

BEFORE THE ENVIRONMENTAL APPEALS BOARD

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U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ORAL ARGUMENT

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IN THE MATTER OF:	:
	:
CITY AND COUNTY OF SAN FRANCISCO	: NPDES Appeal No.
	: 20-01
	:
NPDES Permit No. CA0037681	:
	:

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Thursday,  
October 8, 2020

Video Teleconference

The above-entitled matter came on for hearing, pursuant to notice, at 1:00 p.m. EDT

BEFORE:

THE HONORABLE AARON P. AVILA  
Environmental Appeals Judge

THE HONORABLE MARY KAY LYNCH  
Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN  
Environmental Appeals Judge

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ALSO PRESENT:

Marnie Ajello, Counsel for the San Francisco Bay  
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Eurika Durr, Clerk of the Board  
Jon Fleuchaus, Counsel to the Board  
Noha Haggag, Counsel to the Board  
John Kilborn, EPA Region 1  
Greg Miller, EPA  
Becky Mitschele, EPA Region 9  
Ammie Roseman-Orr, Counsel to the Board

1 P-R-O-C-E-E-D-I-N-G-S

2 (1:00 p.m.)

3 MS. DURR: The Environmental Appeals  
4 Board of the United States Environmental  
5 Protection Agency is now in session for oral  
6 argument in re: City and County of San Francisco,  
7 Permit Number CA0037681, NPDES Appeal No. 20-01.  
8 The Honorable Judges Aaron Avila, Mary Kay Lynch,  
9 and Kathie Stein, presiding.

10 No recording devices allowed.

11 JUDGE AVILA: Thank you very much.  
12 Good morning, or good afternoon, depending on  
13 where you are. This is Judge Avila again. We're  
14 going to do another roll call for the record in a  
15 few moments, but I first wanted to provide you  
16 with some reminders for today's argument, with  
17 the understanding that you may be somewhat tired  
18 of getting instructions at this point, but we  
19 think it'd be useful to go through these things.  
20 And if folks could be sure to mute their  
21 microphones, that would be great, until you're  
22 called upon.

1           The Judges will keep our cameras on  
2           and microphones on for the duration of the  
3           argument. Presenters will turn on their camera  
4           and unmute their microphones when I ask you to  
5           begin your portion of the argument. At the  
6           conclusion of your time arguing, please once  
7           again turn off your camera and mute your  
8           microphone.

9           Please be sure to speak directly into  
10          your microphone and try to avoid speaking over  
11          others. This will help the court reporter in  
12          transcribing the proceedings. Observers will  
13          keep their microphones and cameras off for the  
14          duration of the argument. In the event there are  
15          any occurrences during the argument that inhibit  
16          the court reporter, I'd ask that the court  
17          reporter turn his microphone on and let us know  
18          immediately.

19          If you have not already done so,  
20          please disconnect from any virtual private  
21          network or VPN connections. And with that, I'd  
22          like to turn to the roll call. When I call your

1 organization, please unmute your microphone and  
2 state your name and affiliation, and whether your  
3 role in today's argument is as a presenter or an  
4 observer. And let's start with the petitioner,  
5 please.

6 MR. SILTON: Good afternoon, Judge  
7 Avila. This is Andrew Siltan, counsel for  
8 petitioner, city and county of San Francisco. I  
9 will be presenting. Thanks.

10 JUDGE AVILA: Thank you. Also for  
11 petitioner, who do we have observing?

12 MR. DAVIS: This is Richard Davis  
13 observing.

14 MR. RODDY: John Roddy, San Francisco  
15 City Attorney's Office, observing.

16 MS. KUS: Estie Kus.

17 JUDGE STEIN: Excuse me, Judge Avila,  
18 there's some background feedback. Someone is not  
19 on mute. I'm hearing noise in the background.

20 JUDGE AVILA: If you aren't speaking,  
21 if you could be sure your microphone's on mute,  
22 it would be helpful. Thank you.

1 MS. KUS: Good morning. Estie Kus,  
2 San Francisco City Attorney's Office, observer.

3 MS. SCHOONMAKER: Hello, this is  
4 Mackenzie Schoonmaker, counsel for petitioner,  
5 city and counsel of San Francisco, observer.

6 JUDGE AVILA: Okay, thank you. I  
7 think that's everyone for petitioner. Next, EPA  
8 Region 9 and Office of General Counsel.

9 MS. VON VACANO: Good morning, Your  
10 Honor. This is Marcela von Vacano. I'm counsel  
11 for the Region. Presenter.

12 MR. MINOR: And Dustin Minor. I'm  
13 also counsel for Region 9. Presenting.

14 MS. PARIKH: This is Pooja Parikh,  
15 from the Office of General Counsel. Observing.

16 MR. FORD: And this is Pete Ford,  
17 Office of General Counsel, observing.

18 MS. MITSCHELE: Becky Mitschele,  
19 Region 9. Observing.

20 JUDGE AVILA: Thank you very much.  
21 Next, for the Amici National Association of Clean  
22 Water Agencies and California Association of

1 Sanitation Agencies.

2 MS. ASPATORE: Hi, this is Amanda  
3 Aspatore for NACWA.

4 JUDGE AVILA: Thank you. Now, if the  
5 court reporter could identify himself?

6 COURT REPORTER: Sam Wojack, court  
7 reporter.

8 JUDGE AVILA: Thank you. For the  
9 Environmental Appeals Board, if the Clerk of the  
10 Board could identify herself first?

11 MS. DURR: Eurika Durr, Clerk of the  
12 Board.

13 JUDGE AVILA: Thank you. And we also  
14 have two senior counsel and a counsel to the  
15 Board observing. If you could identify  
16 yourselves now, please?

17 MS. ROSEMAN-ORR: Ammie Roseman-Orr,  
18 senior counsel to the Board.

19 MS. HAGGAG: Noha Haggag, counsel to  
20 the Board.

21 MR. FLEUCHAUS: Jon Fleuchaus, counsel  
22 to the Board.



1                   JUDGE AVILA: Thank you. We also have  
2 some wonderful technical assistance available to  
3 us today if things don't go smoothly, but we hope  
4 they will. If you could identify yourself,  
5 please?

6                   MR. MILLER: Hi, this is Greg Miller.  
7 I'm over at our headquarters in D.C.

8                   JUDGE AVILA: Thank you, Mr. Miller.  
9 We also have observers from the State of  
10 California Attorney General's Office and the  
11 California Regional Water Quality Control Board.  
12 If you could identify yourselves, please?

13                   MS. AJELLO: Hi, this is Marnie  
14 Ajello. I'm counsel for the San Francisco Bay  
15 Regional Water Board, and I'm observing.

16                   JUDGE AVILA: Is Mr. Melnick on?  
17 Okay, well, I guess we'll proceed.  
18 And finally, we have an observer from EPA Region  
19 1. If you could identify yourself?

20                   MR. KILBORN: John Kilborn, EPA Region  
21 1.

22                   JUDGE AVILA: Great. Thank you very

1 much, everyone. The Environmental Appeals Board  
2 is still relatively new to conducting oral  
3 argument by Skype, but on behalf of the Board,  
4 I'd like to say thank you for working with the  
5 Board to make this happen given the current  
6 circumstances. We anticipate this will go  
7 smoothly as I said, but if we encounter any  
8 technical difficulties, please bear with us.

9 The Environmental Appeals Board, as  
10 the clerk said, is hearing an oral argument today  
11 on the petition for review of a Clean Water Act,  
12 National Pollutant Discharge Elimination System  
13 authorization, issued by Region 9, to the City  
14 and County of San Francisco. Petitioner is the  
15 City and County of San Francisco.

16 Today's argument will proceed as  
17 outlined in the Board's July 7 order. We'll hear  
18 argument first from petitioner, then we will hear  
19 from EPA Region 9. Petitioner may reserve up to  
20 ten minutes of its allocated time for rebuttal.  
21 And if petitioner opts to reserve time for  
22 rebuttal, we'll hear that rebuttal argument after

1 the Region presents.

2 On behalf of the Board, I would like  
3 to express that we very much appreciate the time  
4 and effort each of you have spent expended in  
5 connection with briefing on the petition and  
6 preparing for and participating in this oral  
7 argument. Oral argument is an important  
8 opportunity for you to explain your contentions  
9 and the important issues in this case to the  
10 Board. It is also an opportunity for the Judges  
11 to explore with you the contours of your  
12 arguments and the issues in this case.

13 You should assume that we have read  
14 the briefs and other submissions, and therefore  
15 are likely to ask questions that will assist us  
16 in our deliberations. You should not assume that  
17 the Judges have made up their minds about any of  
18 the issues in this case, but instead, we are  
19 using this as an opportunity to listen, to help  
20 us understand your position, and to probe the  
21 legal and factual record support on which the  
22 Region based its permit decision.

1           As the clerk stated, there's no  
2 recording of any kind allowed. We do have a  
3 court reporter transcribing the oral argument,  
4 and a transcript of the argument will be posted  
5 to the docket in this matter.

6           We'll now proceed with the oral  
7 argument. If you're not presenting oral  
8 argument, again, please turn off your video and  
9 mute your microphone. Also, we do not have a  
10 timer that everyone can see, but the Clerk of the  
11 Board will inform you when you have five minutes  
12 remaining in your allotted time, and then again  
13 when your time has expired.

14           So with that, let's proceed. Counsel  
15 for the petitioner, please go ahead, and let me  
16 know if, at the start, you'd like to reserve time  
17 for rebuttal.

18           MR. SILTON: Everybody see and hear  
19 me? The most critical question at this point.

20           JUDGE AVILA: Yes.

21           JUDGE AVILA: Yes, thank you.

22           MR. SILTON: Thank you, Your Honors,

1 and good afternoon. My name is Drew Silton. I'm  
2 counsel for petitioner, and I would like to  
3 reserve five minutes for rebuttal.

4 JUDGE AVILA: Okay, thank you.

5 MR. SILTON: It is my privilege to be  
6 here today on behalf of the City and County of  
7 San Francisco. Its Public Utilities Commission  
8 and its residents will be affected by the Board's  
9 decision in this matter.

10 San Francisco is a longtime leader in  
11 addressing the unique water quality challenges  
12 posed by combined sewer discharges. In the early  
13 1970s, and before the Clean Water Act was even  
14 passed, San Francisco began work on what would  
15 become its long-term control plan. By 1997 and a  
16 cost of billions, San Francisco completed  
17 construction of the controls called for in its  
18 plan.

19 That same year, in a predecessor to  
20 the permit that is now on review here, EPA Region  
21 9 determined that San Francisco's CSD control  
22 program met the requirements of the CSO control

1 policy and was exempt from its planning and  
2 construction requirements.

3 JUDGE LYNCH: Counsel, if I could ask  
4 a question? This is Judge Lynch, can you hear  
5 me?

6 MR. SILTON: Yes.

7 JUDGE LYNCH: So, in the CSO policy,  
8 the 1994 CSO policy, it indicates that there are  
9 three circumstances under which certain  
10 provisions of the CSO policy may not apply.  
11 Which particular circumstance are you saying  
12 applies to San Francisco?

13 MR. SILTON: Your Honor, as we stated  
14 in our papers in the petition and all the  
15 briefing, we stated that we were subject to  
16 Section 1(c)(2).

17 JUDGE STEIN: I can't hear you. I  
18 believe your mic has gone out.

19 MR. SILTON: Can you hear me now?

20 JUDGE STEIN: Yes.

21 MR. SILTON: In that circumstance, it  
22 applies where a permittee has substantially

1 developed or is implementing a CSO control  
2 program. So that particular exemption, which  
3 therefore subjects a party that has developed a  
4 long-term control plan to limit its set of  
5 requirements dealing with sensitive areas  
6 analysis.

7 JUDGE LYNCH: I think we are having  
8 some --

9 JUDGE STEIN: There's some mic issues  
10 that you seem to be having again.

11 MR. SILTON: Your Honor, I will dial  
12 in for audio, if that would --

13 JUDGE AVILA: Okay. Well, give that  
14 a shot, and if the clerk could suspend the time  
15 for the time being?

16 (Pause.)

17 MR. SILTON: My apologies. This is  
18 Andrew Silton.

19 JUDGE AVILA: Okay, I think we can  
20 hear you now.

21 JUDGE LYNCH: So, this is Judge Lynch.  
22 I had some follow-up questions for you. So, can

1 you hear me?

2 MR. SILTON: Yes, I can, Your Honor.

3 JUDGE LYNCH: So, when you applied for  
4 grandfathering in 1994 to the Region, is it  
5 correct that you made a comparison to the  
6 presumption approach for approval --

7 (Simultaneous speaking.)

8 MR. SILTON: That's correct.

9 JUDGE LYNCH: And what criteria in the  
10 presumption approach are you maintaining you met  
11 at that time?

12 MR. SILTON: The specific criterion  
13 for the presumption approach we were trying to  
14 hit is 85 percent captured for treatment. So, as  
15 I believe specified, we were actually performing  
16 then, we were achieving through either using  
17 additional primary treatment at the plant, or  
18 basically inline treatment in the system,  
19 achieving either 100 percent primary treatment,  
20 or equivalent to primary treatment, even for  
21 CSDs. That did occur.

22 JUDGE LYNCH: And what's your position



1 on the parameters of the grandfathering  
2 provision? Is it in perpetuity, or exactly what  
3 does it grandfather?

4 MR. SILTON: Your Honor, we would  
5 submit that it grandfathers San Francisco to the  
6 point until the Region would determine consistent  
7 with the CSO control policy -- or I'm sorry, that  
8 the Region would determine consistent with the  
9 CSO control policy that San Francisco's long-term  
10 plan is no longer, or is not achieving compliance  
11 with the applicable water quality standards. At  
12 that point, the Region would have a basis to  
13 require revisions as the policy specifies.

14 JUDGE LYNCH: What about the sensitive  
15 areas? There's a specific provision in the  
16 section of the CSO policy that you're relying on,  
17 C.2, that talks about upgrading and monitoring  
18 with respect to sensitive areas, and then  
19 separately for post-construction monitoring.

20 MR. SILTON: With respect to the  
21 sensitive areas analysis, Your Honor, yes, San  
22 Francisco would be subject to that. But the

1 terms on which it could be required to change the  
2 controls called for in its plan are narrow.

3 Specifically, as is laid out, one of  
4 the instances of this is in Section IV.B.2.e --  
5 which deals with how this is written into permits  
6 -- is that sensitive areas analysis is not a  
7 wholesale reevaluation of the potential for  
8 additional controls. It's a more narrow  
9 reevaluation, simply dealing with whether new or  
10 improved techniques have arisen that would  
11 eliminate or relocate CSDs to sensitive areas on  
12 the one-hand, or a reassessment of financial  
13 feasibility.

14 It's not, as the Region has framed it  
15 here in table 7, a broader inquiry into achieving  
16 additional potential reductions from the  
17 discharges that are already occurring. At the  
18 point where you're into an exemption, or  
19 particularly, you're really post phase 2, you're  
20 at a point in development of your long-term plan  
21 where you've already satisfied the criterion for  
22 discharges to sensitive areas that cannot be

1 eliminated.

2 If EPA has approved your plan, they  
3 have found that you achieved reductions to the  
4 extent necessary to protect the water quality  
5 standards in those sensitive areas. So, it's a  
6 narrower inquiry than the one that's being  
7 proposed by the Region.

8 JUDGE LYNCH: Can I ask you a question  
9 here? Are --

10 MR. SILTON: Of course.

11 JUDGE LYNCH: I didn't want to  
12 overtalk. Are you saying that this particular  
13 review for sensitive areas, there has to be a  
14 demonstration with respect to water quality  
15 standards?

16 MR. SILTON: To be clear, with respect  
17 to a review that would require San Francisco to  
18 develop and consider additional means for  
19 reducing discharges to sensitive areas, yes. It  
20 would need to be predicated on a finding based on  
21 the PCMP data, that water quality standards are  
22 not being attained in the receiving waters.

1                   JUDGE STEIN: Is this true  
2                   irrespective of whether there's any change in the  
3                   operation of the system? I mean, you're  
4                   basically talking about something that was put  
5                   into effect in the 70s, and with some very narrow  
6                   carve outs, you're suggesting that this is an  
7                   exception that is in perpetuity. So,  
8                   irrespective of rainfall patterns, design, or  
9                   effectiveness, the agency has no authority to  
10                  require an update to a long-term control plan?  
11                  Is that your position?

12                 MR. SILTON: Your Honor, our position  
13                 is that the agency has authority to require  
14                 updates to the long-term control plan when the  
15                 post-construction monitoring data showed that the  
16                 plan is not resulting in water quality --  
17                 basically, performance that is not meeting the  
18                 applicable water quality standards.

19                 Certainly, Your Honor, when EPA wrote  
20                 the CSO control policy, and when Congress  
21                 codified it, one could contemplate that over the  
22                 course of time, you know, sewer systems wouldn't

1 simply leave their operations completely alone,  
2 and that certainly rain patterns wouldn't change  
3 over time. But only one set of criteria are  
4 specified in the policy as a basis for requiring  
5 revisions to the plan, and that's based on your  
6 performance.

7 So it certainly allows, when there's  
8 a demonstrated need based on receiving water  
9 quality, to go back and look at your plan, but  
10 outside those circumstances, simply to invoke the  
11 change of time and the fact that San Francisco  
12 did initially start some of this planning in the  
13 1970s is not independently a basis on which EPA  
14 can require -- or indeed is not a basis absent  
15 post-construction monitoring data showing that  
16 you aren't achieving water quality standards --

17 JUDGE AVILA: So --

18 MR. SILTON: To require revisions to  
19 your plan.

20 JUDGE AVILA: Sorry to interrupt, but  
21 just so I'm clear, so, if the rainfall in the San  
22 Francisco area increased by 100 percent since the

1 last time the permit was renewed, it's your  
2 position that before any update to the long-term  
3 control plan could be required, the Region would  
4 have to demonstrate that there was violations of  
5 water quality standards?

6 MR. SILTON: That's correct, Your  
7 Honor.

8 JUDGE AVILA: Okay.

9 MR. SILTON: And to be clear, we still  
10 have built in to the permitting process, you  
11 know, the five-year cycle. And that gives both  
12 time for, in ordinary circumstances even, let's  
13 put aside CSOs. Let's talk about another kind of  
14 system. There may be instances where things  
15 change over time, and EPA doesn't necessarily  
16 have the ability to take that next look until the  
17 next permitting term.

18 It's the same thing here. We would  
19 have the ability, though, over that time to  
20 collect data. And beyond that, if in year one,  
21 EPA finds that the data generated due to this  
22 increase in rainfall are resulting in, you know,

1 an increase in ambient water quality above those  
2 water quality standards notwithstanding  
3 implementation of their plan, EPA has the ability  
4 to use a reopener provision.

5 That's explicitly what's called for in  
6 Section IV.B.2.g of the CSO control policy.  
7 That's the mechanism that EPA, and now by virtue  
8 of incorporation, Congress has specified.

9 JUDGE STEIN: I mean, we're talking  
10 about the renewal of a permit here, which hasn't  
11 been, you know, issued in some time, and your  
12 answer to the agency's request for an update in  
13 the plan is to bump it down the road and reopen  
14 it later. And it seems to me that -- I mean, the  
15 Region will obviously speak to this at an  
16 appropriate time in the argument -- the Region is  
17 saying that there's some confusion about what  
18 exactly constitutes your plan, and they're asking  
19 for an update now. So, I don't understand how  
20 the reopener provision and just bumping this  
21 further down the line really solves the issue.

22 MR. SILTON: Your Honor, we submit

1 that that confusion is entirely misplaced,  
2 particularly when you look at the record. San  
3 Francisco has a long-term control plan. It does  
4 consist of several documents, but it's  
5 sufficiently concrete and identifiable. The EPA  
6 was able to look at it in 1997, again in 2003,  
7 and again in 2009, and find that it's met the  
8 requirements of the CSO control policy.

9 JUDGE LYNCH: Counsel?

10 MR. SILTON: And beyond that, in --

11 JUDGE LYNCH: Counsel, this is Judge  
12 Lynch. Can I pause you for a moment?

13 MR. SILTON: Of course.

14 JUDGE LYNCH: For clarification.  
15 Where is your long-term control plan? Is it the  
16 2018 synthesis document?

17 MR. SILTON: Your Honor, it consists  
18 of the 2018 synthesis document, as well as the  
19 individual documents that have been identified as  
20 part of the West Side long-term control plan in  
21 Appendix A.

22 JUDGE LYNCH: So, let me ask again for



1 clarification. The synthesis document has 21  
2 documents in it. There's 23, but it's  
3 applications for the grandfathering. So, am I  
4 correct that the synthesis document that you're  
5 saying is part of your long-term control plan is  
6 21 documents, and the most recent document is  
7 1991?

8 MR. SILTON: That's correct, Your  
9 Honor. And this is more the --

10 JUDGE LYNCH: And are you saying -- go  
11 ahead.

12 MR. SILTON: And yes, this is  
13 different obviously from most cities' long-term  
14 control plans. But nonetheless, EPA has been  
15 able to glean all of the relevant implementation  
16 criteria out of this long-term plan and actually  
17 operationalize them in a permit. And --

18 JUDGE LYNCH: Counsel, can I pause you  
19 again? So, how does this document, 21 documents,  
20 the most recent being 1991, reflect current  
21 conditions, including the work that you're doing  
22 under your sewer upgrade program beginning in

1 1997?

2 MR. SILTON: Your Honor, I think San  
3 Francisco actually explained it in its letter  
4 back to the Regional Board. The documents  
5 postdating those that are specified in the  
6 synthesis are not part of the long-term plan.

7 The capital upgrades that San  
8 Francisco has been undertaking as part of the  
9 sewer system improvement program are a series of  
10 efforts both to repair and replace aging  
11 infrastructure. They're intended actually to  
12 ensure that the existing CSD controls, the ones  
13 called for by our plan, actually continue to  
14 perform as specified in the plan itself. But  
15 this --

16 JUDGE LYNCH: And counsel, did the  
17 state or EPA agree with the statements in your  
18 letter?

19 MR. SILTON: Candidly, Your Honor, I  
20 don't know what position the state has taken with  
21 respect to our identification of what constitutes  
22 the plan. And I candidly don't know what the --

1 JUDGE LYNCH: And in the letter -- go  
2 ahead.

3 MR. SILTON: And candidly, I don't  
4 know what EPA's position is, either, they having  
5 -- although, they did respond to the -- they did  
6 key up the state's comments on this letter. EPA  
7 did not itself in its brief discuss in any way  
8 San Francisco's response back to the Region.

9 JUDGE LYNCH: In your letter, you talk  
10 about some things that are incomplete and  
11 updates. Have you sent an updated plan to either  
12 the state or EPA, either an updated synthesis  
13 document or plan?

14 MR. SILTON: Sitting here right now  
15 Your Honor, I'm not aware of one having been  
16 sent.

17 JUDGE STEIN: Can you give me an  
18 example or two of specific requirements in the  
19 long-term control plan update condition that your  
20 client claims is unduly onerous?

21 MR. SILTON: Of course, Your Honor.  
22 Certainly, it's overly onerous to require San

1       Francisco to again do a recharacterization of its  
2       system as it exists today, which is not what's  
3       called for by the CSO control policy. They're  
4       asking for a post-implementation full-scale  
5       characterization, something that hasn't  
6       necessarily been done, and is not contemplated by  
7       the control policy.

8                 And similarly, the requirement for,  
9       say, San Francisco to develop a set of control  
10       alternatives that requires, you know, real  
11       hardcore engineering analyses and the devotion of  
12       time, modeling, and other efforts that San  
13       Francisco could be putting in -- and they're, if  
14       nothing else, expensive to do -- could be putting  
15       into continuing to repair and upgrade the  
16       systems, again, that our post-construction  
17       monitoring data have shown to result in  
18       attainment, and conversely, EPA has not shown  
19       with San Francisco's data that San Francisco is  
20       not in fact in attainment with water quality  
21       standards. And those data should be the load  
22       star.

1                   JUDGE AVILA: I'm sorry to interrupt,  
2 but I guess I had to go back to it. I don't want  
3 to belabor it, but then how can that be clearly  
4 erroneous to require those updates that you just  
5 identified when the most recent document in the  
6 synthesis as part of the long-term control plan  
7 is from 1991? I mean -- go ahead.

8                   MR. SILTON: Your Honor, it's clearly  
9 erroneous because quite categorically, there's no  
10 such concept as a post-construction of your long-  
11 term control plan system characterization under  
12 the CSO control policy. That might be  
13 impossible. I would agree that it would be  
14 possible, say, if EPA found San Francisco was not  
15 attaining water quality standards. And EPA had a  
16 basis for requiring San Francisco to revisit its  
17 plan.

18                   There could be circumstances where  
19 some additional characterization work would be  
20 necessary. But what is specified as properly  
21 appropriate to a phase 2 or post phase 2 system,  
22 certainly one that's subject to the exemption

1 under Section I.C.2, does not include the initial  
2 characterization tasks that are called for in the  
3 CSO policy.

4 JUDGE AVILA: So, just to be clear,  
5 this kind of circles back to your earlier point  
6 in that regardless of how old the long-term  
7 control plan is, once a long-term control plan  
8 has been established, the Region is not free to  
9 require an update of it until the Region shows  
10 that there's been a violation of water quality  
11 standards? Is that, in a nutshell, your  
12 position?

13 MR. SILTON: Correct, Judge Avila.  
14 And if I may -- I'm conscious of time here -- I  
15 would like to talk a bit about Section 5. I'm  
16 sorry, Judge Lynch?

17 JUDGE LYNCH: Well, I'm looking at the  
18 CSO policy, and it talks about attaining  
19 compliance with the Clean Water Act, including  
20 compliance with water quality standards, and it  
21 has the word including. It doesn't say  
22 exclusively. And it talks about accurate

1 information.

2 MR. SILTON: That is true, Your Honor,  
3 but in terms of explicitly describing where  
4 revision to the plan is required. The policy  
5 speaks to looking at the water quality and  
6 performance data collected as part of the post-  
7 construction monitoring plan.

8 JUDGE STEIN: Then I'd like to hear  
9 about some of your other issues as soon as we're  
10 done with this colloquy because there were some  
11 other issues you raised.

12 MR. SILTON: Of course. And thank  
13 you, Judge Stein. The generic WQBELs, Section 5,  
14 and Attachment G, Section 1(i)(1), are going to  
15 force San Francisco to invest in water quality  
16 compliance without reasonable certainty that  
17 those investments are actually going to result in  
18 compliance with the Act.

19 And this is because these provisions  
20 ended up in the permit because the Region  
21 promulgated them inconsistent with the NPDES's  
22 regulations, procedures for setting water quality

1 base limits. Explained on --

2 JUDGE STEIN: Can I interrupt you one  
3 second here?

4 MR. SILTON: Sure.

5 JUDGE STEIN: Are you familiar with  
6 the Board's decision in the City of Lowell?

7 MR. SILTON: Yes I am, Your Honor.  
8 You decided it just a few months ago.

9 JUDGE STEIN: Well, we did. And my  
10 question is how is that -- How is that decision  
11 distinguishable from this matter? And if so,  
12 how?

13 MR. SILTON: Your Honor, the key  
14 difference there is Lowell did not articulate its  
15 challenge to EPA's authority, or for the  
16 necessity of the generic WQBELs with specificity.  
17 By contrast, San Francisco has identified the  
18 Region specific failures to comply with the  
19 standards to permit process, as described in the  
20 Permit Writers' Manual, and as prescribed by  
21 Section 122.44(d)(i), as well as EPA's failure to  
22 make findings of fact in the record to support



1 the determination that the limits are necessary.

2 JUDGE AVILA: So, where on 122.44  
3 (d)(i) does it say that all limitations must go  
4 through the standards to permit process?

5 MR. SILTON: Your Honor, it certainly  
6 does not say that explicitly, but by prescribing  
7 that process and interpreting, as the Permit  
8 Writers' Manual has explained, that the  
9 122.44(d)(i) process that's laid out there is the  
10 implementation of the command in 301(b)(1)(c) to  
11 set limits that are protective or necessary to  
12 meet water quality standards.

13 And the reason why that becomes the  
14 exclusive process is EPA codified it as a rule.  
15 If EPA had wanted to create a non-exclusive  
16 process, it would've done so by guidance. It  
17 would've been a little odd, and I'm not familiar  
18 with a lot of instances where EPA does this, to  
19 codify a rule and say, do anything other than  
20 what the rule says because it's a rule. And  
21 going back just --

22 JUDGE AVILA: Well, is this a water

1 quality-based -- I think you called it a WQBEL, a  
2 water quality-based effluent limitation -- is  
3 that what this is? Isn't it more of a  
4 prohibition on violating narratives or violating  
5 state water quality standards? It's not in the  
6 same section as the water quality-based effluent  
7 limitations in the permit, is it?

8 MR. SILTON: Your Honor, certainly  
9 that's not where the Region chose to put it, but  
10 the NPDES regulations only prescribe one set of  
11 procedures for setting limits to protect water  
12 quality. Whether you put a different label on it  
13 or not, our point is that the operable provisions  
14 of the regulation that cabin the agency's  
15 discretion, that govern the setting of water  
16 quality-based limits, are those, regardless of  
17 what you call them, are in 122.44 (d)(i).

18 JUDGE AVILA: Can you have narrative  
19 water quality-based effluent limitations?

20 MR. SILTON: Yes, you can. The issue,  
21 Your Honor, this one is not in any way derived  
22 from the applicable water quality standards. And

1 that's I think the first issue, and the Region  
2 also did no kind of reasonable potential analysis  
3 to determine that it's required. Certainly, you  
4 could have a narrative, and specifically  
5 122.44(k) contemplates the use of best management  
6 practices.

7 But those are BMPs. Those specify you  
8 do something with your facility. You don't just  
9 incorporate something generically into the  
10 permit. But yes, some versions of narratives are  
11 appropriate under our line of argument.

12 JUDGE AVILA: Well, how is it any  
13 different than the permit requirement that, like,  
14 you shall optimize system operation to minimize  
15 combined sewer discharges and maximize pollutant  
16 removal during wet weather?

17 MR. SILTON: Because these at least  
18 involve circumstances that we can control.  
19 Conversely, where you're talking about just the  
20 receiving water, simply by contributing to an  
21 exceedance of water quality standards, regardless  
22 of what San Francisco does or does not do, we

1 could potentially be in violation of the generic  
2 standard.

3 But also, Your Honors, just I want to  
4 make clear as well in some of the other issues,  
5 too, just very quickly on the subject of overflow  
6 reporting, that San Francisco is working on  
7 addressing isolated overflows from its sewer  
8 system. However, these are a distinct  
9 phenomenon. One that are distinct from combined  
10 sewer overflows.

11 And the Region hasn't articulated with  
12 a reasonable clarity how it has the authority to  
13 regulate them, how it has the authority to  
14 require reporting. And to be clear, our issue is  
15 with the Region's just conclusory indication of  
16 the nine minimum controls, rather than specifying  
17 or exercising considered judgment and just  
18 providing a string of references to be an NMC  
19 guidance. And --

20 JUDGE LYNCH: Counsel?

21 MR. SILTON: Just --

22 JUDGE LYNCH: What about your

1 responsibility with respect to operation and  
2 maintenance of your facility?

3 MR. SILTON: Well, as I was saying,  
4 Your Honor, we did say in our briefs that in --

5 MS. DURR: Time.

6 MR. SILTON: A requirement that --

7 JUDGE AVILA: Time's up. We'll give  
8 you ten more minutes and we'll give the Region  
9 ten more minutes.

10 MR. SILTON: Thank you, Judge Avila.  
11 I appreciate the Board's indulgence on that. The  
12 issue, I think -- and San Francisco has explained  
13 in its briefs and it did in its comments -- that  
14 a reporting requirement tailored to O&M would be  
15 appropriate, or would be a legitimate exercise to  
16 EPA's authority for serving compliance with NMCs.  
17 Our issue here is particularly its expansiveness  
18 in covering overflows that result solely from  
19 basically the exceedance of localized sewer  
20 capacity.

21 JUDGE AVILA: But how --

22 MR. SILTON: This is --

1                   JUDGE AVILA: Can I ask, when an  
2 isolated sewer overflow event occurs, how at the  
3 time that it occurs do you know it came from  
4 solely -- and I think in your petition's words --  
5 solely from exceedance of capacity? How could  
6 you possibly know that?

7                   MR. SILTON: Your Honor, I guess I  
8 would say it's a two-step process in order to  
9 figure this out. The first step is simply based  
10 on location. San Francisco knows, or based on a  
11 particular storm, and based on its work modeling  
12 and characterizing its own system, that it knows  
13 where there's likely to be these types of  
14 capacity constraints, and given a certain storm,  
15 if we see an overflow in a particular place, we'd  
16 know what the cause is.

17                   In most instances where an overflow is  
18 in a place that you do not anticipate, and more  
19 typically as well, an operations and maintenance  
20 or sewer failure related overflow, will also last  
21 longer.

22                   JUDGE LYNCH: Counsel?

1           MR. SILTON: One that's caused by a  
2 storm that exceeds the -- I'm sorry?

3           JUDGE LYNCH: Counsel, without this  
4 reporting, how does the regulator know that your  
5 modeling is accurate?

6           MR. SILTON: Your Honor, the basic  
7 issue is that San Francisco uses the model to  
8 generate the data that we'd be using for  
9 reporting, so it ends up being actually entirely  
10 circular if you're trying to validate the model  
11 based off of model-generated data. One of the  
12 things I think to just keep in mind is that San  
13 Francisco doesn't have meters or detection  
14 systems on every single conceivable point in its  
15 sewer system. There are limitations to what they  
16 can gather. So in fact, the Region's assertion  
17 that yes, we can collect this data and validate  
18 the model --

19           JUDGE LYNCH: Well, counsel, isn't it  
20 typical that an individual who has backups into  
21 their basement would contact the city?

22           MR. SILTON: That's correct, Your

1 Honor. So, but to be clear, Your Honor, they  
2 would contact the city with that backup, but the  
3 actual -- and what I believe the Region is  
4 looking for is volume, those volume  
5 determinations, which maybe conceivably there  
6 could be some delta between volume with or  
7 without an O&M problem.

8 The volume can only be calculated  
9 based on the model. There's no other way  
10 extrinsically from that to calculate the volume  
11 that's at issue.

12 JUDGE AVILA: So then, I guess, are  
13 you objecting to just the volume requirement and  
14 not the actual requirement to report on ISOs, or,  
15 I mean --

16 MR. SILTON: No, Your Honor, we're  
17 objecting to the requirement in toto because the  
18 Region hasn't articulated an --

19 JUDGE AVILA: Well, the CSO control  
20 policy aims to eliminate these things. If the  
21 permitting authority can't get the information  
22 about how often they're occurring, or if at all,



1 how do you implement that CSO control policy?

2 MR. SILTON: Your Honor, to be clear,  
3 the CSO control policy is looking at the  
4 elimination, or really the control of combined  
5 sewer overflows, which the policy defines the  
6 specific ways that it discharges to waters of the  
7 U.S. Where we're talking about --

8 JUDGE AVILA: Well, I'm sorry to  
9 interrupt, but taking it to that extreme, doesn't  
10 that incentivize an operator to run the system  
11 such that there's isolated sewer overflows and to  
12 avoid issues with the permitted outfalls? I  
13 mean, that's kind of a perverse incentive system.

14 MR. SILTON: No, Your Honor. If you  
15 were to look at the Clean Water Act in isolation,  
16 I could see how that theoretically would be the  
17 case, but I mean, San Francisco has obligations  
18 both under local and state law with which it  
19 might have to comply. There's also political,  
20 and just rate payer pressure. I mean, these are  
21 ultimately the San Francisco PUC's customers.

22 JUDGE LYNCH: And public health

1 concerns, as well, correct?

2 MR. SILTON: Yes, Your Honor, there  
3 are, but we acknowledge them and San Francisco is  
4 taking this phenomenon very seriously, but EPA is  
5 not a free ranging public health agency. It has  
6 a defined jurisdiction under the act to  
7 protection of the waters of the United States.

8 And at this point -- I recognize  
9 there's already been granted an extension of time  
10 -- I would like to touch on the two permits  
11 issue. The consequence of the fact is San  
12 Francisco was already deeply troubled by the  
13 Region's errors during the permitting process.

14 But we were at least on the same terms  
15 with the Region with respect to how many permits  
16 there were. The Region recognized the integrated  
17 nature of the West Side facilities and that it  
18 required a single unitary permit. But we then  
19 ended up with the circumstances after this appeal  
20 was filed where the Region was faced with losing  
21 its ability to enforce the contested permit  
22 provisions and things changed.

1                   We ended up with two permits, one  
2                   state, one federal, and one enforceable and one  
3                   not, which works out conveniently for the  
4                   Region's enforcement objectives. And --

5                   JUDGE AVILA: Well, let's just talk  
6                   about whether -- since our time is short.  
7                   There's no dispute that San Francisco requires a  
8                   permit from EPA, right?

9                   MR. SILTON: Correct, Your Honor.

10                  JUDGE AVILA: Okay. So, how does the  
11                  determination of whether there's one permit or  
12                  two permits alter the outcome on any of the  
13                  things that we've talked about previously, about  
14                  updating your long-term control plan, the  
15                  narrative prohibition on violating water quality  
16                  standards or isolated sewer overflows? Are any  
17                  of your arguments that we just talked about tied  
18                  to whether it's one permit or two?

19                  MR. SILTON: No, Your Honor. But  
20                  here's where it matters. In the one versus two -  
21                  - and then we can get separately to the issues  
22                  about whether or not there's an adequate record

1 for a separate permit. The reason why it matters  
2 is the scope of what EPA needs to do on remand.  
3 If we're in the context of a single permit, one  
4 that was jointly issued as the record reflects by  
5 EPA and the California Regional Water Quality  
6 Control Board, certainly the Board can't tell  
7 California what to do.

8 But it can direct EPA to carry out the  
9 Board's instructions on remand within the  
10 construct of a single permit, which means you  
11 have to get buy-in from California in order to  
12 basically preserve the single permit, or in order  
13 to observe the Board's instructions, you have to  
14 come up with a new permit. That's our  
15 contention. That's where this makes a  
16 difference, which I noted the Board was concerned  
17 about that initially in some of the briefing on  
18 whether or not San Francisco could supplement its  
19 petition. That's the reason.

20 And to be clear, the record  
21 unambiguously supports only the issuance of a  
22 single permit here. And then, getting to the

1 second issue of, let's take the Region's claim at  
2 face value for the moment of there's a separate  
3 federal permit. The record's insufficient to  
4 support a separate federal permit that looks like  
5 this, one that covers all of the West Side  
6 facilities, one that makes no mention of this  
7 being a separate permit, and that was in some way  
8 consolidated under Section 124.4. The especially  
9 --

10 JUDGE AVILA: I'm sorry to interrupt,  
11 but I guess this is where I'm still not quite  
12 following. If you had to get a permit from EPA  
13 for outfall one, that's into the Pacific Ocean  
14 more than three miles, which of these provisions  
15 that we've been talking about would no longer be  
16 valid?

17 MR. SILTON: Your Honor, there's the  
18 potential that some of the provisions with  
19 respect to -- and I may've not been clear earlier  
20 about -- this may have an impact on EPA's  
21 authority to issue some of the provisions covered  
22 in the nearshore outfalls. I'm sorry, I wasn't

1 clear about that point.

2 JUDGE AVILA: Okay, I see.

3 MR. SILTON: And that's a real  
4 problem. Under Section 402(c), when California  
5 received authorization, EPA's permitting  
6 authority ended. As a matter of law, permitting  
7 authority is suspended. And the Region hasn't  
8 provided a cogent explanation in the record for  
9 how this should work in practice because of the  
10 integrated nature of the facilities, and because  
11 you have to recognize if California has  
12 jurisdiction over the outfalls, they're part of a  
13 combined sewer system, they have obligations  
14 under Section 402(q) in the CSO control policy,  
15 as well. In the first instance, that set of  
16 dividing lines would've needed to have been drawn  
17 in the record.

18 JUDGE LYNCH: Well, counsel, you are  
19 aware of the state's position that this was two  
20 permits in October. Why didn't you raise this in  
21 your petition?

22 MR. SILTON: Your Honor, because that

1 was simply the state stating its position, and  
2 we've challenged that in a separate forum. At  
3 that point, we hadn't heard anything from EPA,  
4 and we believe the state's position was  
5 erroneous, and the state didn't have the ability  
6 to speak on behalf of --

7 MS. DURR: Time.

8 MR. SILTON: The federal agency. If  
9 you have any further questions -- or I'll thank  
10 you, Your Honors.

11 JUDGE AVILA: Yeah. Thank you very  
12 much.

13 And we'll still give you the five  
14 minutes for rebuttal, and we'll give the Region  
15 40 minutes.

16 And so, we'll hear from the Region  
17 now.

18 Mr. Silton, if you could turn off your  
19 camera and microphone.

20 (Simultaneous speaking.)

21 MR. SILTON: Yeah. Thank you, Judge  
22 Avila.

1 JUDGE AVILA: Thank you. EPA Region  
2 9?

3 MR. MINOR: Hello. This is Dustin  
4 Minor.

5 Bear with me one moment. I'm trying  
6 to get my screen fixed here. There you go.  
7 Thank you.

8 So, this is Dustin Minor representing  
9 Region 9.

10 I am going to briefly explain the  
11 exhibits that we've provided, and also I will be  
12 addressing the consolidated versus joint permit  
13 issue.

14 My colleague, Ms. von Vacano, will be  
15 addressing all of the substantive issues raised  
16 in the petition.

17 So, with that, I wanted to make sure  
18 everyone had the exhibits that we've provided  
19 prior to the oral argument.

20 Instead of putting them on the screen,  
21 I think it's easier just to refer to them

22 JUDGE STEIN: Yes.



1 JUDGE AVILA: We have them, thank you.

2 MR. MINOR: Great. So, starting with  
3 the first page, the Exhibit A, this shows the  
4 structure of San Francisco's system.

5 MR. MINOR: And what you will see, if  
6 you're looking at it, is right along the Pacific  
7 Ocean, there is a large white box that's labeled  
8 the transport storage structure.

9 And this is the storage structure that  
10 was built when they created the system to  
11 minimize the amount of overflows that they were  
12 having.

13 And so, the way this works is  
14 everything comes in during wet weather, goes into  
15 these storage boxes, and then in wet and dry  
16 weather, if you don't exceed capacity, goes to  
17 the system and is discharged to the Pacific Ocean  
18 more than three miles offshore.

19 And that is what requires a need for  
20 a federal permit.

21 These same boxes also overflow when  
22 you exceed -- so, the capacity of the system is

1 43,000,000 gallons per day.

2 JUDGE AVILA: I'm sorry to interrupt,  
3 but when you said this is what requires a federal  
4 permit, did you mean this is what requires an  
5 EPA-issued permit?

6 MR. MINOR: I did. Thank you.

7 JUDGE AVILA: Okay.

8 MR. MINOR: So, the system is designed  
9 to treat to secondary and discharge from the  
10 outfall in waters outside of the state's  
11 jurisdiction more than three miles offshore,  
12 43,000,000 gallons a day.

13 And then it's also designed to have an  
14 additional 22,000,000 gallons per day that is  
15 treated to equivalent to primary and discharged  
16 offshore.

17 When there's wet weather events that  
18 exceed that capacity, you know, there's the  
19 ability to pump an additional 100,000,000 gallons  
20 per day out of the deep water outfall.

21 But the same structures that are used  
22 to store the water to avoid the discharges and

1 convey it to the outfall are also what's  
2 discharged directly.

3 And the red arrows on this chart  
4 represent the different sewer overflows.

5 And so, I just wanted to show the  
6 court what the overflows actually look like, and  
7 so we'll just quickly scroll through these.

8 The first one, CSDO-02, at Ocean  
9 Beach, shows that it is at the base of the cliff  
10 and discharges right onto the beach.

11 So, if someone were to walk by on the  
12 beach here, they would be going right through  
13 where the overflow is released.

14 So, these are not pipes that discharge  
15 out into the ocean. These are where people play,  
16 swim, and surf.

17 The next two on the next page are the  
18 largest structures right on the main beach where  
19 people go to the beach in San Francisco.

20 And this shows on CSDO 02, the Vicente  
21 structure, what it looks like when it comes out,  
22 and it shows graffiti and other things.

1                   And then if you look at 3, on Lincoln  
2                   Way, you can see there's ponding in front of it,  
3                   and see the distance between the oceans and the  
4                   structures.

5                   So really, what we're talking about  
6                   here is, you know, sewage that has just settled  
7                   in the transport storage boxes, and then it might  
8                   go through a screen and is being discharged  
9                   directly onto the beaches.

10                  The other discharge locations are  
11                  similar. They're on the Bay side.

12                  And so, I won't go through all of  
13                  those, but they also discharge onto the beaches.

14                  So, you know, San Francisco concedes  
15                  in their supplement at page 4 and in their motion  
16                  to stay that the system is an integrated system  
17                  that doesn't operate pursuant to a state and  
18                  federal distinction.

19                  It has one integrated, independent  
20                  system where the discharges to the CSDs occur  
21                  only after the outfall is maximized, and it  
22                  requires reliance on all of the infrastructure

1 located across the West Side facilities,  
2 including the pump stations, transport storage  
3 boxes, conveyance pipes, and everything else.

4 And --

5 (Simultaneous speaking.)

6 JUDGE AVILA: Can I just ask, would  
7 EPA have had the authority to include the  
8 contested provisions of this permit if there were  
9 one permit and EPA were the only permitting  
10 authority, the only discharge where the outfall  
11 number one into more than three miles into the  
12 Pacific Ocean? Pardon me.

13 MR. MINOR: Yes, I believe so.

14 JUDGE AVILA: Okay.

15 And how do you explain why this  
16 permit, at least in my view, or it seems like  
17 it's consistently referred to as one jointly  
18 issued permit until the notice of stay?

19 MR. MINOR: Well, I think it is both  
20 a joint permit and a consolidated permit, and you  
21 know, I think it's a distinction without  
22 difference.

1                   And there wasn't a need to distinguish  
2                   between the two until there were the separate  
3                   challenges, which were provided for in the permit  
4                   and the fact sheet.

5                   And so, you know, as we stated in our  
6                   papers, San Francisco failed to raise this issue  
7                   in its petition, and even before that under the  
8                   comments.

9                   And we believe that --

10                   JUDGE LYNCH: Well, counsel?

11                   MR. MINOR: Yes?

12                   JUDGE LYNCH: Do you agree with what  
13                   the state set forth in their October 29 letter,  
14                   that it was two permits?

15                   MR. MINOR: Yes. By operation of law,  
16                   it's both one permit and two permits.

17                   If you were to do what San Francisco  
18                   asked and consider it a joint permit, it's still  
19                   separately issued and separately challengeable in  
20                   each fora.

21                   And really, it's a veiled attempt to  
22                   try to have what the Board does or what the state

1 does, invalidate the other proceeding.

2 And as the Board has said in response  
3 to the motion to stay, the Board does not have  
4 authority to regulate or decide any matter  
5 related to either a speculative enforcement  
6 action, or the state proceeding.

7 And the Board --

8 JUDGE LYNCH: But your position is  
9 that for the provisions that are stayed in EPA's  
10 permit, you could enforce those exact same  
11 provisions in the state permit?

12 MR. MINOR: Yes, those have not been  
13 stayed in the state proceedings.

14 So, just like --

15 (Simultaneous speaking.)

16 JUDGE LYNCH: Have you ever done that  
17 in Region 9?

18 MR. MINOR: Well, I think, you know,  
19 this one integrated system that requires a permit  
20 from state and federal waters, it's not the only  
21 system like that, but it is fairly unique.

22 But, for example, the other system in

1 San Francisco where most of the sewage goes is on  
2 the East Side, and that is only discharging into  
3 state waters.

4 And there is no need for a separate  
5 permit by EPA or joint and consolidated permit,  
6 and we have the authority ---

7 JUDGE LYNCH: My question was have you  
8 ever exercised that authority in this type of  
9 situation?

10 MR. MINOR: I'm never aware of us  
11 having exercised that authority in a situation  
12 that we were taking enforcement action while a  
13 matter is stayed, and the Board has yet to rule  
14 on it.

15 JUDGE STEIN: So, if you were to look  
16 at this, or if I were to look at this as one  
17 permit with two authorizations, would that be an  
18 inappropriate way to consider what we have here?

19 MR. MINOR: Well, I think it is both  
20 a federal permit and a state permit, whether it's  
21 considered one joint permit or two consolidated  
22 permits, and we use the same terms for San



1 Francisco's benefit because it has the same  
2 systems that are being managed.

3 And so, you know, since it's  
4 separately reviewable and separate fora, and  
5 there's separate, independent authority for it,  
6 it is both a federal permit and a state permit  
7 whether it's one permit or two.

8 JUDGE AVILA: Well, let me try to get  
9 at this a slightly different way.

10 Do you see any difference in the way  
11 this permit would be implemented that would be  
12 required of San Francisco under this permit?

13 Is there any difference if it's  
14 considered one or two permits?

15 MR. MINOR: You know, San Francisco  
16 didn't raise this issue in its comment, so we  
17 didn't address it in the response to the  
18 comments, and they also didn't really say what  
19 they were seeking when they asked for a  
20 determination by the Board that it be a joint  
21 permit, right?

22 They initially asked that the Board

1 just determine that it's a joint permit, or in  
2 the alternative, to remand and specify which  
3 provision goes with which.

4 And so, the Region's position is a  
5 joint permit is a consolidated permit under both  
6 authorities, and there is no difference.

7 JUDGE LYNCH: This is Judge Lynch.  
8 What was its status?

9 Was it a joint permit during those two  
10 to three months when EPA had not signed it?

11 MR. MINOR: No. At that point it  
12 wasn't because we had not issued --

13 (Simultaneous speaking.)

14 JUDGE LYNCH: What was it during those  
15 --

16 MR. MINOR: The state permit only. It  
17 requires signature by both agencies to be  
18 effective. The Board has to pursuant to its --

19 JUDGE LYNCH: Counsel, that's directly  
20 contrary to what the state said in the October 29  
21 letter, right?

22 MR. MINOR: I don't think so, no.

1 I think the state said that it was two  
2 separate permits, and that the state permit could  
3 go forward independently, whether EPA signed it  
4 or not.

5 And so, they were drawing a  
6 distinction that their independent authority was  
7 valid, and so that, you know, San Francisco was  
8 in a position there according to the state  
9 without opining on the state's position, that  
10 vis-a-vis the state, the new permit was in  
11 effect, and vis-a-vis EPA, the old permit was in  
12 effect.

13 JUDGE LYNCH: I thought you said that

14 --

15 JUDGE AVILA: So, during that -- go  
16 ahead, Judge Lynch. Sorry. Go ahead. Sorry.

17 JUDGE LYNCH: I thought prior to this  
18 answer, you said that the permit required all  
19 signatures.

20 MR. MINOR: It does. I mean, the idea  
21 here is that San Francisco can't operate without  
22 a permit issued by EPA and a permit issued by the

1 state.

2 And, so it requires a permit from both  
3 agencies. And we chose to do it as a joint  
4 consolidated permit.

5 When they applied for a renewal, the  
6 state acted on that before EPA did.

7 And so, during those few months when  
8 they had a new state permit, they still had a  
9 federal permit, it still required two permits.

10 It was just the old permit because the  
11 effective date had not kicked in yet because it  
12 hadn't come to life yet federally.

13 JUDGE STEIN: But now they're both  
14 effective, correct, with the exception of the  
15 provisions that are stayed because they're being  
16 challenged?

17 We're past the point where you only  
18 have one authorization. Don't we now have two  
19 authorizations for this?

20 MR. MINOR: Yes, and the only  
21 distinction between the two permits, San  
22 Francisco makes much of the, you know, great

1           onerous effects that this imposes on them.

2                       But the only thing they're able to  
3           articulate is reports, a different due date for  
4           the reports.

5                       All of the other terms are the same,  
6           including permit renewal and the permit  
7           application.

8                       So yes, currently, there's two  
9           permits. They have the same terms, and that was  
10          done to protect San Francisco, to avoid  
11          inconsistency, with the exception of the due date  
12          for reports.

13                      JUDGE AVILA: On the reports, when  
14          they submit a report -- let's put aside the due  
15          date -- is it possible for the state to accept  
16          the report and EPA not to accept the report as in  
17          compliance with the permit?

18                      MR. MINOR: You know, I think the  
19          report would require joint approval from both  
20          agencies, and if one approved it and the other  
21          didn't, I would anticipate that we would, you  
22          know, work together to resolve that just as we

1 work together to resolve the permit terms, as we  
2 were drafting the permit to avoid  
3 inconsistencies.

4 So, I think we would do everything we  
5 could to avoid that, but, you know, that would  
6 apply whether you had a joint permit or a  
7 consolidated permit.

8 If it requires the approval of both  
9 agencies, you have to get that.

10 So, it's, you know, maybe it's not an  
11 appropriate analogy, but it's like, you can't go  
12 out unless mom and dad say okay.

13 And, you know, if one says yes and the  
14 other says no, you've got to resolve that. And  
15 so --

16 JUDGE AVILA: And I guess, to put it  
17 another way, that wouldn't depend on whether it  
18 was one permit or two.

19 Still, even if it was one permit, it  
20 would still need the okay of California and the  
21 EPA, right?

22 MR. MINOR: Yes.

1 JUDGE AVILA: Okay. Are there any  
2 other questions on this?

3 Maybe we should proceed to your  
4 counsel's, or did you have one?

5 MS. VON VACANO: Good afternoon.

6 JUDGE AVILA: Why don't we proceed to  
7 what your co-counsel is covering, unless you --

8 MR. MINOR: No, that's it. Thank you.

9 JUDGE AVILA: Thanks.

10 MS. VON VACANO: Good afternoon, Your  
11 Honors. Can you hear me?

12 JUDGE STEIN: Yes.

13 MS. VON VACANO: Great, thank you.

14 I will be covering the substantive  
15 issues of narrative WQBELs, update to the long-  
16 term control plan, and SOCSS, which are  
17 essentially spills from this system.

18 As Judge Lynch pointed out, and to  
19 address San Francisco's argument, it does appear  
20 that San Francisco assumes that it has exemptions  
21 in perpetuity due to the phase of the permit.

22 It is actually irrelevant whether it's

1 a phase 2 or post phase 2 because these  
2 requirements continue to apply to any permittee.

3 And that is laid clear by 402(q),  
4 which requires that every NPDES permit conform to  
5 the CSO control policy.

6 JUDGE AVILA: Well, given that they're  
7 post phase 2, what part of the CSO policy should  
8 I look to here?

9 MS. VON VACANO: I believe that the  
10 appropriate is 18696, and this is the section  
11 that requires ongoing narrative standards, as  
12 well as post-construction monitoring and  
13 reassessment of the sensitive areas.

14 It is important to know that all of  
15 these requirements apply regardless of the phase  
16 of the permit.

17 And going back to the long-term  
18 control plan assessment itself, that requirement  
19 is also an ongoing assessment per the policy at  
20 18691.

21 But the key comment that I'd like to  
22 make is that we used precisely the post-



1 construction monitoring information that San  
2 Francisco provided to determine on the record as  
3 a whole that beneficial uses are not protected.

4 They are known as beneficial uses  
5 under the California Water Quality Standards.

6 JUDGE AVILA: So, where should I look  
7 in the record to see where you've found that  
8 beneficial uses were not being met?

9 MS. VON VACANO: The response to  
10 comments that cites to San Francisco's own  
11 report, which is AR-63, in response to Comment B-  
12 13, just like --

13 (Simultaneous speaking.)

14 JUDGE AVILA: I'm sorry, B as in boy,  
15 13?

16 MS. VON VACANO: Correct.

17 So, AR-10 RTC B-13, at page 20, we  
18 cited the information provided by San Francisco  
19 itself that recreational users, 20 percent of  
20 them are exposed to contact with water, that  
21 their copper and zinc exceedances -- that  
22 approximately 100,000,000 gallons were discharged

1 from the CSDs from 2011 to 2014, and by San  
2 Francisco's own admission, it's more like  
3 196,000,000 gallons of sewage on public beaches.

4 This is at AR-88 B, at page 8.

5 So, this is information from San  
6 Francisco indicating that the beaches that are  
7 used for surfing, swimming, playing that were  
8 shown in the exhibits do have adverse impacts  
9 because of the massive amounts of sewage coming  
10 from the CSDs.

11 On that basis, we believe that it's  
12 appropriate to have narrative WQBELs in which,  
13 Judge Avila, you are correct that they're in a  
14 separate section concerning prohibition against  
15 not complying with the state water quality  
16 standards, and yes, this provision was upheld in  
17 Lowell, as you know.

18 The other important comment that I  
19 think is important to address at this time is  
20 that we provided an extensive explanation of why  
21 the long-term control plan is inadequate in AR-  
22 91.

1 San Francisco never commented on this  
2 memo.

3 This memo explains that there had been  
4 changes to the system, to the sewer shed, and  
5 also laid out the fact that the collection of  
6 documents that are supposedly the long-term  
7 control plan is confusing and inaccurate.

8 JUDGE AVILA: When was the first time  
9 that the Region said that the long-term control  
10 plan was confusing or inaccurate or not clear?

11 MS. VON VACANO: This was raised, Your  
12 Honor, during actually the back and forth,  
13 because we met with San Francisco, I believe,  
14 over ten times over the period of six years, and  
15 decided that it was time to ask for a long-term  
16 control plan update.

17 And as you know, once San Francisco  
18 submitted the synthesis in 2018, the state  
19 explained that it was not adequate.

20 We continue to with the permit  
21 requirement because in essence, the update, the  
22 table 7 in the permit only asked San Francisco to

1 assess current conditions.

2 It does not force San Francisco to  
3 implement anything right away, and in compliance  
4 with the CSO control plan, it allows for San  
5 Francisco to explain the feasibility and cost of  
6 any potential measures.

7 JUDGE LYNCH: And counsel, this is  
8 Judge Lynch.

9 When you say that their existing long-  
10 term control plan is inaccurate -- you said a  
11 collection of documents is confusing and  
12 inaccurate.

13 Specifically, what is inaccurate?

14 MS. VON VACANO: It seems to be  
15 missing, Your Honor, one really important  
16 document, which is the 2015 West Drainage Basin  
17 Urban Watershed Opportunities Technical  
18 Memorandum that we refer in the memo at page 10.

19 That memorandum, which basically  
20 explains that there is a way to reduce or  
21 minimize discharges at Ocean Beach.

22 However, it also clarifies that it's

1 not necessarily part of the long-term control  
2 plan.

3 So, the key issue that we're looking  
4 at, discharges in sensitive areas, and the  
5 document that explains that there is a way to  
6 reduce those discharges, allegedly is not part of  
7 the long-term control plan.

8 JUDGE LYNCH: Thank you.

9 JUDGE STEIN: So, I have a question  
10 about the narrative prohibition that you  
11 referenced a few minutes ago.

12 Is it fair to describe a specific  
13 WQBEL as an end of pipe effluent limit on a  
14 particular constituent?

15 And is that distinguishable from a  
16 limit on the effect that the effluent can have on  
17 the receiving water?

18 Why or why not?

19 MS. VON VACANO: That is correct,  
20 Judge Stein. We believe that there are two  
21 different types of effluent limits.

22 A numeric limit that is measured at

1 the end of pipe is feasible when there's  
2 information in the record to assess the amount of  
3 the pollutant.

4 A narrative limit that measures the  
5 effect on receiving waters, like the narrative  
6 WQBELs here, is different in kind, and it serves  
7 as a backstop.

8 In the case of San Francisco, this  
9 backstop or safety net, as was characterized in  
10 Lowell, is extremely important because of the  
11 existence of the 1979 exception, which is  
12 essentially a variance that has been in place for  
13 more than 40 years that exempts San Francisco  
14 from complying with the bacteria standards  
15 completely.

16 However, it does require compliance  
17 with the other standards to the maximum extent  
18 practical.

19 That allows for, in this permit term,  
20 requiring that San Francisco monitor other  
21 pollutants in the ocean plan, the applicable  
22 water quality standard, in order to assess what

1 are the impacts?

2 It is appropriate to monitor these in  
3 the receiving water to assess whether designated  
4 uses are being protected.

5 JUDGE LYNCH: Counsel?

6 JUDGE STEIN: Thank you, that's  
7 helpful.

8 MS. VON VACANO: Thank you, Judge  
9 Stein.

10 JUDGE LYNCH: Counsel, this is Judge  
11 Lynch.

12 I understand San Francisco to be  
13 arguing, at least in part, that you don't need  
14 this provision because you have the reopener, so  
15 can you explain to us why you think that the  
16 reopener is not sufficient?

17 MS. VON VACANO: Yes, Your Honor. San  
18 Francisco argues that there are specific WQBELs  
19 already in place in the reopener.

20 However, we believe that a backstop is  
21 necessary because of the magnitude of the problem  
22 and the risk, including the health concerns,

1 posed by the amounts of sewage discharge in  
2 public beaches.

3 San Francisco's counsel just stated  
4 that it's very difficult for San Francisco to  
5 assess how it could comply with these standards.

6 But as an example, the basin plan and  
7 the ocean plan prohibit floatables.

8 One example.

9 San Francisco can better control and  
10 assess whether the storage boxes in the CSDs that  
11 my colleague described are truly capturing as  
12 many floatables as necessary.

13 So, this backstop does allow for some  
14 flexibility, but we believe that San Francisco is  
15 a sophisticated entity, has been aware of the  
16 standards that are in place, and thus, this tries  
17 to implement the CSO control policy as codified  
18 in 402(q), to minimize impacts to human health,  
19 and water quality, and marine, aquatic life.

20 JUDGE AVILA: Well, then why not  
21 include a permit term that says minimize to the  
22 maximum extent practical the discharge of



1 floatables?

2 MS. VON VACANO: We believe that in  
3 order to ensure protection of water quality  
4 standards, under 122.44(d), and to comply with  
5 301(b)(1)(C), this approach, this broad  
6 narrative, is more appropriate.

7 And as you know, and as it was  
8 explained in Lowell, it has been upheld by the  
9 courts.

10 So the intent is to have a broad  
11 narrative protection, a catch-all, so that we can  
12 prevent harm.

13 JUDGE STEIN: Unless my colleagues  
14 have something else on this, I'd like to turn to  
15 isolated sewer overflows.

16 I don't know if you --

17 JUDGE AVILA: Could I ask one further  
18 question, Judge Stein? I'm sorry.

19 JUDGE STEIN: Sure. Go ahead.

20 JUDGE AVILA: To what extent is the  
21 narrative prohibition also -- and I thought I had  
22 understood it to also kind of contemplate

1       unforeseen events.

2                   That is, unforeseen conditions of the  
3       receiving waters that might render any WQBELs not  
4       protective, and therefore, this all sort of  
5       backstop in that sense, as well, for unforeseen  
6       circumstances.

7                   Am I right or wrong on that?

8                   MS. VON VACANO: You are correct,  
9       Judge Avila.

10                   As I stated earlier, there are no  
11       pollutant-specific WQBELs for the discharges,  
12       even though there's signs that there have been  
13       copper, zinc exceedances.

14                   But for instance, another narrative  
15       within the basin plan addresses toxics.

16                   So, should there be a toxic discharge,  
17       this would provide a basis to correct that  
18       situation.

19                   And those broad narratives help to  
20       protect the water quality.

21                   JUDGE AVILA: Okay, thanks.

22                   JUDGE STEIN: So, with respect to

1 isolated sewer overflows, I want to focus in a  
2 little bit on San Francisco's jurisdictional  
3 argument.

4 And it's my understanding that the  
5 Region is requiring reporting from isolated sewer  
6 overflows in order to know whether the combined  
7 sewer system is operating properly, and that the  
8 permit requirements to maximize storage capacity  
9 is not resulting in isolated sewer overflows from  
10 the permit existing.

11 Is that correct, or am I  
12 misunderstanding your argument?

13 MS. VON VACANO: That is correct,  
14 Judge Stein. That is what we explained in the  
15 response to comments at C-3, page 23.

16 And we contend that 402(q) is the  
17 basis for this authority, specifically the nine  
18 minimum controls in the policy at page 18691.

19 The first one of which is proper  
20 operation and regular maintenance of the system.

21 Others are maximum use of the  
22 collection system for storage, and maximization

1 of flow to the plant for treatment.

2 It is inappropriate to use people's  
3 basements as storages for clear, obvious public  
4 health issues.

5 But, as Judge Avila pointed out,  
6 without knowing where these spills occur, in the  
7 streets, in people's basements, it is impossible  
8 for determining authority to ensure that the  
9 maximum amount of sewage in combined waste water  
10 is being directed to the plant for treatment.

11 We also believe that under normal  
12 NPDES regulations, such as 122.41(e), operation  
13 maintenance is not just confined to direct  
14 discharges, in they affect other issues that  
15 indirectly impact discharges, such as training,  
16 lab certification, and of course, up above the  
17 building infrastructure.

18 JUDGE STEIN: Other than the  
19 provisions that you've just called to our  
20 attention, and the CSO control policy, and the  
21 nine minimum control guidance, is there any other  
22 legal authority for their provisions in the Clean

1 Water Act that you would point us to that would  
2 serve as a basis for these provisions?

3 MS. VON VACANO: Yes, Your Honor.

4 Section 308(a) provides for broad  
5 authority to collect information from a point  
6 source, and clearly, this is a point source  
7 permitted under NPDES, and this is information  
8 relevant on the discharges and operation of the  
9 system.

10 JUDGE LYNCH: Are there any limits on  
11 that? This is Judge Lynch. Is that unbridled  
12 information request authority?

13 MS. VON VACANO: No, Your Honor.

14 I believe that the limits are that the  
15 agency must show that there is an actual  
16 discharge, as addressed and servicable (phonetic)  
17 in -- producers.

18 EPA cannot send a 308 or require  
19 information if there's no evidence of the  
20 discharge, but here, there certainly is evidence  
21 of discharge.

22 JUDGE AVILA: But I think Judge

1 Lynch's question was going into, okay, you have a  
2 discharge, how broad can you require?

3 I mean, can you require reporting of  
4 anything that you can -- imaginable, or does it  
5 have to be tied to implementing some particular  
6 provision, like the nine minimum controls, a  
7 particular provision of the Clean Water Act, or  
8 can you require them to report, you know, what  
9 color the house was that the ISO event occurred  
10 in?

11 MS. VON VACANO: Thank you for the  
12 clarification. There are limitations.

13 The 308 I think has to be directly or  
14 indirectly related to the discharge.

15 But as we see, the O&M regulations  
16 require that operators verify that labs have  
17 proper certification that is only indirectly  
18 related to the actual discharge, but has  
19 relevance.

20 JUDGE LYNCH: This is Judge Lynch. I  
21 have a question about corrective action.

22 On page 22 of your response to

1        comments, you state that at least one of the  
2        reasons why the Region needs this information is  
3        to determine whether there's a need for any  
4        corrective action.

5                    What do you mean by corrective action?

6                    MS. VON VACANO:  What the Region means  
7        is that there are recurring instances of raw  
8        sewage in peoples' homes, or for instance, the  
9        reported and verified reports of manholes blowing  
10       into the air, and geysers of sewage in the  
11       streets.

12                   That is an area where San Francisco  
13       must take corrective action.

14                   And it is up to San Francisco as a  
15       permittee to determine what that corrective  
16       action is, but to us, it signals that there's a  
17       need to do something about that.

18                   JUDGE LYNCH:  So, this permit is not  
19       calling for any particular corrective action?  Is  
20       that right?

21                   MS. VON VACANO:  Correct.  Yes, Your  
22       Honor.

1 JUDGE AVILA: But let me be clear.

2 And in the response to comments, when  
3 you said you need this monitoring and reporting  
4 in order to determine whether corrective actions  
5 are necessary, you're saying it's up to San  
6 Francisco, though, what corrective actions to  
7 take?

8 MS. VON VACANO: Yes, Your Honor. Much  
9 as with like the long-term control update and the  
10 tasks, the permitting authorities have the NPDES  
11 permit regime.

12 We do not prescribe specifically what  
13 steps permittees must undertake to comply. They  
14 decide how to correct an action.

15 However, the CSO control policy does  
16 allow for an ongoing assessment of the system as  
17 a whole.

18 So, San Francisco to some extent I  
19 think raises concerns that this reporting, as  
20 well as the long-term control plan update, are  
21 unduly burdensome, but we are simply asking that  
22 San Francisco take a hard look at its facilities



1 so that it can improve them and minimize  
2 discharges of CSOs and ensure that the maximum  
3 amount flows to the plant.

4 MS. DURR: Five minutes.

5 JUDGE AVILA: So, I don't want to  
6 belabor this, but I guess I'm still a little  
7 confused.

8 So you get a report that there's been  
9 an ISO event under the permit. What happens?

10 MS. VON VACANO: I think ideally, Your  
11 Honor, what happens is under the next permit  
12 term, we may be able to craft a condition asking  
13 San Francisco to look at that area.

14 At this point, it is premature to  
15 think what the agency would do in terms of those  
16 spills.

17 We would like to get, at this point,  
18 a sense of how many of those spills occur, and  
19 whether they can be prevented.

20 JUDGE AVILA: And I think San  
21 Francisco said that -- and I just want to make  
22 sure I understand the monitoring requirement

1 properly -- do they have to report both the event  
2 and the volume of the isolated sewer overflow?

3 MS. VON VACANO: Yes. To some extent,  
4 there are volume limits in that particular  
5 section, but still the requirement is to report.

6 JUDGE AVILA: And is the volume report  
7 based on modeling, or -- that's what I took San  
8 Francisco to be saying.

9 Is that right, or is it actual  
10 measurement of --

11 MS. VON VACANO: Actually, it's more  
12 like a self-assessment in that the city would  
13 itself, on its own, decide if something is more  
14 than 1,000 gallons or greater.

15 We don't have any way to assess  
16 whether that volume is happening in people's  
17 homes, but yes, it would be up to San Francisco  
18 if the spill is more than 50,000 gallons to  
19 provide a technical report.

20 So, we're looking especially at San  
21 Francisco taking a hard look at its system.

22 And this is, again, in the context of

1 the 79 exception, which exempted San Francisco  
2 from any requirements.

3 We believe that this permit term is a  
4 necessary correction, and that these permit terms  
5 are fully supported by the record in 402(q).

6 JUDGE AVILA: And just to dovetail  
7 back to I think a question that was asked earlier  
8 with respect to what I'll call the San  
9 Francisco's jurisdictional argument -- I think  
10 I'm paraphrasing here, but I take their argument  
11 to be that before you can require this, you have  
12 to trace each ISO event to reaching a water of  
13 the United States.

14 And I take it from what you've been  
15 saying, you disagree because what this reporting  
16 requirement is about is seeing if the system is  
17 working as it should be, and if it's not, why  
18 not?

19 MS. VON VACANO: Correct, Your Honor.  
20 The --

21 JUDGE AVILA: So, is it fair to say  
22 this isn't really, quote, a regulation of the

1 ISOs, instead, more of a monitoring, reporting  
2 requirement to determine if the system as a whole  
3 is working properly?

4 MS. VON VACANO: Correct, Your Honor.  
5 And San Francisco agreed in its comments in  
6 Attachment A, A-9.

7 It said that it would be amenable to  
8 reporting these requirements, and also agreed --  
9 and this is at response to comment C-3 at 22 --  
10 that the frequency, cost, location of sewer  
11 overflows are useful metrics to evaluate the  
12 system operations and maintenance.

13 JUDGE AVILA: Well, I took they agreed  
14 in large part -- you know, putting aside this  
15 jurisdictional argument -- they agreed to, as you  
16 just said, to the efficacy of much of this  
17 monitoring, and I took the only thing in their  
18 petition -- and I want to make sure you read the  
19 petition the same way -- that what they were  
20 objecting to was requiring reporting of ISO  
21 events when they were caused solely by capacity  
22 issues?

1                   And that's what I also took their  
2                   comments to be saying, to the extent we're buying  
3                   into this reporting requirement, you should add a  
4                   permit term that exempts it from events that are  
5                   caused solely by a design capacity problem.

6                   MS. VON VACANO: That is my  
7                   understanding of their contention. I think that  
8                   --

9                   (Simultaneous speaking.)

10                  MS. DURR: Time.

11                  MS. VON VACANO: Incorrect. And for  
12                  the reasons stated, we ask you to please deny the  
13                  petition.

14                  JUDGE AVILA: Thank you. Judges, do  
15                  you have any other questions?

16                  JUDGE LYNCH: No.

17                  JUDGE STEIN: Not from me, thank you.

18                  JUDGE AVILA: Thank you very much,  
19                  counsel.

20                  MS. VON VACANO: Thank you.

21                  JUDGE AVILA: We'll hear now from San  
22                  Francisco for five minutes of rebuttal.

1 MR. SILTON: Thank you, Judge Avila.  
2 I'm sorry, I'm hearing a little bit of an echo.

3 JUDGE AVILA: We are too. Do you have  
4 both microphones on, maybe?

5 MR. SILTON: No, I do not.

6 JUDGE LYNCH: It's all right now, so  
7 --

8 JUDGE AVILA: Yeah, go ahead now.

9 JUDGE LYNCH: Go and try to proceed.

10 JUDGE AVILA: Yeah, go ahead. It  
11 seems to be better.

12 MR. SILTON: Okay. Thank you, Your  
13 Honors.

14 The Region did not, in fact, in  
15 justifying either of the long-term control plan  
16 update or the generic WQBELs in the permit, that  
17 San Francisco is not currently protecting  
18 beneficial --

19 JUDGE AVILA: Excuse me, we are  
20 getting the echo, and the court reporter's not  
21 getting this.

22 Is your laptop muted, Mr. Silton?

1 MR. SILTON: Yes, it is. Is that  
2 better?

3 JUDGE AVILA: Yeah, that was better,  
4 I think.

5 MR. SILTON: Okay. I just changed a  
6 different audio setting on my computer.

7 JUDGE AVILA: Okay.

8 MR. SILTON: My apologies.

9 JUDGE AVILA: No, no problem. Just so  
10 we have a clear record, you can start your  
11 rebuttal again, five minutes.

12 MR. SILTON: Thank you, Your Honor.

13 The Region, in justifying either the  
14 long-term control plan update or the generic  
15 WQBELs, did not find that San Francisco is not  
16 protecting beneficial uses.

17 Yes, the Region identified a number of  
18 data points, but did not actually exercise  
19 considered judgment in making any kind of  
20 assessment about whether or not San Francisco is  
21 in fact attaining the beneficial uses.

22 This would've entailed something along

1 the lines of describing what attainment of the  
2 beneficial uses means, and then, you know,  
3 comparing the data that they have gathered to  
4 those beneficial uses to make an assessment.

5 That's not what the Region did.

6 They simply laid out data points and  
7 concluded that San Francisco could somehow better  
8 protect beneficial uses, which in any event, is  
9 not the standard under the CSO control policy.

10 The standard is protection itself of  
11 water quality standards.

12 I would note as well, with respect to  
13 the generic WQBELs that the Region specifically  
14 identified and teased out two different concepts  
15 here, an instance where it is feasible to set  
16 numeric effluent limits to protect water quality,  
17 and other instances where it is not.

18 There is no finding on the record  
19 anywhere made by the Region that there is some  
20 demarcation with respect to feasibility, or that  
21 there are certain water quality standards for  
22 which setting water quality-based effluent limits



1 would not -- you know, specific limits developed  
2 consistent with 122.44(d)(i).

3 No finding that that would not in fact  
4 be feasible, and indeed, if you look at both the  
5 CSO control policy, Section IV.B.2.c, as well as  
6 actually the guidance for permit writers, AR-  
7 95(c), particularly in Chapter 5, they very much  
8 do contemplate the actual setting of WQBELs for  
9 combined sewer systems.

10 The provision that Ms. von Vacano  
11 cited with respect to requirements, to include a  
12 narrative standard to ensure compliance with  
13 water quality standards, is in fact a phase 1  
14 requirement, one that would apply to a system  
15 that has yet to develop any CSO controls, let  
16 alone that hasn't compiled the 23 years' worth of  
17 post-construction monitoring data that San  
18 Francisco has gathered.

19 JUDGE LYNCH: But counsel, doesn't the  
20 CSO policy specifically state that the phases are  
21 not sequential?

22 That the requirements apply

1 simultaneously?

2 MR. SILTON: Your Honor, there are  
3 instances where phases could go differently, but  
4 we are in a circumstance where all of San  
5 Francisco's system has in fact been implemented  
6 and built out.

7 Certainly -- or, go ahead.

8 JUDGE LYNCH: I had another question.  
9 Thank you for that answer.

10 MR. SILTON: Sure.

11 JUDGE LYNCH: I had another question  
12 I wanted to ask you for clarification purposes.

13 Do you agree that a reassessment of  
14 the sensitive areas is appropriate, or not? I'm  
15 not clear on your position on that.

16 MR. SILTON: Your Honor, a sensitive  
17 areas assessment would be appropriate on limited  
18 grounds as actually specified in Section  
19 IV.B.2.e.

20 And the other section, specifically  
21 II.C.3, where it deals with sensitive areas'  
22 reassessments.

1 JUDGE LYNCH: So --

2 MR. SILTON: And where the narrow  
3 inquiry has -- go ahead.

4 JUDGE LYNCH: So, in your case, which  
5 of the tasks in table 7 of the permit are  
6 inappropriate?

7 MR. SILTON: They're inappropriate to  
8 the extent that they're requiring San Francisco  
9 to look at measures that are in the service of  
10 reduction, of further reducing discharges to the  
11 CSDs, as opposed to elimination or relocation  
12 because that's the narrower inquiry.

13 And I think a thing to be clear about  
14 too on the specific record that we have here --  
15 because there is a way to read this as saying the  
16 reductions are in service of trying to eliminate  
17 or relocate -- the Region is treating them in the  
18 record as conceptually distinct.

19 If you look at AR-10(a), page 18, the  
20 Permit Writers' Memo, AR-91 at page 10, this is  
21 kind of an either/or.

22 They're not expecting San Francisco to

1 read this at feasibility and suddenly find that  
2 they can do elimination or relocation.

3 They are expecting further  
4 minimization.

5 The other piece of this I would just  
6 like to note in closing -- just I know our time  
7 is limited -- is that we have not come out of  
8 this argument with any further clarity from the  
9 Region's perspective to how many permits are  
10 issued.

11 A critical threshold point on which  
12 San Francisco needs clarity just to know what  
13 particular obligations are and are not in effect?

14 I think another critical implication  
15 of what the Region has said here, and is an  
16 implication of their position, is they're saying  
17 they have jurisdiction over all discharges from  
18 the system.

19 The Board's findings, with respect to  
20 the scope of the stay, expressly stated that --

21 May I finish my thought?

22 JUDGE AVILA: You can finish your

1 sentence.

2 MR. SILTON: With respect to the stay,  
3 was that specifically -- the limit of EPA's  
4 authority to stay is basically for discharges  
5 over which it has jurisdiction, such that there  
6 are questions there.

7 JUDGE AVILA: Judges, any other  
8 questions?

9 JUDGE LYNCH: No. Thank you.

10 JUDGE STEIN: Not from me.

11 JUDGE AVILA: Again, I'd like to thank  
12 everyone, all the parties for the very helpful  
13 oral argument briefing and all your attention to  
14 this case.

15 On behalf of the Board, I want to say  
16 we appreciate it very much, and with that, the  
17 case is submitted.

18 MR. SILTON: Thank you, Your Honors.

19 MS. DURR: These proceedings are now  
20 adjourned.

21 (Whereupon, the above-entitled matter  
22 went off the record at 2:36 p.m.)

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Before: US EPA/EAB

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