

**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)	
_____)	

**REGION 9 RESPONSE TO 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

The U.S. Environmental Protection Agency (“EPA”), Region 9 and the California Regional Water Quality Control Board, San Francisco Bay Region (“RWQCB”) issued a consolidated National Pollutant Discharge Elimination System (“NPDES”) Permit for the City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, NPDES No. CA0037681 / Order No. R2-2019-0028 (“Oceanside Permit”), pursuant to 40 C.F.R. § 124.4 (“Consolidation of permit processing”). EPA and the RWQCB consolidated the federal and state permits because San Francisco discharges into Federal waters more than three miles offshore in the Pacific Ocean and discharges into State waters through seven (7) combined sewer discharge structures (“CSDs”).

California issues NPDES permits for discharges into State waters pursuant to its EPA-authorized NPDES program. Pursuant to 33 U.S.C. § 1342(b), the State of California is authorized to administer the NPDES Program through the State Water Resources Control Board (“State Water Board”) and the nine RWQCBs.¹ The Oceanside Permit, Order No. R2-2019-0028, was adopted by the RWQCB on September 11, 2019, and became effective as to discharges to State waters on November 1, 2019 (“State Permit”). AR #15 at 2. EPA Region 9 signed the Oceanside Permit, NPDES No. CA0037681, on December 10, 2019, AR # 17 at 3, and the uncontested provisions were effective as to discharges to Federal waters on March 9, 2020 (“Federal Permit”).²

¹ See Approval of California’s Revisions to the State National Pollutant Discharge Elimination System Program, 54 Fed. Reg. 40,664 (Oct. 3, 1989); Discharges of Pollutants to Navigable Waters: Approval of State Programs, 39 Fed. Reg. 26,061 (July 16, 1974).

² The effective date of the Federal Permit was 30 days from the date of the notice of stay letter pursuant to 40 C.F.R. § 124.16 and § 124.60(b). See, February 7, 2020 Notice of Stay of

In October and December of 2019, the City and County of San Francisco (“San Francisco”) challenged the State Permit before the State Water Board and then in Superior Court.³ On January 13, 2020, San Francisco filed a Petition seeking Environmental Appeals Board (“EAB” or “Board”) review of three conditions in the Federal Permit: 1) receiving water limitations at Section V. and Attachment G, Section I.I.1.; 2) the requirement to update the Long-Term Control Plan (“LTCP Update”) with current information at Section VI.C.5.d.; and 3) the reporting of sewer overflows at Section VI.C.5.a.ii.b.

EPA Region 9 informed San Francisco and the Board in the Notice of Stay of Contested Conditions that the contested provisions of the Federal Permit are stayed pending final agency action by the Board on the Federal Permit.⁴ However, since the State Permit, with identical terms, was issued by the California RWQCB, EPA informed San Francisco that EPA’s Notice of Stay of Contested Conditions had no effect on the State Permit.⁵

Contested Conditions for NPDES Permit No. CA0037681 (“Notice of Stay of Contested Conditions”).

³ See AR #140, October 11, 2019 Petition for Review of Order R2-2019-0028, Request for Stay and Hearing. See also AR #144, December 18, 2019 First Amended Petition for Writ of Administrative Mandate and Complaint for Declaratory Relief, Case No. RG19042575.

⁴ As noted in EPA’s Notice of Stay of Contested Conditions:

After a permit appeal is filed under 40 C.F.R. §124.19, “contested conditions” are stayed pending final agency action pursuant to 40 C.F.R. §124.16(a)(1), and for NPDES permits 40 C.F.R. §124.60(b)(1). “Uncontested conditions” of NPDES permits shall become enforceable 30 days after the Region notifies “the discharger and all interested parties of the uncontested conditions” pursuant to 40 C.F.R. §124.60(b)(1)(See also, 40 C.F.R. §124.60(b)(5) and 40 C.F.R. §124.16(a)(2)(ii)).

⁵ More specifically, EPA noted the following:

The Oceanside Permit is both a State Permit and a Federal Permit by operation of law because it was issued pursuant to both California’s authorized NPDES program for discharges to State waters and EPA’s authority to issue permits into Federal waters more than three miles offshore. This is consistent with 40 C.F.R § 124.4(a)(2) which states “whenever draft permits are prepared at the same time, the . . . fact sheets (§ 124.8), administrative records (required under § 124.9 for EPA-issued permits only), public comment periods (§ 124.10), and any public hearings (§ 124.12) on those permits should also be consolidated. The final permits may be issued together.” *See also* 40 C.F.R. § 124.4(c)(2).

On February 28, 2020, San Francisco filed a “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” (“San Francisco’s Motion”).

As set forth below, the Board should deny San Francisco’s Motion because the Board does not have authority to review or remand a notice of stayed conditions. The only authority delegated to the Board relevant to San Francisco’s January 13, 2020 Petition for Review is the authority to review the Federal Permit. The Board does not have the authority to stay the State Permit or review EPA’s authority to enforce it. Finally, the Board should deny San Francisco’s Motion for Leave to Amend its Petition because it is untimely.

However, since 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, this stay has no impact on the California-issued NPDES Oceanside Permit, Order No. R2-2019-0028. Since 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 retains authority to enforce it pursuant to 33 U.S.C. § 1342(i).

II. LEGAL BACKGROUND AND ARGUMENT

A. *The CWA Allows EPA To Grant States The Authority To Issue NPDES Permits And Provides That EPA May Enforce State-Issued Permits In Authorized States.*

The CWA establishes a framework of shared responsibility between EPA and the states. 33 U.S.C. § 1251(b) (providing “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”) CWA Section 402(b), 33 U.S.C. § 1342(b), provides that EPA shall authorize states that meet the requirements set forth in the CWA to administer the NPDES permitting program. *Nat’l Ass’n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, (2007). CWA Section 402(c)(1) provides that once a state has been authorized to issue NPDES permits, EPA must suspend issuance of permits into state waters. 33 U.S.C. § 1342(c)(1). CWA Section 402(d)(1) addresses EPA’s limited authority to issue permits in authorized states and requires states to provide notice to EPA of proposed permits. 33 U.S.C. § 1342(d)(1). CWA Section 402(d)(2) provides that EPA may object to a state NPDES permit if the Administrator determines it is outside of the guidelines and requirements of the CWA. 33 U.S.C. § 1342(d)(2). If, after such objection, a state does not revise the permit to address EPA’s objection, EPA may issue the permit pursuant to CWA Section 402(d)(4). 33 U.S.C. 1342(d)(4).⁶ EPA does not have authority to issue NPDES permits in states authorized to implement the NPDES program under

⁶ See, *South’ Cal’ Alliance of Publicly Owned Treatment Works v. U.S. EPA*, 853 F. 3d 1076, 1078 (9th Cir., April 12, 2017) (*SCAP*)(noting the following:

‘If [NPDES permitting] authority is transferred, then state officials-not the federal EPA-have the primary responsibility for reviewing and approving NDPES permits, albeit with continuing EPA oversight’ *Nat’l Ass’n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 650.

CWA Section 402(b) outside of the permit objection process under Section 402(d),⁷ except in limited circumstances such as discharges to Federal waters more than three miles offshore. 33 U.S.C. §§ 1342(b)&(d).

In addition to EPA's oversight authority for authorized state NPDES programs, CWA Section 309(a)(1) authorizes EPA to enforce any condition or limitation that implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 in a state permit issued pursuant to an approved permit program under section 1342(i) of the Act. 33 U.S.C. §§ 1319(a)(1) and 1342(i). Citizens may also enforce state-issued NPDES permits in federal court pursuant to Section 505 of the Act. 33 U.S.C. § 1365.

As noted in *SCAP*, “permits issued by the state are subject to administrative and judicial review in accordance with state law. *See, e.g.,* Cal. Water Code § 13330 (providing for review in California Superior Court of State Board decisions).”⁸ *SCAP* notes that “[b]y contrast, if jurisdiction returns to EPA and EPA issues a federal NPDES Permit, EPA’s decision may be appealed within EPA to the Environmental Appeals Board (EAB). 40 C.F.R. § 124.19(a)(1). A final EPA permit approved by the EAB is subject to review in an appropriate circuit court of appeals. 33 U.S.C. § 1369(b)(1)(F).”⁹ Here, EPA did not invoke the objection procedures in 33 U.S.C. § 1342(d), and instead issued the Federal Permit for discharges to Federal waters, while the RWQCB issued the State Permit for discharges to State waters. Thus, the CWA provides

⁷ *SCAP* at 1078-79 (summarizing EPA’s oversight authority in authorized states, including the ability to issue a permit if a state declines to address EPA’s comments).

⁸ *SCAP* at 1081.

⁹ *SCAP* at 1079.

EPA the authority to enforce state-issued permits in authorized states, such as the State Permit issued by the RWQCB.

B. The Board's Authority Under 40 C.F.R. Parts 1 and 124 Is Limited To The Express Delegations Set Forth In The Regulations.

As set forth in 40 C.F.R. § 1.25(e)(2), the Board does not have authority to review matters for which there is no express delegation. The 1992 rule that created the Environmental Appeals Board provided, “*express delegations* of authority from the Administrator to the Board to hear and decide appeals.”¹⁰ More specifically, 40 C.F.R. § 1.25(e)(2) provides the following:

The Environmental Appeals Board shall exercise any authority *expressly delegated* to it in this title. With respect to any matter for which authority has not been *expressly delegated* to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate. (*emphasis added*).

Since the Part 124 regulations do not expressly authorize the Board to review a notification of stayed permit conditions, and the Administrator has not requested review, the Board does not have the authority to do so.¹¹

The Region's Notice of Stay of Contested Conditions is governed by 40 C.F.R. §§ 124.16(a) and 124.60(b). The 124.16(a) provisions were included in and later amended as part of

¹⁰ 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992) (citing regulation creating the EAB. The delegation was done through a rulemaking as opposed to by an internal delegation: “Under the old scheme, the rules of practice governing Agency adjudications did not actually delegate authority to the Judicial Officers . . . By contrast, under the rule promulgated herein, the rules of practice actually effect the delegation of the Administrator's authority.”)

¹¹ See, e.g., *In re: Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997)(holding that EAB's authority is limited to reviewing specific permit terms that are alleged to violate the statute or regulations at issue and EAB's authority is limited to issues within the confines of the EAB's jurisdiction).

the consolidated permit procedures for RCRA, UIC and NPDES permits.¹² The 124.60(b) procedures apply to NPDES permits only.¹³

A notice of stayed permit conditions issued pursuant to 40 C.F.R. §§ 124.16 and 124.60(b) is not “a final permit decision issued under 40 C.F.R. § 124.15,” reviewable pursuant to 40 C.F.R. § 124.19(a)(1), nor is it a “contested permit condition” or “other specific challenge to the permit decision” reviewable pursuant to 40 C.F.R. § 124.19(a)(4)(i). Furthermore, a notification of stay is not a type of “final permit decision” because 40 C.F.R. § 124.15(a) precisely and narrowly defines the term “final permit decision” to mean “a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.” Since a notification of stayed permit conditions is not one of the actions listed, the Board does not have authority to review it.

The plain language of 40 C.F.R. § 124.19 is focused on and limited to appeals of contested permit conditions or other challenges *to the final permit decision*. The silence of 40 C.F.R. § 124.19 with respect to appealing a notification of stayed permit conditions, therefore, speaks volumes. Since the Board may only act where it has been expressly delegated authority to do so, the Board has no authority to review the Region’s notification of stayed permit conditions.

Where the Board is asked to opine on something other than a final permit decision under 40 C.F.R. § 124.15, the regulations expressly provide for that review. For example, 40 C.F.R. § 124.5 sets forth a process whereby the Regional Administrator’s denials of requests for modification, revocation and reissuance, or termination of NPDES, UIC and RCRA permits can

¹² See, e.g., 45 Fed. Reg. 33,290, 33,411-33,414 (May 19, 1980), 48 Fed. Reg. 14,146, 14,271-14,276 (April 1, 1983), 65 Fed. Reg. 30,886, 30,911- 30,912 (May 15, 2000), and 78 Fed. Reg. 5281, 5285-5288 (Jan. 25, 2013).

¹³ *Id.*

be “informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.” 40 C.F.R. § 124.5(b). The Board’s jurisdiction to review Regional actions that are outside the scope of its 40 C.F.R. § 124.19(a) authority is limited to those authorities expressly delegated, such as informal review of such denials, or responding to requests from the Administrator for advice or other assistance in accordance with 40 C.F.R. § 1.25(e)(2). Thus, since the authority expressly delegated to the Board does not include the authority to review notice of stayed conditions, the Board does not have authority to review San Francisco’s Motion.

C. Even If The Board Had Authority To Review The Notice Of Stayed Provisions, The Board Lacks Authority To Review San Francisco’s Motion Because The Board Does Not Have Authority To Stay The State Permit Or Review EPA’s Statutory Authority To Enforce State-Issued Permits.

EPA and the RWQCB issued the consolidated Oceanside Permit because San Francisco discharges occur both within and outside of the territorial waters of the state more than three miles offshore. AR #17, Fact Sheet at F-6. Given the interrelated nature of the activities and operations of the onshore system that are necessary to comply with the permit requirements for discharges to the territorial waters of the State and to Federal waters beyond the State’s jurisdiction, Region 9 and the RWQCB consolidated the Federal and State Permits pursuant to 40 C.F.R. § 124.4 to avoid any inconsistencies in the Federal and State Permits.

Although the State Permit and the Federal Permit were consolidated as allowed by 40 C.F.R. § 124.4, they were issued pursuant to the independent authority of Region 9 over Federal waters and the RWQCB over State waters. Signature by one sovereign is not necessary for the Permit to be effective as to the other.¹⁴ Indeed, the permits were issued at different times and are

¹⁴ See, October 29, 2019 Letter from Michael Montgomery, RWQCB to Michael Carlin, San Francisco at 4-5 (setting forth the federal only provisions of the Oceanside Permit that are not enforceable by the RWQCB because they pertain only to the discharge outside of California’s territorial waters).

subject to separate appeals. Although the RWQCB identified some provisions of the Oceanside Permit that are not enforceable by the RWQCB, the entire Oceanside Permit is enforceable by EPA. There are no State-only provisions of the Oceanside permit because of the interrelated nature of the actions onshore, the CSDs, and the discharge to Federal waters offshore.

The Board does not have authority to review state-issued NPDES permits in authorized states. As the Board noted in *In re: Missouri Permit No. MO-49136*, NPDES Appeal No. 17-04, Sept. 12, 2017, *Order Dismissing Petition for Lack of Jurisdiction*:

The Board is a tribunal of limited jurisdiction, however, and its authority to review permit decisions is "limited by the statutes, regulations, and delegations that authorize and provide standards for such review." *In re State of Haw., Dep't of Transp., Highways Div.*, NPDES Appeal No. 13-11, at 2 (EAB Nov. 6, 2013) (Order Dismissing Petition for Review). *See In re Mich, CAFO Gen. Permit*, NPDES Appeal No. 02-11, at 3 (Mar. 18, 2003) (Order Dismissing Petition for Review); *In re Carlton. Inc.*, 9 E.A.D. 690, 692 (EAB 2001); *see also* 57 Fed. Reg. 5320 (Feb. 13, 1992). The Board is authorized to hear appeals of individual permit decisions issued by EPA under the CWA at 40 C.F.R. part 124. This part provides "EPA procedures for issuing, modifying, revoking and reissuing, or terminating all * * * NPDES' permits, 40 C.F.R. § 124.1(a). Under part 124, the EPA Regional Administrator issues a final permit decision, 40 C.F.R. § 124.15(a), and such EPA-issued permits are in turn appealable to the Board under 40 C.F.R § 124.19(a). But the Board's authority to review CWA NPDES permit decisions under 40 C.F.R. § 124.19(a) does not extend to state-issued permits as the Board's jurisdiction is circumscribed by its governing regulations. *See* 40 C.F.R. § 1.25(e)(2).

San Francisco implicitly acknowledges that the Oceanside Permit is, in effect, two permits, a Federal Permit issued by EPA and a State Permit issued by the RWQCB, by filing separate challenges to the State Permit through the State Water Board and the Alameda Superior Court and the Federal Permit via its Petition to the EAB.¹⁵ These separate challenges

¹⁵ *See*, AR #140, Petition for Review of Order R2-2019-0028, Request for Stay and Hearing, October 11, 2019 at 3, which seeks the following from the State Water Board:

III. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW

demonstrate that San Francisco is cognizant of the reality that the EAB does not have jurisdiction over the State of California and that the California Superior Court does not have jurisdiction over EPA. The fact that the Federal and State Permits were consolidated pursuant to 40 C.F.R. § 124.4 does not give the Board the authority to review or stay the State Permit.

The Board may not, as San Francisco suggests, use the stay provisions in 40 C.F.R. § 124.16 and 40 C.F.R. § 124.60(b), or its authority regarding motions at 40 C.F.R. § 124.19(f), or its general “Board Authority” at 40 C.F.R. § 124.19(n) to stay the State Permit or review EPA’s authority to enforce it. 33 U.S.C. §§ 1319(a) and 1342(i). There is no language in 40 C.F.R. §§ 124.16(a)(1) or 124.60(b) authorizing the EAB to stay the conditions of state permits or stay EPA’s authority to enforce such conditions. Section 124.19(n) is plainly circumscribed to “acts” and “measures” taken in furtherance of the Board’s “duties and responsibilities” prescribed in Part 124, which nowhere includes the duty or responsibility to review state permit conditions or EPA’s statutory authority to enforce state permits. And, Section 124.19(f) grants no additional authority to the Board at all, and merely prescribes the form and content of written motions. The State Permit remains in effect unless San Francisco prevails in its separate challenge in State

San Francisco seeks review of the Permit adopted by the Regional Board and attached to this Petition as Exhibit 1 (Order No. R2-2019-0028).

IV. DATE OF THE REGIONAL BOARD ACTION

The Regional Board adopted the Revised Tentative Order No. R2-2019-0028 on September 11, 2019.

V. THE REGIONAL BOARD’S ADOPTION OF THE PERMIT WAS INAPPROPRIATE AND IMPROPER AND SHOULD BE REMANDED

The Regional Board’s adoption of the Permit was inappropriate and improper, it is not supported by substantial evidence, and the Permit must be remanded to the Regional Board.

See also, AR #144 (containing San Francisco’s December 16, 2019 Petition for Writ of Mandate and Complaint for Declaratory Relief in Alameda Superior Court).

court. San Francisco may not seek to have the EAB grant the relief it seeks in State court.¹⁶ If EPA were to seek to enforce the State Permit, while the Federal Permit was stayed, San Francisco could raise any concerns it has about such an enforcement action in federal district court at that time. However, the EAB does not have authority to review the enforceability of the State Permit pursuant to San Francisco's Petition for Review filed pursuant to 40 C.F.R. § 124.19.

D. In Addition To Denying San Francisco's Motion Because It Is Beyond The Board's Authority, The Board Should Deny San Francisco's Request To Amend Its Petition To Address The Two Permit Issue Because It Is Untimely.

In addition to being beyond the Board's authority, San Francisco's Motion seeking to amend the Petition to add a substantive challenge to the "two permit" theory is untimely. San Francisco knew that the RWQCB viewed the Oceanside Permit as two separate permits,¹⁷ and chose not to address it in its Petition to the EAB. Since San Francisco filed an extensive challenge to the "two permit" issue in Alameda County Superior Court¹⁸ prior to filing its action with the EAB, San Francisco could have addressed this issue when it filed its original Petition.

¹⁶ San Francisco's objection to the State Permit was denied by the State Board and San Francisco filed a challenge in Alameda Superior Court. *See* AR #144, San Francisco's December 16, 2019 Petition for Writ of Mandate and Complaint for Declaratory Relief in Alameda Superior Court, Paragraph 6 at 3.

¹⁷ *See*, October 29, 2019 Letter from Michael Montgomery, RWQCB to Michael Carlin, San Francisco at 2 (setting forth the RWQCB's view that "the joint permit is properly viewed as two separate permits, one issued by U.S. EPA and one issued by the Regional Water Quality Control Board").

¹⁸ *See*, San Francisco's December 16, 2019 Petition for Writ of Mandate and Complaint for Declaratory Relief in Alameda Superior Court AR # 144 at 15 (setting forth in detail San Francisco's concern with the RWQCB's assertion that "the joint permit is properly viewed as two separate permits, one issued by U.S. EPA and one issued by the Regional Water Board . . . Contrary to your assertions . . . precedent support the view that joint permits are in fact dual permits . . ."). *Id.* at 11-18 (setting forth in detail San Francisco's objection to the two permit issue.)

Thus, the Board should deny San Francisco's Motion to Amend its Petition to address the "two permit" issue because it is untimely, as well as beyond the scope of the Board's authority.

III. CONCLUSION

The EAB's jurisdiction is limited to deciding matters that are within the scope of the authority delegated to it pursuant to 40 C.F.R. § 1.25(e)(2), which does not include the authority to review a notice of stayed provisions. San Francisco's Motion should be denied because the Board does not have authority to stay a state-issued NPDES permit or review EPA's authority to enforce it.

In conclusion, after consultation with and concurrence by the Office of General Counsel, EPA Region 9 respectfully requests that the Board deny San Francisco's Motion.

March 16, 2020

Respectfully submitted,

For EPA

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response is less than 7,000 words, excluding the Table Of Authorities, Table of Attachments, Certificate of Service and this Statement of Compliance with Word Limitation.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached *Region 9 Response To 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. The parties have agreed to accept service of filings by electronic mail only pursuant to 40 C.F.R. 124.19(i)(3)(ii), with no hard copy service by mail or similar means.

March 16, 2020

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