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February 28, 2020

Via EAB eFiling System

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460

Re: City and County of San Francisco, Appeal No. NPDES 20-01

Dear Ms. Durr:

Please find enclosed for filing the City and County of San Francisco's 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 for Appeal No. NPDES 20-01.

The enclosed Motion was prepared in compliance with the formatting and length requirements contained in 40 C.F.R. § 124.19 and the Environmental Appeals Board Practice Manual. Because the attachments to this Motion exceed 50 pages, hard copies of all documents will be mailed to the Environmental Appeals Board separate from this Motion.

Thank you for your attention to this matter.

Sincerely,

J. Tom Boer

Samuel L. Brown

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

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

CITY AND COUNTY OF SAN FRANCISCO'S
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

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I. INTRODUCTION

Petitioner, the City and County of San Francisco ("San Francisco") unexpectedly finds itself in need of the assistance of the Environmental Appeals Board (the "Board" or "EAB") in securing what should be a mandatory and non-discretionary stay of the undisputed contested permit conditions raised in its Petition for Review ("Petition") of the Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project (collectively, the "Westside Facilities"), City and County of San Francisco National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0037682 ("2019 Permit" or "Oceanside Permit") in NPDES Appeal No. 20-01. Rather than establishing the stay as required by 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1), the United States Environmental Protection Agency Region 9 ("Region 9" or the "Region") has concocted a legal and factual fiction to support a complete end-run around the requirement, rendering the contested permit conditions fully enforceable, instead of staying their force and effect. The Region, for the first time, in its Notice of Stay of Contested Permit Conditions (the "Notice"),[1] now makes the self-serving claim that there is not just one permit, but two – a "federal" and a "state" permit – and purports to stay the "federal" conditions while simultaneously emphasizing its authority to enforce the exact same "state" conditions. The Region's actions are contrary to law, contrary to logic, and contrary to basic principles of administrative procedure.

San Francisco hereby moves the Board for expedited entry of an order staying the contested permit conditions or, in the alternative, expedited entry of an order remanding the Notice to Region 9 with instructions to the Region to issue a revised notice that properly

[1] Notice issued by the EPA Region 9 on February 7, 2020 and styled as "Notice of Stay of Contested Conditions for National Pollutant Discharge Elimination System (NPDES) Permit No. CA0037681, Order No. R2-2019-0028, EAB Appeal No. NPDES 20-1." *See* Attachment 1.

identifies the stayed provisions of the 2019 Permit pursuant to 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1). Further, San Francisco asks the Board for leave to amend its January 13, 2020 Petition for Review in order to add a substantive challenge to this "two permit" theory adopted by the Region. This motion is made pursuant to 40 C.F.R. §§ 124.19(f) and 124.19(n) on the grounds that, in violation of 40 C.F.R. §§ 124.16(a) and 124.60(b)(1), as described herein, the Region failed to stay all of the contested permit conditions of the jointly issued 2019 Permit.

II. FACTUAL AND REGULATORY BACKGROUND

A. The Region's Notice of Stay of Contested Permit Conditions

On January 13, 2020, San Francisco filed its Petition for Review of the 2019 Permit. San Francisco's Petition contested the following permit conditions: (1) the generic water quality based effluent limitations at Section V and Attachment G.I.I.1; (2) the "LTCP Update" at Section VI.C.5.d; and (3) the reporting and other regulation of isolated sewer overflows at Section VI.C.5.a.ii.b. San Francisco's Petition for Review at p. 2.

Pursuant to the Code of Federal Regulations, "if a request for review of a RCRA, UIC, or NPDES permit under § 124.19 of this part is filed, the effect of the contested permit conditions *shall be stayed* and shall not be subject to judicial review pending final agency action." 40 C.F.R § 124.16(a)(1) (emphasis added). The Regional Administrator is charged with identifying the stayed provisions and "shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit . . ." 40 C.F.R. § 124.16(a)(2)(ii); *see also* 40 C.F.R. § 124.60(b)(1) ("[I]f 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.").

On February 3, 2020, having not received any notification regarding the uncontested permit conditions, San Francisco sent a letter to Tomas Torres, Director of the Water Division for EPA Region 9, expressing concern about the lack of notification. *See* Attachment 2 at pp. 1-2. A few days later, on February 7, three weeks after the Petition was filed, the Region issued a Notice of Stay of Contested Permit Conditions signed by Director Torres (the "Notice"), without any explanation for the delay.[2] The Notice provides that, "in light of the federal permit conditions that have been challenged in the EAB, the following permit conditions are contested and therefore stayed pending final agency action on the federal Oceanside Permit, NPDES No. CA0037681: 1) receiving water limitations at Section V. and Attachment G, Section I.I.1.; 2) the Long Term Control Plan Update at Section VI.C.5.d.; and 3) the reporting and other regulation of sewer overflows at Section VI.C.5.a.ii.b. All other provisions of the federal Oceanside Permit, NPDES No. CA0037681, are effective 30 days from the date of this notice." Attachment 1 at p. 2. However, the Notice also claims that the "the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028, is currently in effect for all discharges to state waters pursuant to issuance by the RWQCB, and this stay has no impact on the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028." *Id.* at pp. 1-2. Further, EPA emphasizes that "[s]ince the [California-issued NPDES Oceanside Permit] was issued pursuant to California's authorized NPDES program pursuant to 33 U.S.C. § 1342(b), U.S. EPA Region 9 is authorized to enforce it pursuant to 33 U.S.C. § 1342(i)." *Id.* at p. 2.

[2] This delay in responding, in itself, was contrary to applicable law and an abuse of discretion. *See* 40 C.F.R. § 124.16(a)(2)(ii) (The Regional Administrator's notice of stayed contested permit conditions and uncontested and severable conditions must be issued "as soon as possible after receiving notification from the EAB of the filing of a petition for review."). It appears that EPA used the time to develop its *post hoc* rationalization for arbitrarily limiting the scope of the automatic stay.

Practically, what this means is that EPA has refused to stay the terms in the 2019 Permit. Under Region 9's twisted interpretation of the Permit, it has stayed the "federal component" of the Permit but not the "State component" of the exact same clauses in the exact same Permit and it retains its enforcement discretion to independently enforce those terms. In other words, under this interpretation, the automatic stay has literally no effect. Not only is this position inconsistent with EPA's regulations and the plain language of the 2019 Permit issued by EPA, but this Notice represents the *first time* in the Permit issuance and adoption process that EPA has taken the position that there are *two* permits, not one jointly issued 2019 Permit.

B. The Region's Joint Issuance of a Single Permit with the Regional Board

The 2019 Permit is a single permit jointly issued by EPA Region 9 and the San Francisco Bay Regional Water Quality Control Board ("Regional Board"). San Francisco's Westside Facilities cannot operate without discharging to both waters of the United States and waters of the State. In order to operate and to discharge from the Westside Facilities in compliance with the law, San Francisco must have a validly issued permit under the Clean Water Act. The indivisible nature of the Westside Facilities, and associated discharge, was recognized when both Region 9 and the Regional Board adopted the exact same Permit, referred to as NPDES No. Permit No. CA0037681 and Order No. R2-2019-0028, respectively. The evidence conclusively establishes that the 2019 Permit is a single permit, as demonstrated by the joint process involved in its adoption by EPA and the Regional Board, the single, joint administrative record, and the plain language of the 2019 Permit.

Region 9 and the Regional Board conducted a joint administrative process to issue the 2019 Permit. The singular nature of the permitting process is evident in EPA's public notice inviting comments, which stated in relevant part:

> EPA and the Board have prepared a draft National Pollutant Discharge Elimination System permit (CA0037681) (PDF) for the above discharger in accordance with the Clean Water Act (CWA) and Porter-Cologne Water Quality Control Act. The discharger treats and discharges wastewater and stormwater into federal and state waters of the Pacific Ocean. The sludge from the facility is anaerobically-digested onsite and hauled to a landfill or land-applied.[3]

EPA's public notice only invites a single set of comments "on the draft permit," stating that "[c]omments must be sent to the attention of Jessica Watkins at the Board and to Becky Mitschele at EPA."[4] Other indicia that Region 9 and the Regional Board issued a single permit include, for example, jointly drafting the permit and its conditions, jointly reviewing and responding to comments via a single response to comments that made no distinction between separate "state law" and "federal" requirements and terms, and jointly meeting with San Francisco staff during the permit issuance process on multiple occasions.

EPA's public statements during the adoption process further confirm that a single permit was issued by Region 9 and the Regional Board. For example, at the public hearing on September 11, 2019, before the Regional Board, representatives from EPA's regional office in San Francisco "express[ed] EPA's support" for the Permit. *See* Attachment 3, Staff Summary Report for Regional Board Adoption Hearing on September 11, 2019 at p. 1 ("Since this permit covers discharges to both State and federal waters, we have worked closely with U.S. EPA to facilitate joint reissuance."); Attachment 4, Transcript of Regional Board Adoption Hearing on September 11, 2019 at p. 6:7-10 (statement by Regional Board representative explaining ". . . we issue this permit jointly with EPA because the plant discharges to federal waters that are beyond State jurisdiction") and at p. 47:10-14 (statement by EPA representative explaining, ". . . EPA is

[3] *See* EPA in California, Notice of Opportunity to Comment and Board Meeting for Discharge Permit (Apr. 19, 2019), available at https://archive.epa.gov/epa/ca/draft-npdes-permit-city-and-county-san-francisco-oceanside-facilities.html (last visited February 24, 2020) (emphasis added).
[4] *Id.*

here because the permit would authorize discharges to federal and state waters. Therefore, the *permit is jointly issued by the Board and EPA*.") (emphasis added).

Although it was expected that EPA would quickly approve the joint permit after the Regional Board's September 2019 hearing, it delayed action for three months. *See* Attachment 5, December 10, 2019 Letter from EPA Region 9 Regional Administrator Michael Stoker Adopting 2019 Permit. In the interim, the Regional Board, in a *post hoc* effort to ensure that the new permit conditions went into effect on its desired timeline, concocted the legal and factual fiction that two separate permits had been proposed and approved for the Westside Facilities, one by the Regional Board, under California law, and one by Region 9, under federal law. To that end, over a month *after* the Permit was adopted, the Regional Board, for the first time, took the position that *part* of the 2019 Permit – the provisions "authorized pursuant to State law" – would go into effect despite the lack of any EPA approval of the permit. *See* Attachment 6, October 29, 2019 Letter from Regional Board Executive Officer Michael Montgomery to San Francisco Public Utilities Commission at p. 4. The Regional Board Executive Officer's after-the-fact modification of the Permit from one single permit into two separate permits – subsequent to the joint permit's authorization by members of the Regional Board after notice and comment – absent any administrative proceeding was contrary to law and invalid. *See* Cal. Water Code § 13223(a)(2) (Regional Board cannot delegate to the Executive Officer "the issuance, modification, or revocation of any water quality control plan, water quality objectives, or waste discharge requirement.").[5]

[5] The attempt to divide an approximately 150 page permit into purportedly entirely separate "federal terms" and "State terms" was not only illegal, but also technically impractical given the design and operation of San Francisco's facilities. For example, operating Discharge Point 001 – the "federally authorized" discharge point in the Pacific Ocean – in compliance with permit terms can only be accomplished via reliance on infrastructure located across the Westside Facilities, including pump stations, transport-storage boxes, and conveyance pipes. Conversely, it would be impossible to comply with the remaining permit terms for operation of the Westside Facility – including

On December 10, 2019, months after the Regional Board's action on the permit, EPA Region 9 finally adopted the 2019 Permit by a letter from Regional Administrator Michael Stoker. *See* Attachment 5. The Region provided no explanation for the exceptional delay. In adopting the Permit, the Regional Administrator explicitly stated that the "effective date of the permit is February 1, 2020, unless a petition for review is filed with the Environmental Appeals Board." *Id.* at pp. 1-2. Nothing included in the adoption letter indicated the 2019 Permit was anything but one permit. To the contrary, the 2019 Permit adopted by the Region was an exact replica of the 2019 Permit adopted by the Regional Board at the September 11, 2019 hearing, except it included an additional page with Director Torres' signature and a table with the updated effective date.

The plain language, including the structure and terms of the Permit, clearly indicates that it was adopted as a single permit:

- "The following Discharger is authorized to discharge . . . in accordance with the waste discharge requirements (WDRs) *and* federal National Pollutant Discharge Elimination System (NPDES) permit requirements set forth in *this* Order." *See* San Francisco's Petition for Review, Attachment 1 (2019 Permit) at p. 1 (emphasis added);

- "The Regional Water Board and U.S. EPA notified the Discharger and interested agencies and persons of their *intent to jointly issue WDRs and NPDES permit requirements* …" *Id.* at p. 5 (emphasis added);

- "The Regional Water Board intends that *joint issuance of this Order* with U.S. EPA will serve as its certification under CWA section 401 that discharges pursuant to this Order comply with 33 U.S.C. sections 1311, 1312, 1313, 1316, and 1317." *Id.* (emphasis added);

- "The Discharger shall comply with all "Standard Provisions" included in Attachment D" in which "references to 'Regional Water Board' *shall be interpreted as 'Regional Water Board and U.S. EPA,'* and references to 'Regional Water Board Executive Officer' shall be interpreted as '*Regional Water Board Executive Officer and U.S. EPA.*" *Id.* at p. 9 (emphasis added);

discharge from authorized Combined Sewer Discharges to surface waters of the State – if San Francisco were not authorized to discharge from Discharge Point 001.

- "The Discharger shall comply with *all* applicable provisions of the 'Regional Standard Provisions, and Monitoring and Reporting Requirement' (Attachment G)," which are regional- and state-specific permit terms that are applied to *all* discharges and aspects of the Westside Facilities, including discharges into Federal waters via Discharge Point No. 001. *Id.* at p. 10 (emphasis added);

- Further, the 2019 Permit's legal authorities are explicit: "This Order serves as WDRs pursuant to California Water Code article 4, chapter 4, division 7 (commencing with § 13260). This Order is also issued pursuant to federal CWA section 402 and implementing regulations adopted by U.S. EPA and Water Code chapter 5.5, division 7 (commencing with § 13370). *It shall serve as a National Pollutant Discharge Elimination System (NPDES) permit authorizing the Discharger to discharge into waters of the United States as listed in Table 2 subject to the WDRs and NPDES permit requirements in this Order*." *Id.* at p. 5 (emphasis added).

Additionally, there is a complete lack of any distinction between the alleged "state-only" and "federal-only" terms in the Permit as adopted.

The response to comments, jointly issued by EPA Region 9 and the Regional Board in support of adopting the Permit, further confirm that only a single permit was issued. Nowhere in the response to comments is any distinction made between "federal-only," "state-only," and "joint" terms. In fact, without fail, the Response to Comments uniformly uses the term "we" to refer to Region 9 and the Regional Board. For example, San Francisco provided comments on efforts to regulate isolated sewer overflows in Section VI.C.5.a.ii.b. of the Permit; under Region 9's *post hoc* efforts to make a distinction between "federal" and "state" waters, such overflows would never impact federal waters and, therefore, those terms would have been "state only" terms adopted under "the California-issued NPDES Oceanside Permit." However, the Response to Comments clearly shows that Region 9 and the Regional Board were jointly responding to San Francisco's comments on terms for inclusion in a single, joint permit:

> ***San Francisco Comment C.5***. *The definition of sewer overflows from the combined sewer system in Attachment A of the tentative order should be revised to exclude sewer overflows from the combined sewer system occurring as a result*

of storms exceeding the system's level of service (i.e., when the design capacity of the system has been exceeded).

Response: We disagree. As explained in our response to San Francisco Comment C.3, limiting the definition as suggested 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.[6]

…

San Francisco Comment C.14. *Applying reporting requirements for sanitary sewer systems to San Francisco's combined sewer system arbitrarily and capriciously deprives San Francisco the protections the California legislature has otherwise afforded the regulated community when the legislature mandated that the State Water Board adopt sanitary sewer overflow reporting requirements. …*

Response: The monitoring and reporting requirements for sewer overflows from the combined system are not State mandates … They are necessary to implement federal law. Specifically, such monitoring and reporting is needed to detect violations of Clean Water Act section 301 and evaluate compliance with the Nine Minimum Controls … To the extent that the monitoring and reporting requirements also implement State law, the costs of compliance would not be a State mandate subject to reimbursement … [7]

Even if the Regional Board has theoretical authority under State law to issue independent waste discharge requirements to San Francisco (apart from any EPA action under federal law), that is not the approach nor the authority that was exercised by the Regional Board on September 11, 2019, when it voted to approve the 2019 Permit jointly drafted and issued by Region 9 and relied upon a single administrative record and a cohesive set of permit terms and obligations to do so. Similarly, the Region's issuance of the 2019 Permit on December 10, 2019 did not include any identification of federally enforceable provisions or make any distinctions between "federal-only," "state-only," and "joint" terms.

EPA and California have a long history of intentionally issuing permits that clearly identify those terms that are state-only and federal-only. For example, under the Clean Air Act,

[6] *See* San Francisco's Petition for Review, Attachment 10 at p. 24 (emphasis added).
[7] *Id*. at p. 26-27 (emphasis added).

EPA has delegated authority to the states' permitting authorities to issue Title V Permits for major sources of air pollutants. *See* 40 C.F.R Part 70. In this context, EPA identifies which permit terms are federal permit terms. *See id.* at § 70.6(b)(2) ("[T]the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act. . .").[8] Thus, EPA knows how to promulgate and identify federal-only permit terms. Here, EPA failed to distinguish between the alleged federal and state permit provisions until ***after*** the permit was issued. This is strong evidence that the claim that Region 9 and the Regional Board issued two *separate* permits is nothing more than an arbitrary, *post hoc* rationale developed to create a basis for the respective agencies' authority to apply the permit before joint adoption, in contravention of law, and stymie San Francisco's lawful challenge of permit terms.

III. REVIEW BY THE BOARD

The Code of Federal Regulations includes a procedure for filing motions requesting an order or other relief from the Board. *See* 40 C.F.R. § 124.19(f). It also authorizes the EAB 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." *Id.* at § 124.19(n). Since this regulation authorizes the Board to sanction the Region for failing or refusing to comply with the provisions of Part 124, including those in 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1) for stays of contested

[8] *See, e.g.* Bay Area Air Quality Management District, Title V Permits, available at https://www.baaqmd.gov/permits/major-facility-review-title-v/title-v-permits (last visited February 25, 2020). This webpage includes all current Title V Permits issued by the District, under the delegation of EPA, for each county in the District's territory. All approved permits (linked as pdfs on the page) include a table for each regulated source listing the applicable requirements and identifying whether they are federally enforceable.

permit conditions, it is beyond any reasonable dispute that the Board is authorized to review the Region's compliance with these provisions. The Region's compliance with these provisions – i.e., the sufficiency and legality of the Region's notification of the stayed permit conditions – is an issue "arising in [this] appeal" and the Board's review of the Region's Notice under § 124.19(n) would further "the efficient, fair, and impartial adjudication" of the issue.

The standard of review applied by the Board in evaluating a petition is set forth in section 124.19(a)(4)(i). The Board may grant review of a permit decision when the petitioner shows that the decision was based on either "a finding of fact or conclusion of law that is clearly erroneous," or "an exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review." *Id.* at § 124.19(a)(4)(i)(A),(B). This same standard of review is appropriate for this Motion, as it is the only explicit standard of review provided by Part 124, and this Motion is made under Part 124.

IV. ARGUMENT

A. The Contested Permit Conditions Are Undisputed

San Francisco's Petition clearly identifies the contested permit conditions, namely, (1) the generic water quality based effluent limitations at Section V and Attachment G.I.I.1; (2) the "LTCP Update" at Section VI.C.5.d; and (3) the reporting and other regulation of isolated sewer overflows at Section VI.C.5.a.ii.b. Petition for Review at p. 2. The Region's Notice states that the following "permit conditions [] have been challenged" and "the following permit conditions are contested . . . 1) receiving water limitations at Section V. and Attachment G, Section I.I.1.; 2) the Long Term Control Plan Update at Section VI.C.5.d.; and 3) the reporting and other regulation of sewer overflows at Section VI.C.5.a.ii.b." Attachment 1 at p. 2. Thus, there is no dispute about which permit conditions are contested.

B. Contested Permit Conditions Shall Be Stayed

Staying the contested permit conditions is mandatory and non-discretionary. "If a request for review of a . . . NPDES Permit under § 124.19 of this part is filed, the effect of the contested permit conditions *shall be stayed* and shall not be subject to judicial review pending final agency action." 40 C.F.R § 124.16(a)(1) (emphasis added); *see also id.* at § 124.60(b)(1) (emphasis added) ("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)); EAB Practice Manual (EPA, March 2013) at p. 56 ("*The effect of any contested permit conditions* and the effect of any uncontested conditions that are not severable from contested conditions under a RCRA, UIC, or NPDES permit *is stayed pending final agency action*. 40 C.F.R. § 124.16(a)(2)(i).") (emphasis added). The Region directly acknowledges this requirement in its Notice – "[a]fter a permit appeal is filed under 40 C.F.R. § 124.19, 'contested conditions' are stayed pending final agency action . . ." Attachment 1 at p. 2.

C. The Region's Notice Is Clearly Erroneous Because It Fails To Stay the Undisputed Contested Permit Conditions

In its Notice, the Region acknowledges the 2019 Permit is "jointly issued" for the Westside Facilities, including the Oceanside treatment plant. However, the Region then artificially creates a distinction between "the federal Oceanside Permit, NPDES No. CA0037681" and "the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028" and the "federal" and "state" permit conditions. Attachment 1 at pp. 1-2. The Region states that "the federal permit conditions that have been challenged in the EAB . . . are therefore stayed pending final agency action on the federal Oceanside Permit, NPDES No. CA0037681" and then adds that "the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028, is

currently in effect for all discharges to state waters pursuant to issuance by the RWQCB, and *this stay has no impact on the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028*." *Id.* at p. 2. The Region 9 then states that "[s]ince the RWQCB Oceanside Permit, Order No. R2-2019-0028, was issued pursuant to California's authorized NPDES program pursuant to 33 U.S.C. § 1342(b), *U.S. EPA Region 9 is authorized to enforce it pursuant to 33 U.S.C. § 1342(i).*" *Id*. Thus, according to the Region, the exact same permit terms that are allegedly "stayed" are *not in fact* stayed, but are currently effective and enforceable by the Region.

EPA's position in the Notice is contrary to law and clearly violates the mandate in 40 C.F.R § 124.16(a)(1) that all contested permit conditions *shall be stayed*. The Region has attempted an end-run around its mandatory obligation to stay the contested permit conditions and has plainly failed to satisfy the procedural and substantive requirements under the Code of Federal Regulations relating to staying the contested permit conditions. A proper notice must stay "*the force and effect of the contested conditions*." 40 C.F.R. § 124.60(b)(1) (emphasis added); *see also* EAB Practice Manual at p. 56 ("*The effect of any contested permit conditions* . . . under a . . . NPDES permit *is stayed* pending final agency action. 40 C.F.R. § 124.16(a)(2)(i).") (emphasis added). Here, the Region has admitted that under the framework that it has established, the stay does not impact the undisputed, contested permit conditions. In other words, the force and effect of the contested conditions is not stayed and instead San Francisco must comply with these conditions or risk enforcement *by Region 9*. This decision by the Region constitutes clear error.

Additionally, the Region's *post-hoc* rationalization that there are separate "federal" and "state" permit conditions is based on clearly erroneous findings of fact. As described in detail in section II.B above, nowhere in the 2019 Permit, or the associated administrative record, did the

Region identify any permit terms that are "federal permit conditions" and it certainly did not categorize the contested permit conditions as "federal" or "state" permit conditions. In fact, the 2019 Permit terms as adopted, as well as the public notice for the proposed permit, statements by Region 9 at the Regional Board hearing, and the joint Response to Comments all conclusively establish that EPA took the position during the entire administrative process that there was a single Permit and that it had federal jurisdiction over all aspects of that Permit. The decision by the Region to construe the Permit differently in the Notice constitutes clear error.

D. The Region's Notice Involves a Matter of Policy that Warrants Review

The Region has acknowledged that San Francisco is entitled to appeal the 2019 Permit to the EAB. *See* Attachment 5 at pp. 1-2. However, through its Notice, the Region has concluded that San Francisco is not entitled to the procedural safeguards built into the EAB appeals process because it can allegedly "stay" the contested permit conditions while simultaneously enforcing those *exact same* permit conditions. The logic underlying the Region's actions – that EPA is authorized to enforce state-issued NPDES permits pursuant to 33 U.S.C. § 1342(i) – would apply to any one of the many jointly issued NPDES permits in this country. In essence, the Region is establishing a new policy that contested permit conditions in jointly issued NPDES permits will not be stayed pending EAB review. If the Region's Notice is not rejected, it will create troubling precedent and deny each similarly-situated permittee from the ability to obtain a final resolution of its dispute before having to implement and otherwise undertake time and resources on permit conditions that may ultimately be modified or eliminated. Given the scope (all jointly issued NPDES permits issued in this country) and the nature of the Region's action (denying a NPDES permittee procedural safeguards guaranteed in the Code of Federal Regulations), it is necessary and appropriate for the EAB, in its discretion, to grant San Francisco's Motion and provide

guidance on these "important policy consideration[s]." *See generally* 40 C.F.R. § 124.19(a)(4)(i)(B).

V. REQUEST FOR RELIEF

Given the EAB's broad authority under 40 C.F.R. §§ 124.19(f) and 124.19(n) to rule on motions and review the Region's compliance with the provisions of 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1) and for the foregoing reasons, San Francisco respectfully requests expedited entry of an order staying the undisputed, contested permit conditions. Such a stay would include staying San Francisco's obligation to implement, and the EPA's authority to enforce "the force and effect of the contested conditions," regardless of whether the Region characterizes them as "federal" or "state" permit conditions, and regardless of whether the Region is acting in its jurisdiction as the issuer of the alleged federal Oceanside permit, NPDES No. CA0037681, or the enforcer of the alleged California-issued NPDES Oceanside permit, Order No. R2-2019-0028. Because the alleged California-issued NPDES Oceanside permit is purportedly fully effective and enforceable, San Francisco urges that the EAB decide this motion and enter the requested order on an expedited basis. *See* 40 C.F.R. § 124.19(f)(6) ("The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.").

In the alternative, San Francisco respectfully requests expedited entry of an order remanding the Notice to Region 9 with instructions to the Region to issue a revised notice pursuant to 40 C.F.R. §§124.16(a) and 124.60(b)(1) staying San Francisco's obligation to implement, and the EPA's authority to enforce, "the force and effect of the contested conditions," regardless of whether the Region characterizes them as "federal" or "state" permit conditions, and regardless of whether the Region is acting in its jurisdiction as the issuer of the

alleged federal Oceanside permit, NPDES No. CA0037681, or as the enforcer of the alleged California-issued NPDES Oceanside permit, Order No. R2-2019-0028.

Lastly, San Francisco asks the Board for leave to amend its January 13, 2020 Petition for Review in order to add a substantive challenge to this "two permit" theory recently adopted by the Region. Since San Francisco was not aware this was the Region's position on January 13, 2020 – because the Region did not express this "two permit" theory until it was described in the Notice sent on February 7, 2020 – San Francisco respectfully requests the opportunity to amend its Petition to add the argument that the Region's theory is clearly erroneous and contrary to law. 40 C.F.R. § 124.19(a)(4)(i)(A),(B).

VI. STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. §§ 124.19(d)(1)(iv) & (f)(5), the undersigned counsel hereby certify that this Motion does not exceed 7,000 words. Not including the transmittal letter, caption, table of contents, table of authorities, signature block, table of attachments, statement of compliance with the word limitation, and certification of service, this Petition contains 5,178 words.

VII. CERTIFICATE OF CONFERENCE

In accordance with 40 C.F.R. § 124.19(f)(2), the undersigned counsel conferred with counsel for the Region to ascertain whether it concurs or objects to this Motion. Counsel for San Francisco spoke by telephone with Dustin Minor, counsel for the Region, on February 25, 2020, about the issues addressed in this Motion. Counsel for San Francisco then spoke with Sylvia Quast, Regional Counsel at Region 9, the morning of February 28, 2020. Ms. Quast confirmed that the Region does not concur with the relief sought.

VIII. LIST OF ATTACHMENTS

Attachment 1: Notice of Stay of Contested Conditions for National Pollutant Discharge Elimination System (NPDES) Permit No. CA0037681, Order No. R2-2019-0028, EAB Appeal No. NPDES 20-1

Attachment 2: February 3, 2020 Letter from San Francisco to Tomas Torres, Director of the Water Division for EPA, Region 9

Attachment 3: Staff Summary Report for Regional Board Adoption Hearing on September 11, 2019

Attachment 4: Transcript of Regional Board Adoption Hearing on September 11, 2019

Attachment 5: December 10, 2019 Letter from EPA Region 9 Regional Administrator Michael Stoker Adopting 2019 Permit

Attachment 6: October 29, 2019 Letter from Regional Board Executive Officer Michael Montgomery to San Francisco Public Utilities Commission

Date: February 28, 2020

Respectfully submitted,

/S/ J. Tom Boer

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached *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* to be served via email upon the persons listed below.

February 28, 2020

Respectfully submitted,

/S/ J. Tom Boer

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