstops *in the event* that the effluent limitations and other provisions in the permit prove to be inadequate." Petition at 19-20 (citing AR#14 at 14:16-20) (emphasis added). This explanation is not only inconsistent, AR#10.a at 15, but it is also invalidated by the Permit's broad "reopener" provision which allows the Region to modify the Permit if there is evidence "the discharges . . . have or will have a reasonable

[1] The Fact Sheet contradicts the Region's assertions, explaining that the WQBELs in the LTCP section of the Permit are "intended to achieve applicable water quality objectives and criteria." AR#17 at F-17.

potential to cause or contribute to . . . adverse impacts on water quality or beneficial uses of the receiving waters." AR#17 at 10, F-27; AR#96 at 18696.

A lack of a clear rationale for the WQBELs necessitates remand. *In re City of Taunton*, NPDES Appeal No. 15-08 (EAB Oct. 30, 2015) (Order at 3) (where "the Board cannot ascertain from the record the basis for the Region's decision [or] the Region's rationale in support," remand is necessary); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62 (EAB 2006) (Board will only defer to a permit issuer on technical matters *if its rationale is adequately explained* and reasoning is supported in the record).

### 2. The Region Failed to Follow the CWA, EPA's Regulations, and EPA Guidance in Developing the Generic WQBELs

Section V and Attachment G.I.I.1 *are* WQBELs, irrespective of the Region's obfuscation.[2] The Region must follow the *exact same authorities* it cites in support of these Permit terms, which includes following EPA's NPDES regulations when establishing the WQBELs and demonstrating adequate explanations in the AR. Petition at 13-15; Response at 16-17 (citing, *e.g.*, 40 C.F.R. §122.44(d)(1)(vii)(A)); *see In re City of Taunton*, Order at 3 ("[A] petition for review . . . is largely a matter of record review").

The Region cannot simply repeat the text of 40 C.F.R. 122.44 §(d)(1)(vii)(A); that is circularly meaningless. Instead, the Region must – but failed to – follow the "standards-to-permits" process when it established the WQBELs. Petition at 13-14. For example, the Region does not assert it complied with the requirements at section 122.44, nor would any such claim be credible, especially with respect to Attachment G.I.I.1, which is a "standard provision" for the entire Bay Area region. The Region further argues that it does not need to follow the regulations

[2] The Region now concedes that Section V and Attachment G.I.I.1 *are* WQBELs. Response at 12-22 (characterizing terms as "WQBELs"). This new position is inconsistent with the AR – where the Region emphasizes that Section V and Attachment G.I.I.1 are *not* WQBELs, but rather, "receiving water limitations," AR#10.a at 11 – and thus, merits remand. *In re Austin Powder Co.*, 6 E.A.D. 713, 719-720 (Board remanded permit because Region gave differing explanations).

when establishing WQBELs. Response at 18 ("simply not required by the Act"). The Region is wrong.

*Before* including WQBELs in an NPDES permit, the Region must conduct and document whether a discharge of a pollutant will have the reasonable potential to "cause . . . or contribute to an excursion above any State water quality standard." 40 C.F.R. §122.44(d)(1)(i); Petition at 13. The Region is aware of this requirement and conducted this analysis in support of the WQBELs in Section IV.B for dry weather discharges from Discharge Point 001. AR#17 at F-19-24. However, there is no evidence that the Region addressed reasonable potential considerations in developing Section V and Attachment G.I.I.1.

Further, the AR includes no evidence that the Region accounted for "existing controls on point and non-point sources of pollution, the variability of the pollutant or pollutant parameter in the effluent . . . and where appropriate, the dilution of the effluent in the receiving water" when establishing WQBELs. 40 C.F.R. §122.44(d)(1)(ii); Petition at 13-14 (citing Att.13: EPA's NPDES Permit Writers' Manual). The CSO Policy mandates WQBELs be "site-specific." AR#96 at 18689, 18691, 18694 (describing site-specific considerations); AR#95.c at 3-37, Exhibit 3-8; Permit Writers' Manual at 9-20. The Region clearly erred by failing to explain the site-specific factors it considered.

The Region is incorrect that it is not required to "translate" WQS when establishing WQBELs by, for example, defining compliance and explaining how to determine compliance. Response 18; Permit Writers' Manual at 5-20, A-17. Separately, the Region's position in the Response has changed compared to the AR, where the duty to translate WQS when establishing WQBELs is acknowledged. AR#10.a at 12 (claiming it had "not failed to translate applicable water quality standards into permit terms"); *see In re Austin Powder Co.*, 6 E.A.D. at 719-720 (EAB 1997); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (remand necessary when rationale for a particular permit decision was articulated for first time on appeal). The Region clearly erred by failing to follow NPDES regulations when it established the WQBELs.

### 3. The Generic WQBELs Are Not Consistent with CSO Policy or Supported by the Record

The Region clearly erred by failing to identify information in the AR supporting its conclusions or explaining its reasoning consistent with the CSO Policy and applicable WQS. Petition at 17-20; *see In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). The Response attempts to distract from these failures with overbroad statements, unsupported assertions, and uncontextualized tidbits of data.

Under the CSO Policy, the Post-Construction Compliance Monitoring Program ("PCMP") is the critical means for Post-Phase II dischargers to "verify compliance with [WQS] and protection of designated uses as well as to ascertain the effectiveness of CSO controls." AR#96 at 18694; AR#94; Permit Writers' Manual at 8-11. The AR contains no evidence that the Region specifically considered San Francisco's PCMP information and the performance of the Westside Facilities. Petition at 6, 19; AR #2; AR#9, Att.B at App.10. Although the Region suggests it "reviewed over ten years of data," the AR provides no indication of what data was considered, what information was relied upon, or how that information relates to the generic WQBELs and NPDES regulations. Response at 22.

The Region cites factoids about copper, zinc and bacteria, apparently to justify the WQBELs.[3] *Id*. The Region, however, provided no explanation for why this information applies to, or is consistent with, WQS, which is critical to establishing WQBELs. Permit Writers' Manual at 6-30 ("permit writer should clearly identify the information and procedures used to determine the need for WQBELs"), 7-2 ("the permit writer should clearly explain in the fact sheet . . . how the final limitations in the permit were determined . . ."); *In re San Jacinto River Auth.*, 14 E.A.D. 688, 701 (EAB 2010) (permit remanded because "administrative record lacks a complete and cogent analysis of how the Region applied the [state WQS] to the permitting decision at issue.").

[3] The same information is included in the AR, but in support of Section VI.C.5.d (LTCP Update) (*see* Section II.C.3, *infra*); the Region did not clearly indicate which permit terms the information purports to support.

For copper and zinc, the Region failed to address San Francisco's technical criticisms. Petition at 27-28. Further, the Region failed to explain the propriety of comparing the cited copper and zinc water quality objectives to end-of-pipe discharge sampling results when the objectives only apply to receiving waters. AR#101 at 1. This failure is especially problematic because the discharges often *do not reach* receiving waters, AR#88.b at 6, and when discharges do reach the Pacific Ocean, they rapidly dilute and disperse. AR#63 at 4-21. Despite the clear legal requirement to consider dilution when establishing WQBELs, and prior, contrary agency findings, the Region failed to explain how it considered dilution when it established the WQBELs. *See* 40 C.F.R. §122.44(d)(1)(ii); Permit Writers' Manual at 6-15; Petition at 28 (citing AR#79.a) ("[A]ccounting for the inevitable dilution within the receiving waters during wet weather, water quality standards appear to be maintained").

Similarly, there is no indication that the Region considered PCMP data for bacteria. Petition at 7, 18, 27-28 (citing AR#9, Att.B at App.10). Although the Region cites to sign-posting and recreational use, neither are determinative of whether beneficial uses are protected. Response at 22; 40 C.F.R. §131.11. The Region cherry picked information suiting its narrative; for instance, it failed to explain the relevance of findings in the same report cited by the Region concluding "[r]ecreational use monitoring . . . indicates that human exposure to high levels of . . . bacteria *is limited* as a result of the very small contact recreation use that occurs during and shortly after CSDs." AR#63 at 4-21 (emphasis added). Most importantly, the AR is devoid of *any* analysis of PCMP data from the Westside Facilities to assess whether beneficial uses are protected. AR#101 at 79-83.

The Region failed to address prior permit findings directly conflicting with the Permit and AR. Petition at 18. The Region brushes aside this clear error by arguing prior findings are "more than ten years old" and it "reviewed more current data." Response at 21-22. However, the Region did not identify this "current data" or explain its relevance. *In re Gov't of D.C.*, 10 E.A.D 323, 342 (EAB 2002) (AR must demonstrate "the Region duly considered the issues raised in the comments" and adopted approach "rational in light of all information").

The Region also failed to explain *why* "current data" would lead to a conclusion other than its prior findings that performance of the Westside Facilities and the San Francisco-specific WQBELs at VI.C.5.c protect beneficial uses. Petition at 18. Decades of prior findings demonstrate the absurdity of Administrator Wheeler's statement that San Francisco has "been in violation of [its] permits . . . since the 1970s." Att.21 at 5. Basic administrative law requires that the Region provide adequate explanations. *In re Shell Offshore*, 13 E.A.D. at 386 (rationale must be "adequately explained and supported"); *In re Gov't of D.C.*, 10 E.A.D. at 342-43 ("Without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis").

#### 4. The Region Cites Inapposite Case Law That Does Not Control the Fact-Specific Arguments in San Francisco's Petition

The case law cited in the Response is inapposite because all of the decisions were in the context of *enforcement*. Response at 18-20. Whether a permit term was violated is a different legal and factual issue than whether a permit term was lawfully established. 33 U.S.C. §1369(b)(2) (permit terms not subject to judicial review in enforcement action).

The Region's reliance on *Nw. Env. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) is misplaced. The issue raised in this Petition is not whether narrative WQBELs are enforceable, but whether the Region established narrative WQBELs contrary to law (Section II.B.2, *supra*), ignored facts associated with the Westside Facilities (Section II.B.3, *supra*), and failed to provide fair notice (Section II.B.5, *infra*).

The Region also fails to reconcile another enforcement case, *NRDC v. Cty. of Los Angeles*, 636 F.3d 1235 (9th Cir. 2011) with its prior findings that "[t]he facts underlying the County of Los Angeles permit and [San Francisco's permit] are readily distinguishable." AR#79.b at 11. Lastly, the Region relies on *Ohio Valley Env. Coal. v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017) – another enforcement case – to argue that because there are other permits with narrative WQBELs, somehow, as a matter of law, the narrative WQBELs in *this* Permit are defensible. Nothing in *Fola* supports this argument.

### 5. The Region Failed to Provide Fair Notice of What the Generic WQBELs Forbid or Require

The natural consequence of the Region ignoring its legal obligations (Section II.B.2, *supra*) and failing to identify clear rationale and support for the WQBELs (Section II.B.1,3, *supra*) is that it failed to provide fair notice of what the generic WQBELs forbid or require. This constitutes clear error. Petition 20-22.

#### a. The Region Mischaracterizes Fair Notice and Advocates an Incorrect Standard

The Region mischaracterizes fair notice. First, the Region confused its obligation to "notice" the Permit under 40 C.F.R. §124.10 with its obligation to provide "fair notice." Petition at 11 (citing AR#9, Att.B at 11-12; AR#10.a at 17). Next, the Region conflates fair notice with "void for vagueness." Response at 25. While fair notice has its roots in the void-for-vagueness doctrine, it has evolved to a principle of "basic hornbook law in the administrative context." *United States v. S. Indiana Gas and Elec. Co.*, 245 F.Supp.2d 994, 1010, n.12 (S.D. Ind. 2003). The Region failed to properly apply CWA authority to establish WQBELs "with precision and guidance" to clarify what "conduct is forbidden or required" via the Permit so San Francisco "may act accordingly." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012); *see also, S. Indiana*, 245 F.Supp.2d at 1010, n.12 ("focus on fair notice case law rather than the void-for-vagueness case law").

The Region's misapplication of the law taints the Response. For example, contrary to the Region's position, San Francisco does not have a "higher standard to meet" because its interest is "economic regulation." Response at 25. The CWA is a civil and ***criminal*** statute, 33 U.S.C. §§1319(c)(1)-(2), and fair notice applies to both criminal and civil liability. *See S. Indiana*, 245 F.Supp.2d at 1010. The White House and current EPA leadership continue to threaten unfounded CWA enforcement against San Francisco. *See* Att.21; AR#125.[4] Fair notice

[4] *See also,* Kevin Freking and Michael Blood, *Trump threatens EPA action against S.F. after claiming that needles from homeless are 'pouring into the ocean'*, MERCURY NEWS (Sept. 18, 2019), https://www.mercurynews.com/2019/09/18/trump-threatens-epa-action-against-s-f-over-needles-in-the-ocean-from-homeless/.

mandates that "those enforcing the law do not act in an arbitrary or discriminatory way." *Fox*, 567 U.S. at 253. Federal courts have clearly applied fair notice to EPA regulatory actions, s*ee, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir.2010), including NPDES permits. *Wis. Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700 (7th Cir. 2013). The Region failed to respond to any of the case law cited by San Francisco. Petition at 20-22.

b. The Region Did Not Specified What Conduct Is Forbidden or Required

The Region failed to specify in the Permit what San Francisco must do, practically, to comply with the WQBELs. There is no indication, for example, in the plain language of the Permit, the AR, or applicable WQS, of what constitutes compliance. *S. Indiana*, 245 F.Supp.2d at 1011 ("relevant guides in the inquiry"). The Region's conflicting rationales support San Francisco's argument. *Id*. (explaining relevance of consistent EPA statements); Section II.B.1, *supra*.

The Region primarily argues that San Francisco should "easily" know what "conduct is forbidden or required" because the WQS are publicly available. Response at 26; *Fox*, 567 U.S. at 253. This assertion is wrong. *Am. Paper Inst. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits"). The Region also argues that *San Francisco* must "engage in an assessment . . . to determine the discharge limits needed to comply with WQS." Response at 25. This violates the prohibition on permittee self-regulation. *Waterkeeper All. v. EPA.*, 399 F.3d 486, 498-504 (2d Cir. 2005); Permit Writers' Manual at 7-1.[5] Each WQS, for example, has unique implementation provisions that *the permitting authority* must consider. 40 C.F.R. §131.13 ("policies generally affecting . . . application and implementation"). For example, the Ocean Plan allows for mixing zones, AR#101 at 16, but does this mean San

[5] This illegal self-regulation supports arguments in Section II.B.2, *supra*. The Region makes the same fatal error with Section VI.C.5.d. Response at 32 ("*San Francisco* to determine the precise means of compliance"); Section II.C.2, *infra.*

Francisco can establish a mixing zone itself since the Region expects *San Francisco* to "assess[] the discharge limits that would meet those standards"? Response 26. The Region failed to identify, in the Permit or AR, which pollutants are subject to the WQBELs. This failure leaves San Francisco without notice as to what actions, if any, it must take to comply with the WQBELs. The Region asserts that San Francisco must comply with objectives in the Ocean Plan "to the greatest extent practical," but neither the Permit nor the AR define this inherently ambiguous phrase. Response at 28. The Region's position is untenable.

The Region's position, although illegal, is clear: San Francisco must bet its multi-billion dollar capital improvement program on correctly guessing what constitutes compliance with WQBELs; then *San Francisco* must develop "discharge limits" based on its interpretation of the WQS; and hope that EPA, the State, and all third parties agree that San Francisco's actions "meet those standards." Response at 26. If San Francisco guesses incorrectly, it faces civil and/or criminal enforcement and squandered capital investments. The Region failed to provide fair notice and the Permit must be remanded.

### C. The Region Clearly Erred by Adopting the LTCP Update at Section VI.C.5.d.

The Region's attempts to bolster clearly erroneous findings of fact and conclusions of law do not effectively address the Region's invalid inclusion of Section VI.C.5.d in the Permit. The plain language of Section VI.C.5.d requires a complete reexamination of San Francisco's LTCP and mandates an enforceable proposal for massive reductions in discharges, contrary to the CSO Policy.

#### 1. The Region Mischaracterizes the Petition and the Obligations Under Section VI.C.5.d.

The Region mischaracterizes arguments in the Petition. Petition 23-31; Response 26-33. San Francisco has consistently acknowledged that post-Phase II permitting provisions in the Policy apply to San Francisco, Petition at 25, 29, and has fulfilled CSO Policy requirements

focused on sensitive areas and the PCMP. Petition at 6-7, 23-24, 27, 29 (citing AR#9, Att.B at 9-12, App.10 at 2-3, 16-17); *see also* AR#2; AR#68.c.

The Region also mischaracterizes the nature of the obligations in Section VI.C.5.d. It would have the EAB believe that Section VI.C.5.d simply requires San Francisco to take documents associated with the existing LTCP and compile them into a "single document." Response at 29.[6] The terms of Section VI.C.5.d speak for themselves – they require a resource intensive "back to square one" assessment of the Westside Facilities, ignore forty years of history, the PCMP, and ongoing capital improvements, and predetermine the outcome: unknown reductions of discharges. Petition at 6-7.[7]

### 2. The Region's Requirement for a LTCP Update Is a Clearly Erroneous Application of CSO Policy.

The Region does not have authority to impose a "LTCP Update" as mandated by Section VI.C.5.d. Response at 26-28. San Francisco agrees that, under the CSO Policy "[i]f WQS are not being met, [the] permittees should be required to submit a revised LTCP that will attain WQS after implementation." Response at 7; *see* Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews (EPA, Jul. 31, 2001) at 47 ("If, after implementing the controls outlined in the LTCP, the CSO community finds that it is still contributing to the nonattainment … it will use the monitoring data and return [] to consider revising the LTCP.").

Both the basis for, and the prescriptive nature of Section VI.C.5.d, are clearly erroneous applications of the CSO Policy. There are no clear findings supporting a conclusion that WQS are not met by the existing LTCP-based WQBELs at Section VI.C.5.c. Petition at 26-30; Section II.C.3, *infra*. In any event, the CSO Control Policy does not support the prescriptive mandates in

[6] The Region falsely claims that "Petitioner has not addressed California's findings [on the LTCP Synthesis] to date." Response at 30, n.16. However, the Region cites to a letter from San Francisco that includes a *response to each comment* made by California regarding the Synthesis, providing the factual and legal rationale for the Synthesis as drafted. Response at 14 (citing AR#88.a).

[7] Administrator Wheeler also disregarded this legal and factual record in his testimony. Att.21 at 5.

Section VI.C.5.d to eliminate, relocate, or reduce the magnitude or frequency of discharges."[8] Petition at 29-30; AR#9, Att.A at 9-15 and Att.B at 9-11. For example, the mandate for "reduction" in discharges is not limited to what is "necessary to meet WQS" as required by the CSO Policy. Petition at 30; AR#96 at 18692.

As EPA's guidance clearly states, the CSO Policy does not *mandate* discharge volume reduction in response to WQS exceedances; a variety of options are available. *See* Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews at 47 (revisions *may* include changes to operating plans or maintenance schedules, development of expanded or additional controls, or review and revision of the WQS); AR#95.b at 4-16–4-17. The Region erred by failing to explain in the record *why* volume reduction was required, as opposed to other options available under the CSO Policy.

### 3. The Region Failed to Identify a Consistent Rationale or Record Evidence Supporting the Findings Necessary to Justify Section VI.C.5.d

The Region provides no clear record-based rationale for Section VI.C.5.d. Section II.B.1, *supra*. The purported rationale cannot legitimately be to determine *whether* WQS are being met, Response at 28, because the PCMP and post construction monitoring data, not the LTCP, must be used for this assessment. AR#96 at 18694 (purpose of PCMP is to "verify compliance with water quality standards"). The CSO Policy requires modification of an LTCP *after* determining that performance of the collection system fails to protect beneficial uses. *Id.* at 18688, 18694. The Region argues the "LTCP Update requirement seeks information about the *current* nature of the discharges to sensitive areas" (Response at 33), but San Francisco already submitted PCMP monitoring data to the Region. Petition at 6, 19 (citing AR#9, Att.B at App.10); AR#2; AR#68.c. Any assessment of WQS achievement should be based on the most up-to-date data from the PCMP. Petition at 29-30. Nonetheless, the AR contains no evidence that the Region considered PCMP data regarding bacteria concentrations and the performance of the Westside

[8] The Region failed to respond to San Francisco's specific concerns identified in the Petition. Petition at 10-11.

Facilities. In the event that the Region's poorly articulated rationale concludes the existing LTCP, reflected in the WQBELs at Section VI.C.5.c, will not protect uses, this finding lacks a reasoned basis, is inconsistent with the record, and is clearly erroneous. Section II.B.1, *supra*.

#### 4. The Region Failed to Provide Fair Notice Regarding the Requirements of Section VI.C.5.d

The Region attempts to deflect San Francisco's fair notice concerns, yet fails to clearly define objectives for compliance with WQS, preventing San Francisco from "know[ing] what is required of [it] so [it] may act accordingly." *Fox*, 567 U.S. at 253. Section VI.C.5.d fails to provide the fair notice. Petition 30-31. Contrary to the Region's misleading statements, Section VI.C.5.d does not require San Francisco to simply "submit a . . . [r]eport." Response at 32. The Permit mandates that San Francisco "prioritize and propose for implementation alternatives to eliminate, relocate, or reduce the magnitude or frequency of discharges" and "[p]rovide an implementation schedule." AR#17 at 22 (Table 7, Task 3). Section VI.C.5.d and the AR, however, fail to provide any guidance to San Francisco on *why* reduction is necessary or, critically, *how much* reduction is necessary. The Region provides no determination of applicable permit limitations, as required by law, but instead argues that San Francisco is "a sophisticated entity," and it is up to "*San Francisco* to determine the precise *means* of compliance." Response at 32 (emphasis added). The *means* of compliance is not at issue; rather, San Francisco lacks fair notice of the substantive, defined *requirements for* compliance. Instead of abdicating its obligations as the permitting authority, the Region must identify which WQS are being exceeded, with supporting data supporting, so San Francisco can evaluate alternatives to respond to the exceedance and develop a revised LTCP that will attain WQS. *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("Thus, '[t]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said.") (Citation omitted). Ultimately, the Region must connect any requirement to 'eliminate, relocate, or reduce' to the CSO Policy, including what is necessary to protect uses.

### D. The Region Clearly Erred by Requiring Reporting of Isolated Overflows at Section VI.C.5.a.ii.b

As a matter of law, the Region does not have authority to regulate isolated overflows – which occur consistent with the engineered system design and all return to the system – because such overflows are caused solely by storms in excess of system capacity that (i) do not reach a water of the United States, and (ii) are not the result of any operation and maintenance failure that affect the remainder of the system and permitted discharges. Petition at 31-33; AR#68.b at 1, 3-1.

In issuing the Permit, the Region failed to identify a valid legal basis for isolated overflow reporting. Despite the Region's litany of claimed authority to support its action (Response at 34-37), the Permit *only* identifies two bases, 40 C.F.R. §122.41(h) and the CSO Policy. AR#17 at F-30. These are inadequate to support the challenged term. *In re Shell Offshore*, 13 E.A.D. at 386 (permit issuer must articulate with reasonable clarity reasons supporting its conclusions). Other justifications cited in the Response cannot be relied upon *post hoc* and nonetheless fail to provide a valid basis for its action.

Isolated overflows do not reach surface waters and system design capacity issues are traditional land-use decisions properly left to localities. Petition at 34, 36.[9] The Region's interest in this Permit solely concerns discharges occurring "more than three miles off shore in the Pacific Ocean through Discharge Point No. 001." AR#20.b. Isolated overflows, which do not reach *any* surface water, have no connection with discharges three miles off-shore.

Finally, the record fails to demonstrate a legitimate need for the reporting required by the challenged terms and the facts do not support the legal basis relied upon by the Region.

[9] EPA's policy emphasizes the jurisdictional limits of federal waters and recognizes State primacy over land use decisions. *See* The Navigable Waters Protection Rule (EPA, Jan. 23, 2020) at 73.

### 1. The Region Failed to Identify Valid Statutory Authority for the Challenged Term

#### a. CWA §402 Authority Does Not Extend to Isolated Overflows

The plain language of Section 402(a)(2) does not provide the Region with authority to regulate isolated overflows. The Region's argument shows the length to which it has twisted statutory authority to justify imposition of Permit requirements. Response at 34.

Section 402(a)(2) authorizes *certain* "data information collection" and "reporting" in permits. However, such requirements can *only* be imposed to "assure compliance with the requirements of [Section 402(a)(1)]." 33 U.S.C. §1342(a)(2). This section specifies that the "Administrator may … issue a permit for the *discharge of any pollutant, or combination of pollutants* …" at §1342(a)(1) (emphasis added). The term "discharge of pollutants" is defined as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.* at §1362(12). "Reporting" authorized by Section 402(a)(2) may only be prescribed to "assure compliance" with permit limitations on the discharge of pollutants. The Region's effort to require reporting on isolated overflows does not fall within that scope.

Contrary to the Region's position, Section 402(a) demonstrates the *limits* in the Region's authority. Isolated overflows do not discharge to jurisdictional waters and are not related to operations or maintenance deficiencies relevant to the discharge of pollutants. In order to justify its exercise of authority, the Region ignores the explicit CWA jurisdictional limitations. Petition at 34; *Cf. Solid Waste Agency of N. Cook Cty. v. Army Corps of Engrs.*, 531 U.S. 159, 171-72 (2001) (rejecting the government's rationale for asserting jurisdiction over 'nonnavigable, isolated, intrastate waters').

b. CWA §308 Information Gathering Authority Does Not Extend to Isolated Overflows

The Region's citation to Section 308 – without meaningful analysis – fairs no better. Response at 38. Foremost, the Region failed to cite Section 308 in connection with issuing the Permit. This demonstrates clear error. *In re Amoco Oil Co*. at 964 (remand where Region's rationale for a permit decision was first articulated on appeal) (citing 40 C.F.R. §124.11 and §124.17).

Regardless, the scope of information collection authorized by Section 308 does not extend to isolated overflows; it only provides authority to collect information to "carry out the objective of this chapter." 33 U.S.C. §1318(a). The objective of the "chapter," as widely recognized by the courts, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at §1251(a); *N. Cal. River v. City of Healdsburg,* 496 F.3d 993, 997 (9th Cir. 2007). Isolated overflows, *by definition,* will have no impact on the "chemical, physical, and biological integrity of the Nation's waters." Section VI.C.5.a.ii.b, therefore, is not necessary to carry out an "objective" of the CWA.

The scope of Section 308 limits information requests to those related to a discharge of pollutants, occurring from a "point source," *to* navigable waters or the ocean. CWA §§308(a), 502(6),(12),(14). Isolated overflows do not reach navigable waters or the ocean and therefore are not subject to EPA's authority under CWA §308.

c. Emergency Authority in CWA §504 Is Limited to Discharges of Pollutants to Waters of the US

Neither the Permit nor the Response to Comments cited Section 504 as a basis for the Region's authority to require reporting on isolated overflows. This demonstrates clear error. *In re Amoco Oil*., 4 E.A.D. at 964.

Even if Section 504 had been cited during the permitting process, the Region's reliance on the provision to collect information about isolated overflows is misplaced. If there is "an imminent and substantial endangerment," Section 504 provides authorization to: "… bring suit … to immediately restrain any person causing or contributing to the alleged pollution to stop the *discharge of pollutants* causing or contributing to such pollution . . ." 33 U.S.C. §1364(a)

(emphasis added). The CWA specifically ties the "discharge of pollutants" to discharges to navigable water or the ocean – neither of which is relevant to isolated overflows. Similarly, the term "pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological *integrity of water*." *Id.* at §1362(19). EPA's own guidance, addressing the appropriate uses of Section 504 in the context of combined overflows, identifies only examples associated with discharges directly *to navigable waters*: (i) beach closings, and (ii) contamination of fish and shellfish. *See* Guidance on Use of Section 504, the Emergency Powers Provision of the Clean Water Act (EPA, Jul. 30, 1993) at 3. Therefore, Section 504 provides no basis to justify reporting of isolated overflows that do not reach jurisdictional waters.[10]

d. EPA's Response Provides No New Information About the Relevance of the NMCs, Which Clearly Do Not Apply to Isolated Overflows

The NMCs do not provide the Region with legal authority to require reporting of isolated overflows. Petition at 38. In issuing the Permit, the Region failed to demonstrate how reliance on NMCs to address capital intensive, engineered system capacity squares with EPA's long-standing position that NMCs are "minimum technology-based controls that can be used to address CSO problems *without extensive engineering studies or significant constructions costs,* prior to the implementation of long-term control measures." AR#95.a at 2 (emphasis added).

The Region's continued argument that NMCs provide a basis for its action illustrates the shallowness of its claimed authority. For example, the Region continues to cite to "whether dry weather overflows are being controlled" as a basis for imposing the reporting requirement. Response at 35. However, this NMC is entirely inapplicable to isolated overflows that *only* occur during wet weather. *See* AR#68.b at 3-1. Similarly, the Region cites to an NMC intended to address "whether flows to the treatment works have been maximized without causing sewer backups." But the Region ignores that this NMC is inapplicable because the "objective of this

[10] The few adjudicated Section 504 cases all share a common denominator: discharges of "toxic" pollutants directly to a water of the United States, which is not the case here. *See, e.g., United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980); *United States v. Conservation Chem. Co.,* 523 F.Supp. 125, 126-27 (W.D. Mo. 1981) (Section 504 may "only be invoked where a defendant is 'causing or contributing' to the discharge of pollution").

minimum control is to reduce the magnitude, frequency and duration of CSOs that flow untreated *into receiving waters*." AR#95.a at 5-1 (emphasis added); Petition at 39.

### 2. Regulations Cited by EPA Do Not Provide Authority to Regulate Isolated Overflows

The Region claims that various regulatory provisions "provide further support" for reporting isolated overflows, Response at 36-37, but none of the cited regulations support this claim:

- 40 C.F.R. §122.41(e) is limited to a requirement to "properly operate and maintain all facilities and systems." It is inapplicable to overflows caused by extreme storm events where the system operates as designed.
- 40 C.F.R. §§122.41(h) and 122.43(a) provide authorization to impose conditions to determine compliance with the CWA or the permit. However, neither of these provisions, absent separate CWA authority, provides authorization to impose the challenged requirements. For example, §122.41(h) only allows the Region to seek information relevant to a potential modification, revocation, reissuance, or termination of the permit, or to determine compliance. Isolated overflows do not reach jurisdictional waters, and thus, fall outside the scope of the criteria in §122.41(h).

### 3. The Region Failed To Provide a Factual Basis for Reporting Isolated Overflows

Evaluation of a system's design capacity *is not* a component of "ensuring adequate operation and maintenance" of a combined system. Response at 34 (". . . reporting provides important information about the proper operation and maintenance of [the] combined sewer system"). EPA misconstrues and misrepresents facts about system design capacity in an effort to support its action.[11] The record includes the correct facts:

[11] The Region misrepresents the relevance of comments to justify the reporting requirement. Response at 38. Cited comments concern irrelevant geographic areas. AR#68.a at 2-1 (Topography divides San Francisco into two watersheds and the Permit covers operations for the "Westside" which drains to the Oceanside Plant; public comments identified by the Region (AR#8.h), Dunseth (AR#8.i), Hooper

- San Francisco designed its collection system to convey flow occurring due to a specifically sized design storm and recognized that "[s]torms of greater magnitude than the design storm, particularly storms of greater intensities than the design storm, may result in flows that exceed the hydraulic capacity of portions of the collection system . . . ponding and/or excursions may occur in areas upstream of the portion of the collection system where the hydraulic capacity has been exceeded." AR#68.b at 3-1. Thus, isolated overflows do not represent an operation or maintenance failure.
- "Excursions from a combined sewer system differ from overflows from a separate sanitary system because of the potential to enter waters of the state. In locations with a separate sewer system, if an SSO enters a catch basin, raw sewage has then entered the storm drain system and can flow untreated to receiving waters. When wastewater from an excursion enters a catch basin … *it simply returns to the sewer system and flows to the treatment plant*." AR#68.b at 2-5 (emphasis added). The Record demonstrates that isolated overflows *do not* reach jurisdictional waters and the Region has shown nothing to the contrary. AR#68.a at 1.

The Region's unrelenting effort to equate isolated overflows with operations and maintenance failures – and refusing to recognize these uncontroverted facts – is not "rational in light of all information in the record," and is therefore a basis to remand. *In re Gov't of D.C.*, 10 E.A.D. at 34.[12]

The other factual underpinning claimed as a basis for requiring the challenged term – whether any diversions result in a discharge to surface waters, to satisfy public notification

(AR#8.j) and Gelini (AR#8.l) provide information only about other geographic areas of the City). The Region's erroneous reliance on these comments, without adequate explanation for their geographic irrelevance, requires remand. *See In re Chukchansi Gold Resort*, 14 E.A.D. 260, 280 (EAB 2009).

[12] The Region also fails to explain why reports submitted by San Francisco do not meet its needs regarding information about isolated overflows. AR#68.a, #68.b; *In re Wash. Aqueduct*, 11 E.A.D. at 585-86 (finding clear error due to a failure to respond to significant comments).

requirements, and to identify whether the public is affected – also fail to support the Region's position. AR#17 at F-30. These requirements are either met by other existing terms, *see* AR#17 at G-12, and/or do not concern jurisdictional waters and therefore, are outside the scope of the Region's authority.

## III. CONCLUSION

San Francisco asks that the Environmental Appeals Board grant the relief requested in the Petition.

Date: April 15, 2020

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## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. §§124.19(d)(1)(iv) & (d)(3), the undersigned counsel hereby certify that this Reply Brief does not exceed 7,000 words. Not including the caption, table of contents, table of authorities, signature block, table of attachments, statement of compliance with the word limitation, and certification of service, this Petition contains 6,945 words.

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## SUPPLEMENTAL TABLE OF ATTACHMENTS

| Attachment # | Name of document |
|---|---|
| 17 | Transcript of Tomas Torres (Director, Water Division, EPA) Voicemail on October 2, 2019 |
| 18 | EPA Inspector General letter to Senator Diane Feinstein on April 6, 2020 |
| 19 | EPA Inspector General letter to Senator Kamala Harris on April 6, 2020 |
| 20 | H. Kelly (General Manager, SFPUC) letter to T. Torres (Director, Water Division, EPA) on December 27, 2019 |
| 21 | Excerpt of Testimony from Hearing on the Fiscal Year 2021 EPA Budget on February 27, 2020 |

## CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2020, a true and correct copy of the foregoing Reply Brief was filed electronically using the EAB eFiling System and was served on the parties by electronic mail at addresses specified below.

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