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

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

CITY AND COUNTY OF SAN FRANCISCO'S REPLY IN SUPPORT OF MOTION TO STAY CONTESTED PERMIT CONDITIONS PENDING APPEAL OR, IN THE ALTERNATIVE, MOTION TO REMAND NOTICE OF STAYED CONTESTED PERMIT CONDITIONS, AND MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

As detailed in its Response to the City and County of San Francisco's ("San Francisco") Motion to Stay Contested Permit Conditions Pending Appeal or, in the Alternative, Motion to Remand Notice of Stayed Contested Permit Conditions, and Motion for Leave to Amend Petition for Review ("Motion"), the Environmental Protection Agency ("EPA") Region 9 ("Region") maintains that it has unchecked authority to make *post hoc* permit modifications to San Francisco's National Pollution Discharge Elimination System ("NPDES") permit No. CA0037682 (the "Oceanside Permit" or "Permit") following issuance of the final Permit, deny any opportunity for review or comment on the modification, disregard its obligation to stay contested Permit conditions during pendency of an appeal, and prevent the Environmental Appeals Board ("Board") from reviewing its actions. The Region is wrong, and the Board should not condone the Region's attempts to game the system.

The Region and San Francisco engaged in six years of site visits, stakeholder meetings, correspondence, and comments regarding reissuance of the Oceanside Permit. Nonetheless, the Region waited until almost *two months after* issuance of the final Permit before unilaterally, and without any review or comment, modifying the Oceanside Permit through adoption of its novel "Two Separate Permits Theory" in the Notice of Stay of Contested Conditions ("Notice" or "Notice of Stay"). Under this newly minted theory, the Region argues the Oceanside Permit is in fact two separate stand-alone permits, a "State Permit" and a "Federal Permit." Relying on this self-serving modification of the Permit, the Region decided in the Notice of Stay that it can simultaneously stay the contested conditions in the "Federal Permit," while enforcing the exact same conditions as part of its oversight of the "State Permit." In its Response, the Region goes even further, arguing that the Board has no authority to review the Region's clearly erroneous actions. Notwithstanding the fact that the Region's first articulation of the theory occurred

almost a month after San Francisco filed its Petition for Review of City and County of San Francisco's Oceanside Wastewater Treatment Plant's NPDES Permit Issued by EPA Region 9 ("Petition"), the Region further asks the Board to deny San Francisco's request to amend its Petition to address the Two Separate Permits Theory as untimely.

Contrary to the Region's contentions otherwise, the Board has authority to hear San Francisco's Motion and grant both aspects of its requested relief to (1) issue an expedited stay of the contested Permit conditions pending appeal, or, in the alternative, remand the Notice of Stay, and (2) provide leave for San Francisco to amend its Petition to address the Region's Two Separate Permits Theory. With respect to the first prong, regardless of the approach adopted by the Board to resolve the matter, San Francisco requests the Board confirm the Region lacks the ability to enforce the stayed contested conditions during the pendency of the appeal.

II. ARGUMENT

A. San Francisco's Narrowly Drawn Motion Only Addresses the Region's Notice of Stay of Contested Conditions

This Motion is narrowly tailored to ask the Board to remedy the Region's egregious disregard for the automatic stay provisions at 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1) based upon the Region's fictitious, *post hoc* Two Separate Permits Theory adopted via the Notice of Stay. Despite the misleading statements made in the Region's Response, San Francisco is not asking the Board "to review state-issued NPDES permits in authorized states" (Resp. at 9) or "stay the conditions of the state permits." Resp. at 10. Rather, San Francisco's Motion is limited to the Board's review of the Notice of Stay, including the radical results from application of the Two Separate Permits Theory, whereby the Region maintains it can enforce stayed contested permit conditions, and deny the Board jurisdiction to review its actions.

San Francisco was compelled to file this Motion in order to challenge the Region's attempt to use the Notice of Stay to justify its non-compliance with mandatory Clean Water Act ("CWA") and regulatory requirements, and to prevent the Board from reviewing its unlawful action. The Region's decisions raise multiple independent bases justifying the Board's review: (1) the Region improperly modified the final Oceanside Permit; (2) the Region's actions are clearly erroneous as a matter of fact and law; (3) the Region's discretionary actions severely impact San Francisco's due process rights; and (4) the Region's actions raise important policy considerations warranting the Board's review. 40 C.F.R. §§ 124.15(a), 124.19(a)(1), (a)(4)(i)(A)-(B).

B. The Board Has Authority to Hear San Francisco's Motion

Attempting to avoid the merits of San Francisco's Motion, the Region argues the Board lacks authority to hear it. Resp. at 3-10. The Region is wrong. The Board has ample authority to hear the Motion.

1. The Region's Notice of Stay Adopts a Modification of the Oceanside Permit, Which is a "Final Permit Decision" That the Board Is Authorized to Hear

The Board has authority to hear challenges to a "final permit decision." 40 C.F.R. § 124.19(a)(1). "[A] final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." 40 C.F.R. § 124.15(a). The Region's *post hoc* adoption of the Two Separate Permits Theory in the Notice of Stay, which resulted in an unlawful modification of the final Oceanside Permit, is a "final permit decision" which the Board can, and should, hear. 40 C.F.R. §§ 124.15(a), 124.19(a)(1). Even the Region recognizes that permit modifications are a type of "final permit decision" fully within the Board's purview to hear. *See* Resp. at 7 (citing 40 C.F.R. § 124.15(a)).

As the Region acknowledges, "EPA has worked with San Francisco for more than six years on the Oceanside Permit." Region Resp. to Petition at 13. Throughout this entire time, the Region never notified San Francisco (or the public) that it was issuing two separate permits, or in the Region's terms, a "State Permit" and a "Federal Permit." Resp. at 1. The Region points to nothing — in the Permit, AR #17, notice for public comments, AR #6, or the Response to Comments, AR #10.a — demonstrating that San Francisco, or the public, had advance notice of the Region's Two Separate Permits Theory prior to finalization of the Oceanside Permit. Instead, the Region waited until issuance of the Notice of Stay to first articulate its novel theory.

The Region's belated adoption of the Two Separate Permits Theory, following the close of public comment and issuance of the final Permit, modifies the Oceanside Permit. As an example, under Section VI.C.5.a.ii.b. of the Permit, San Francisco is required to notify the agencies of overflows from the combined sewer system using specified procedures within six months of the Permit's effective date. Applying the Region's Two Separate Permits Theory, San Francisco must comply with this requirement, and the Region can rely on its oversight authority of the "State Permit" to commence enforcement of violations of this requirement effective May 1, 2020 (*i.e.*, six months after the purported November 1, 2019 effective date of the "State Permit"). In contrast, when the Region's theory is not applied, San Francisco would not be required to comply with this requirement, and the Region would have to wait to commence enforcement of violations of this requirement until August 1, 2020 (*i.e.*, six months after the purported February 1, 2020 effective date of the jointly adopted Permit), absent application of the stay pursuant to 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1). As this example illustrates, the Region's adoption of the Two Separate Permits Theory fundamentally changed the conditions of

the Oceanside Permit, and resulted in "a final decision to … modify … a permit," which the Board can and should hear. 40 C.F.R. §§ 124.15(a), 124.19(a)(1).

The Board's undisputed authority to review permit modifications provides an independent basis for the Board to review the Region's Notice of Stay, and refutes the Region's argument that the Board lacks "express delegation" to undertake such review. Resp. at 6-8. Likewise, the Region's citation to *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722 (EAB 1997) (Resp. at 6, n. 11) is irrelevant and does not support the Region's argument that the Board lacks authority. In *In re Federated Oil & Gas*, the petitioner's arguments were based on the lease terms with its tenant. Denying the request to hear the appeal, the Board explained that "[t]he contractual rights and obligations created under a private lease agreement are not permit conditions, and are therefore not matters on which the Board is authorized to rule." *Id.* at 725. Here, the Notice of Stay implicates NPDES permit conditions that are well within the Board's power to hear.

2. 40 C.F.R. § 124.19(n) Separately Gives the Board Authority to Hear San Francisco's Motion

Under 40 C.F.R. § 124.19(n), the Board is authorized to "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with this part or an order of the Environmental Appeals Board." Hearing San Francisco's Motion unquestionably falls within the Board's broad authorization under § 124.19(n). *See e.g.*, *In re Town of Newmarket, N.H.*, 16 E.A.D. 182, 255-56 (EAB 2013) ("Board has full authority and discretion to manage its docket" pursuant to § 124.19(n)); *id.* at n.5 (citing cases articulating the "Board's inherent authority to

rule on motions and fill other 'gaps' in its procedural rules" and "manage its docket [under] general and well-established principles of administrative law").

Reference to "this part" in 40 C.F.R. § 124.19(n) is to 40 C.F.R. Part 124 (Procedures for Decisionmaking); the stay provisions at 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1) are located within Part 124. Therefore sections 124.16 and 124.60 fall squarely within the scope of the Board's jurisdiction conferred by section § 124.19(n). Not only can the Board review the scope of any stay, it also has authority to sanction parties for a failure to comply with the stay requirements.

In addition, hearing the issue now, while the Board is considering San Francisco's Petition, is consistent with the Board's mandate to efficiently address the issues raised both by the Motion and the Petition. *See e.g.*, EAB Practice Manual (EAB, August 2013) at 36 (the procedural rules under Part 124 are intended "to simplify and make more efficient the Board's review process for permit appeals."); 78 Fed. Reg. 5281, 5281 (Jan. 25, 2013) (Part 124 procedures are designed to "make more efficient the review process" in all permit appeals filed with the Board); *id.* at 5283 (Board has "inherent authority to manage its docket in the most meaningful and efficient manner possible").

The Board's own precedent establishes its jurisdiction over disputes involving the scope of a stay issued under 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1). For instance, in *In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 308 (EAB 2011), the Board chastised petitioners for "not immediately or at any time after the November 2008 Notice [of Contested Conditions] object[ing] that the Region's Notice was in error." This admonishment would be nonsensical if the Board lacked authority to hear a motion addressing the scope of a notice of stay of contested permit conditions.

3. The Region Will Have Unbridled Authority If the Board Lacks the Ability to Review Its Notice of Stay

The Region is asking the Board to disregard its review obligations under Part 124 and set new precedent that the Board lacks authority to enforce or interpret the regulatory requirements for a stay. Under the Region's construct, the Region would have the sole, unchecked discretion to not only identify the stayed contested permit conditions, but also to enact or refuse to enact the stay. The Region's position effectively declares that the Board would be powerless to reign in the Region's staggering efforts at over-reach.[1] The Board should reject the Region's attempts to curb the Board's power and grant San Francisco's requested relief to either issue an expedited stay of the contested conditions or remand the Notice. In either case, the Board should clarify that the Region cannot simultaneously stay and enforce the same contested conditions.

C. San Francisco's Motion Meets the Appeal Requirements of 40 C.F.R. § 124.19 and Merits the Board's Review

Under 40 C.F.R.§ 124.19, the Board's review is warranted when a petitioner demonstrates that its "specific challenge to the permit decision" is based on "(A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. §§ 124.19(a)(4)(i)(A)-(B). This standard of review is applicable to San Francisco's Motion, which is a "specific challenge" to the sufficiency and legality of the

[1] As the Board acts in lieu of the Administrator, the Region's position effectively leaves the Administrator without authority over the Region's decisions related to enforcement of stayed permit conditions. *See In re Marine Shale Processors, Inc*., 5.E.A.D. 751, 795 (EAB 1995) ("The Board is not part of any other office in the Agency and answers only to the Administrator of the Agency."). The Administrator conferred a broad delegation of authority on the Board to hear, and manage, permit appeals. *See, e.g.,* 40 C.F.R. § 1.25(e)(2) ("The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title."); 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992) ("The rule promulgated herein . . . includes express delegations of authority from the Administrator to the Board to hear and decide appeals of various types of cases . . . [U]under the rule promulgated herein, the rules of practice actually effect the delegation of the Administrator's authority.")

Region's Notice of Stay. *See In re Los Alamos Nat'l Security*, 17 E.A.D. 586, 597 (EAB 2018) (the Board adopts the review standard under Section 124.19 for all appeals (including "informal appeals") because "adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal or informal. *Cf.* 40 C.F.R. § 124.19(n) (stating that the Board "may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal").").

1. The Region's Decisions Regarding the Oceanside Permit Rely on Clearly Erroneous Findings of Fact and Conclusions of Law

The Region's decision to adopt the Two Separate Permits Theory, which enables the Region to enforce contested permit conditions is based on several findings of fact and conclusions of law that are clearly erroneous. These errors are plainly apparent.

First and foremost, the Region and the Regional Water Board did not adopt a "Federal Permit" and a "State Permit," as a matter of fact. There is no mention of a "Federal Permit" and "State Permit" in the Permit itself, or in any of the lengthy permit development record. *See, e.g.*, AR #6, 10.a, 17. There is no delineation in the Permit between the "Federal Permit" and "State Permit" terms. There is simply no evidence in the record of the existence of a "Federal Permit" and "State Permit."

In contrast, there is significant evidence that the Region and the Regional Water Board issued a single, jointly issued Permit.

- April 20, 2019: After almost six years of working with San Francisco on a revised Oceanside Permit, and with no prior reference to separate permits, the Region and Regional Water Board publicly noticed a single permit and sought a single set of comments. Mot. at 4-5; AR #6 ("EPA and the [Regional Water] Board prepared *a* draft National Pollutant Discharge Elimination System permit (CA0037681) for the

above discharger in accordance with the Clean Water Act (CWA) and Porter-Cologne Water Quality Control Act.") (Emphasis added).

- August 30, 2019: The Region and the Regional Water Board jointly responded to comments via a single Response to Comments. *See* Mot. at 5; AR #10.a (responding to comments using "we" to describe both the "U.S. EPA and the Regional Water Board").
- September 11, 2019: At the Regional Water Board adoption hearing, Region representatives explained they were present because "the permit is jointly issued by the [Regional Water] Board and EPA." AR #14 at 47:10-14; *see* Mot. at 5. Similarly, the Regional Water Board made multiple statements about joint issuance of a single ("this") permit. *See* Mot., Att. 3 at 1; AR #14 at 6:7-10.
- December 10, 2019: The Oceanside Permit adopted by the Region was identical to the Oceanside Permit adopted by the Regional Water Board. *See* Mot. at 7; *compare* AR #15 (Regional Board Order No. R2-2019-0028), *with* AR #17 (Final Oceanside Permit CA0037681). The plain language of the permit and the lack of any distinction between "State" and "Federal" conditions confirm adoption of a single permit. *See* Mot. at 7-8 (citing demonstrative language in AR #17).

Moreover, the Region's own admission undermines the existence of separate State and Federal Permits. It concedes that this construct is impossible when it states "[t]here are no State-only provisions of the Oceanside permit because of the interrelated nature of the actions onshore, the CSDs [combined sewer discharge structures], and the discharge to Federal waters off-shore." Resp. at 9; *see also* Mot. at 8-9.

Another blatant factual error is the Region's claim that there is a stay, when there is not. *See* AR #20.b at 2; Resp. at 2. The Region further acknowledges this when it argues that if it exercises its authority to enforce the contested conditions (which could occur during the pendency of this appeal while the contested conditions are stayed), San Francisco is left to "raise any concerns it has about such an enforcement action in federal district court at that time." Resp. at 11.[2]

Likewise, a blatant legal error is the Region's attempt to create an exception to the stay requirements in 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1), which are mandatory and provide no exceptions. *See* 40 C.F.R. §§ 124.16(a)(1) (when a petition for review is filed with the Board, "the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action") and § 124.60(b)(1) ("As provided in § 124.16(a), if an appeal of an initial permit decision is filed under § 124.19, the force and effect of the contested conditions of the final permit shall be stayed until final agency action under § 124.19(k)(2)."). The Region does not cite to any authority allowing an exception to, or end-run around, the stay requirement because none exist.

More subtle errors are also present. The CWA mandates procedures that the Region and the Regional Water Board must follow when independently issuing NPDES permits. As for the Region, CWA Section 401(a) requires that EPA obtain certification from California that its proposed permit complies with applicable CWA requirements. 33 U.S.C. § 1341(a). As for the Regional Water Board, among other things, CWA Section 402(d) requires that it provide a copy of its proposed permit to the Environmental Protection Agency ("EPA") for review. *Id.* at §

[2] To the extent EPA pursues enforcement of stayed contested conditions, San Francisco preserves all defenses it has to such an enforcement action, including the ability to challenge any fine or penalty based on a lack of fair notice.

1342(d). The 1989 *NPDES Memorandum of Agreement between the United States Environmental Protection Agency and the California State Water Resources Control Board* ("MOA") documents these required procedures (and others) in detail. Att. 7. The MOA outlines each step of EPA's review and comment process starting with review of the initial permit application and continuing through review of the final permit. *Id.* at 9-20. Yet again, the Region fails to point to anything in the record showing that EPA or the Regional Water Board complied with these mandatory requirements. In totality, this confirms that the Region's adoption of the Two Separate Permits Theory, upon which the Notice of Stay entirely relies, is clearly erroneous as a matter of fact and law.

The Region's attempt to manufacture support for its position by characterizing the Permit as "consolidated" (*see, e.g.*, Resp. at 1, 3) is also based on clearly erroneous findings of fact and conclusions of law. As a matter of law, the Region's reference to 40 C.F.R. § 124.4(a)(2) of the consolidated permitting regulation is inapposite. Resp. at 3. Subsection (a) of section 124.4 applies "[w]here a facility … requires a permit under *more than one statute* covered by these regulations"—a fact pattern not at issue here where the CWA is the only relevant statute. 40 C.F.R. § 124.4(a)(1) (emphasis added).

Even if section 124.4 were applicable, the Region erred as a matter of fact and law by failing to follow any of the procedures required for permit consolidation. Section 124.4(a) envisions the issuance of two physically separate permits throughout the entire administrative process. For example, the section requires that "[t]he first step in consolidation is to prepare *each* draft permit at the same time" and that agencies coordinate on the "draft *permits*" during the administrative process. *Id*. at § 124.4(a) (emphasis added). *See also id*. at § 124.1(f)

(allowing for "coordinate[d] decisionmaking when *different permits* will be issued by EPA and approved State programs.") (Emphasis added).

Under 40 C.F.R. § 124.19(b)(2), the Region's Response must include "a certified index of the administrative record, and the relevant portions of the administrative record." The Region failed to cite to anything in the record to support the existence of two separate permits. An electronic search of the Permit, Fact Sheet, and other attachments reveals not one reference to section 124.4 or the term "consolidated." Instead, throughout the entire permit development process, there was only one, jointly prepared permit. The Region made numerous references to existence of a single, joint permit. *See* argument at pp. 8-9, *supra*. The Region's characterization of the Permit as "consolidated" is factually and legally unsubstantiated.

Additionally, the Region could only consolidate a federal and state permit if both the Region and the Regional Water Board had an agreement to consolidate, or San Francisco recommended consolidation. *See* 40 C.F.R. § 124.4(c)(2)-(3) (permit consolidation allowed where the Regional Administrator and the State Director "*agree* to consolidate draft permits whenever a facility or activity requires permits from both EPA and an approved State" or the permit applicant recommends that "the processing of their applications should be consolidated.") (Emphasis added). Once again, the Region does not cite to any such agreement or recommendation in the record, because none exist.

2. The Region's Discretionary Adoption of the Two Separate Permits Theory Violates Due Process and Warrants Review

The Board's review is also appropriate when a petitioner's "specific challenge to a permit decision" (40 C.F.R. § 124.19(a)(4)(i)) demonstrates that the permit decision is based on an "exercise of discretion" that the "Board should, in its discretion, review." *Id.* at §

124.19(a)(4)(i)(B). The Region's decision to adopt the Two Separate Permits Theory when issuing its Notice of Stay was an exercise of discretion deserving of the Board's review.

The Region's Response is the first time it fully articulates the ramifications of the Two Separate Permits Theory. First, the Region incorrectly argues that the Board lacks authority to review both the Notice of Stay and the Region's self-proclaimed ability to enforce stayed permit conditions during the pendency of this appeal. *See, e.g.*, Resp. at 3 ("the Board does not have authority to review or remand a notice of stayed conditions" and the Board does not have authority to "review EPA's authority to enforce [stayed permit conditions]"). Then, the Region attempts to hide behind the Notice of Stay and prevent the Board from reviewing the Region's modification of the Oceanside Permit (*i.e.*, its *post hoc* adoption of the Two Separate Permits Theory). Resp. at 11-12.

Notwithstanding the Region's efforts to the contrary, due process mandates both that the Board review the Notice of Stay, including the Two Separate Permits Theory first articulated in the Notice of Stay, and that the Region follow the requisite procedures when adopting an NPDES permit, including its adoption of theories inextricably intertwined with that permit, like the Two Separate Permits Theory. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (In the administrative litigation context, the Supreme Court has affirmed that "[p]rocedural due process imposes constrains on governmental decisions which deprive individuals of . . . 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also In re Gen. Elec. Co.,* 4 E.A.D. 615, 627 (EAB 1993) ("[T]he due process clause guarantees that before a deprivation of property occurs, [a] person . . . must be given notice of the . . . deprivation and an opportunity for a hearing").

Part 124 details the procedures the Region must follow prior to issuing a final permit. Among other things, the Region must provide a statement of basis or a fact sheet explaining the rationale for the permit, publicly notice the draft permit and provide access to the administrative record for it, receive and respond to public comment, and base its permitting decision on the underlying administrative record. 40 C.F.R. §§ 124.7-124.11, 124.17, 127.18. These mandated steps guarantee both San Francisco's and the public's due process rights are protected throughout the permitting process. *See In re Gen. Elec.,* 4 E.A.D. at 627, n.11 (citing "*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (citation omitted)."). The Region cannot side-step its mandatory obligations by attempting to modify the Oceanside Permit through issuance of its Notice of Stay, which occurred after issuance of the final Permit and San Francisco's Petition challenging the contested Permit conditions. *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citations omitted).

The Region's failure to cite anything in the record supporting its Two Separate Permits Theory is tantamount to an admission that it never provided the mandatory notice or opportunity to comment on the agencies' alleged issuance of separate State and Federal Permits. *See* 40 C.F.R. § 124.19(b)(2) (the Region's Response needs to include "a certified index of the administrative record, and the relevant portions of the administrative record."). The Region's unsupported claims that the Board cannot review the Notice of Stay, the Region's enforcement of contested permit conditions during the pendency of this appeal, or the Region's modification

of the Oceanside Permit only serve to compound the Region's deprivation of San Francisco's due process rights.

3. The Region's Notice Raises Important Policy Considerations Deserving of the Board's Review

Through the Region's adoption of the Two Separate Permits Theory, as articulated for the first time in its Notice of Stay, the Region is effectively establishing a new policy that contested permit conditions in jointly issued federal/state NPDES permits will not be stayed pending Board review. This is because under the Region's logic, pursuant to CWA Sections 309(a)(1) and 402(i), EPA will always have the authority to enforce any condition or limitation in state-issued NPDES permits. Such a policy would create havoc for all permittees with jointly issued NPDES permits, requiring them to expend time and resources to implement contested permit conditions that may ultimately be modified or eliminated altogether, or risk enforcement. Mot. at 14-15. Further, the Region's approach would create a real risk that challenged permit terms pending before the Board, could be subject to interpretation in federal district court before final agency action via the Board as a result of either an EPA enforcement action or a citizen suit. This would contravene the very purpose of the stay provisions at 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1). These important policy considerations provide yet another basis for the Board to review the Notice of Stay.[3] *See* 40 C.F.R. § 124.19(a)(4)(i)(B) (challenges to a permit decision can include "an important policy consideration that the Environmental Appeals Board should, in its discretion, review."). Given the likelihood of these policy implications coming to fruition if

[3] San Francisco also maintains that that the Region's deprivation of the due process rights of joint permittees raises important policy considerations and that EPA's attempt to establish new policy that contested terms will not be stayed is an act of discretion for the reasons set forth above. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B).

the Region's approach were allowed to stand, it is perhaps unsurprising that the Region elected to remain silent in its Response and entirely sidestep the issue.

D. San Francisco's Challenge to the Region's Two Separate Permits Theory as First Articulated in the Notice of Stay Is Timely

The Board should disregard the Region's meritless claim that San Francisco failed to timely raise a challenge to the Two Separate Permits Theory. Resp. at 11. As a general rule, "all reasonably ascertainable issues" need to be raised during the public comment period. 40 C.F.R. § 124.13. Despite this general rule, 40 C.F.R. § 124.19(a)(4)(ii) addresses circumstances when issues may be raised for the first time as part of the petition process, and requires that "[f]or each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13."

As the timeline below illustrates, San Francisco could not have raised a challenge to the Two Separate Permits Theory during public comment on the Permit and has acted consistent with applicable law in raising the challenge as part of its Motion.

- December 10, 2019: Following the close of the public comment period, the Region notifies San Francisco that the Oceanside Permit is final and being issued. The Region neither raised the Two Separate Permits Theory in the December 10 letter or as part of its earlier administrative process. In fact, by referencing "the final NPDES permit for the subject facility," the Region's letter confirms San Francisco's understanding that there is only a single permit. AR #18 at 1.
- January 13, 2020: San Francisco files its Petition. Not knowing the Region intended to rely on the yet to be articulated Two Separate Permits Theory, San Francisco did not address the theory in its Petition.

- February 3, 2020: The Region was required, pursuant to 40 C.F.R. § 124.16(a)(2)(ii), to notify San Francisco "[a]s soon as possible after receiving notification from the EAB of the filing of [the] petition" of the uncontested (and severable) conditions of the permit. With 21 days having passed since filing its Petition, and having not received a notice of stayed contested permit conditions as required by 40 C. F.R. §§ 124.16(a)(1) and 124.60(b)(1), San Francisco writes the Region requesting the Region issue the required notice without further delay. Mot., Att. 2.
- February 7, 2020: The Region belatedly issues the Notice of Stay, and for the first time in six years, raises the Two Separate Permits Theory and explains that the Region can enforce stayed contested Permit conditions. AR #20.b at 2.

The Region's failure to articulate its Two Separate Permits Theory during the public comment period, or at any time prior to San Francisco's Petition, cannot be weaponized to preclude San Francisco's legitimate efforts to challenge the Region's overreach and defend its right to due process. San Francisco is not a mind-reader. It did not know the Region would adopt a theory with such far reaching consequences after issuance of the final Permit and filing of its Petition. San Francisco raised its objection to the Two Separate Permits Theory as part of its Motion challenging the legal and factual deficiencies in the Notice of Stay because it was the first opportunity it had to do so.

The Region's reference to the Regional Water Board's October 29, 2019 letter is irrelevant and the Board should disregard it. Resp. at 11. First, reference to two separate permits in a letter issued *solely* by the Regional Water Board cannot be deemed to provide notice of the Region's official position on the matter. The Region's Response, which goes to great lengths to highlight the independence of the two agencies, confirms that the Regional Water Board does not

speak for the Region or vice versa. Moreover, the October letter is silent as to the Region's position on two separate permits.

Second, the Regional Water Board's letter was issued well after the close of the public comment period, and was not part of the administrative record upon which the Petition was based. *See* AR #134 (included in "XIV. Post Regional Water Board Adoption Communication and Documents" section of Index for the AR). Further, as a matter of law, the Regional Water Board's position could not estop or otherwise bind the Region. In fact, San Francisco was so perplexed by the two permit concept raised in the Regional Water Board's letter that it wrote to the Region on December 27, 2019, seeking the Region's perspective. *See* Att. 8. When San Francisco did not receive a response to its December letter, it again sought the Region's input in its February 3, 2020 letter. *See* Mot., Att. 2. The Region never responded to San Francisco's inquiry nor expressed a position regarding the concept of two separate permits until issuance of the Notice of Stay, where it adopts the Two Separate Permits Theory.

The absurdity of the Region's reliance on the Regional Water Board's October letter as the basis to support two separate permits is illustrated by its statement that through the letter, the Regional Water Board "identified some provisions of the Oceanside Permit that are not enforceable by the [Regional Water Board]." Resp. at 9. If the agencies had issued two separate permits, the Regional Water Board would not have had to parse the Permit to cull out federal-only requirements. The Regional Water Board's painful attempts at deciphering of the Oceanside Permit, AR #134, occurring a month after its issuance of the final Permit, highlights the absence of any discernible distinction within the Permit between the "State Permit" and the "Federal Permit."

The Region's repeated reference to San Francisco's challenge to the Regional Water Board's issuance of the Oceanside Permit is not, as the Region suggests, an acknowledgement of the existence of two separate permits. Resp. at 9-10. Rather, it is simply an acknowledgement of the involvement of two separate permitting authorities in the issuance of the Oceanside Permit. Contrary to the Region's suggestions otherwise, San Francisco's State Water Resources Control Board administrative challenge as well as its filing of a complaint for declaratory relief, a petition for writ of administrative mandate, and an ex parte application for a temporary restraining order in state court, are all part of San Francisco's recognition of the different procedural review requirements imposed under state and federal law. Due to the critical importance of the challenged conditions, San Francisco chose to ensure that it did not fail to exhaust any administrative or judicial remedy that could later be held out, by the Region or the Regional Water Board, as precluding adjudication of the dispute.

San Francisco's efforts to ensure that its challenge would not be derailed by a procedural objection cannot be turned on its head, as the Region seeks to do here, to deprive San Francisco of its due process rights. Instead of punishing San Francisco for not raising a challenge to the Two Separate Permit Theory in its Petition — before such a theory was articulated by the Region — the Board should admonish the Region for delaying its adoption of the Two Separate Permits Theory until issuing the Notice of Stay. As such, the Region waited roughly two-and-a-half months after issuing the Oceanside Permit and a month after San Francisco's filing of its Petition before articulating the Two Separate Permits Theory.

Finally, the Region has not been prejudiced by San Francisco's request to amend its Petition. The Region admits as much by not raising any prejudice issues in its Response.

The Board has the authority to, and should, allow San Francisco to amend its Petition to raise its concerns with the Two Separate Permits Theory. *See, e.g.*, EAB Manual at 36, n. 33 ("Nothing in Part 124 prevents the EAB from ordering additional briefing in any appeal where the EAB determines it is warranted. *See* 40 C.F.R. § 124.19(n) (stating that the Board "may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part").").

III. CONCLUSION

Despite its mandated obligation to raise the Two Separate Permits Theory, and the unprecedented ramifications of such theory, during the six years of discussions leading up to issuance of the Oceanside Permit, the Region failed to so. The Region inappropriately attempts to use the theory to enforce contested Permit conditions that should be stayed. Compounding its errors, the Region tries to stop the Board from reviewing the theory by arguing that the Board lacks authority to review the Notice of Stay and that any amendment to San Francisco's Petition is untimely.

The Board should not condone the Region's attempts at gamesmanship. Rather, the Board should grant San Francisco's requested relief and either issue an expedited stay of the contested Oceanside Permit conditions or remand the Notice to the Region. In either case, San Francisco requests the Board clarify that the Region can only stay, and not enforce, the contested conditions. Likewise, the Board has the authority to, and should, allow San Francisco to amend its Petition to address the consequences of the Region's belated adoption of the Two Separate Permits Theory.

Dated: April 16, 2020

Respectfully submitted,

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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, supplemental list of attachments, statement of compliance with the word limitation, and certification of service, this Reply contains 6,249 words.

Dated: April 16, 2020

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SUPPLEMENTAL LIST OF ATTACHMENTS

Attachment 7: 1989 NPDES Memorandum of Agreement between the United States Environmental Protection Agency and the California State Water Resources Control Board ("MOA")

Attachment 8: H. Kelly (General Manager, SFPUC) letter to T. Torres (Director, Water Division, EPA) on December 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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 the addresses specified below:

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