



Via Email (torres.tomas@epa.gov)

December 27, 2019

Tomas Torres
Director, Water Division
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Re: Request for Consent – Minor Modification to the Oceanside NPDES Permit

Dear Director Torres,

This letter is in response to your letter dated December 16, 2019, requesting that the San Francisco Public Utilities Commission (“SFPUC”) consent to a minor modification of the 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 (“Oceanside permit”) pursuant to 40 C.F.R. § 122.63(a). Specifically, you seek to correct an error in the effective date of the NPDES permit from February 1, 2019 to February 1, 2020.

We understand the purpose of your request, but as you are aware, the effective date of the Oceanside NPDES permit is a topic of much discussion between the SFPUC and the San Francisco Regional Water Quality Control Board (“Regional Board”). A copy of the relevant correspondence is attached for your reference. Before we respond to your request, we seek guidance from EPA on this topic.

The Regional Board has taken the position that the Oceanside permit “is properly viewed as two separate permits, one issued by U.S. EPA and one issued by the Regional Water Board. . . most of the permit will go into effect on November 1, [while other, enumerated provisions] will not go into effect, because they relate only to discharges to federal waters.” In contrast, your transmittal letter dated December 10, enclosing the signed Oceanside permit, states that “[t]he effective date of the permit is February 1, 2020, unless a petition for permit review is filed with the Environmental Appeals Board

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President

Francesca Viotor
Vice President

Anson Moran
Commissioner

Sophie Maxwell
Commissioner

Tim Paulson
Commissioner

Harlan L. Kelly, Jr.
General Manager



(EAB).” There are no qualifications to this statement or any acknowledgement of the Regional Board’s position.

The positions taken by EPA and the Regional Board on the effective date of the permit appear to be irreconcilable. This conflict creates substantial ambiguity and uncertainty with a number of permit terms. For example, a number of deadlines specified in the Oceanside Permit are set based upon a specified number of months after the “effective date.” If EPA and the Regional Board have inconsistent interpretations of the permit’s effective date, none of these deadlines will align for the submission of documents to the agencies as required by the permit. These misaligned deadlines, and resulting agency review and approval periods, may have a cascading, negative effect on the implementation of some of the permit terms by the SFPUC. The SFPUC, therefore, needs clarification on EPA’s position regarding the effective date and expectations on how deadlines referencing the effective date will be calculated. Once we have that information, we will be in a better position to substantively respond to your request.

Sincerely,



Harlan L. Kelly, Jr.
General Manager
San Francisco Public Utilities Commission

cc: Becky Mitschele, Permits Branch, U.S. EPA Region 9
Michael Montgomery, San Francisco Bay Regional Water Quality Control Board
Dan Harris, California Department of Justice
Marc Melnick, California Department of Justice
Michael Carlin, San Francisco Public Utilities Commission
John Roddy, San Francisco Office of the City Attorney
Tom Boer, Hunton Andrews Kurth

Enclosures: October 18, 2019 letter from SFPUC to Regional Board
October 25, 2019 letter from SFPUC’s counsel to Regional Board and SWRCB
October 29, 2019 letter from Regional Board to SFPUC
October 29, 2019 letter from SFPUC to Regional Board
December 11, 2019 letter from SFPUC to Regional Board
December 13, 2019 letter from Regional Board’s counsel to SFPUC’s counsel



October 18, 2019

[Via Email \(michael.montgomery@waterboards.ca.gov\)](mailto:michael.montgomery@waterboards.ca.gov)

Michael Montgomery, Executive Officer
 California Regional Water Quality Control Board
 San Francisco Bay Region
 1515 Clay Street, Suite 1400
 Oakland, California 94612

Re: Effective date of Order No. R2-2019-0028, NPDES Permit No. CA0037681, Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, City and County of San Francisco

Dear Mr. Montgomery,

The San Francisco Public Utilities Commission ("the SFPUC") appreciates receiving your letter dated October 1, 2019, attaching a copy of Order No. R2-2019-0028, Order No. R2-2019-0028, NPDES Permit No. CA0037681, Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, City and County of San Francisco ("the Order"). We are writing to seek clarity about the perspective of the San Francisco Bay Regional Water Quality Control Board ("Regional Board") with regard to the effective date of the Order.

To be effective, the Order must be adopted jointly by the Regional Board and the United States Environmental Protection Agency ("EPA"). The copy of the Order that you provided to us on October 1 has space for signatures by both a Regional Board official (you) and an EPA official (Mr. Tomas Torres, Director of the Water Division at EPA Region 9). The Regional Board adopted the Order at the public hearing on September 11 and you signed it on September 12.

In contrast, as of the date of this letter, the EPA has not adopted the Order and Mr. Torres has not provided his signature. At the public hearing on September 11, representatives of EPA Region 9 attended and expressed EPA's support for the Order. However, on October 2, Mr. Torres informed the SFPUC that the Order has been elevated to EPA's Office of Water. Mr. Torres stated that he cannot provide any more details on the timing and the scope of that review. We inquired with EPA Region 9 representatives again yesterday about the status and they indicated that the Order is still at the Office of Water and that they remain unaware of the timing or scope of that review.

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Anson Moran
 Commissioner

Sophie Maxwell
 Commissioner

Tim Paulson
 Commissioner

Harlan L. Kelly, Jr.
 General Manager



In your October 1 transmittal letter, you stated that “[t]he requirements of [the Order] are effective starting November 1, 2019.” We are uncertain whether, when you made that statement, you contemplated a scenario where, as here, that effective date may arrive and the Order may not have been adopted by the EPA. We are writing now to inquire about the Regional Board’s perspective on such a scenario. Clear, substantiated direction from the Regional Board about whether the Order, or any portion thereof, becomes effective on the November 1 effective date absent EPA’s adoption of the Order will help eliminate uncertainty for all stakeholders.

The SFPUC is not aware of any precedential authority supporting a position that the Order can become effective under the Clean Water Act absent approval by EPA. Even if such authority did exist, as a practical matter, it is not possible to distinguish the portions of the Order under the Regional Board’s jurisdiction from those under EPA’s jurisdiction. The SFPUC’s water pollution control system is a complex, completely integrated system. Consequently, it is not possible for the SFPUC to comply with Order No. R2-2019-0028 for those conditions under the Regional Board’s jurisdiction and the previous order, Order No. R2-2009-0062, for those conditions under the EPA’s jurisdiction.

The SFPUC would like to engage in a discussion with you about this complex issue in the hopes of finding an appropriate path forward that provides clarity about the regulatory requirements and enables the SFPUC to service hundreds of thousands of San Francisco residents and associated businesses without any interference to the Westside Facilities operations, which would be deleterious to human health and the environment. After that discussion, we request that you provide a written response setting forth the Regional Board’s perspective on which permit(s) govern the continued operation of the Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project if EPA has not adopted Order No. R2-2019-0028 by November 1, 2019. Thank you and please call me at your convenience.

Sincerely,



Michael P. Carlin
Deputy General Manager
San Francisco Public Utilities Commission

cc: Tomas Torres, Director, Water Division, US EPA, Region 9 (torres.tomas@epa.gov)
Becky Mitschele, Permits Branch, US EPA, Region 9 (mitschele.becky@epa.gov)
Eileen Sobeck, Executive Director, California State Water Resources Control Board
(Eileen.Sobeck@waterboards.ca.gov)

October 25, 2019

Via Email

Michael Montgomery
Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612
michael.montgomery@waterboards.ca.gov

Eileen Sobeck
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
eileen.sobek@waterboards.ca.gov

Dear Mr. Montgomery & Ms. Sobek,

We are writing to you on behalf of the San Francisco Public Utilities Commission (SFPUC) in regards to Order No. R2-2019-0028, the Oceanside National Pollutant Discharge Elimination System Permit (#CA0037681) (Oceanside Permit), which was approved on September 11, 2019, by the San Francisco Bay Regional Water Quality Control Board (Regional Board), subject to concurrent issuance by the U.S. Environmental Protection Agency (EPA).

The proposed effective date of the Oceanside Permit is November 1, 2019. However, the EPA co-issues the Oceanside Permit, has taken no action to issue the Oceanside Permit, and based on all available information is not likely to issue the Oceanside Permit in the immediate future. As explained in the SFPUC's Request for a Stay of the Oceanside Permit, the EPA Region 9 official with responsibility for issuing the Oceanside Permit has explained to the SFPUC that he has no substantive information about the review being undertaken by the EPA's Office of Water in Washington D.C., and no scheduling information about when – or even whether – the permit will be issued by the EPA.

The Regional Board and the EPA have consistently considered adoption of the Oceanside Permit to require joint action by both agencies. This view is supported by historical practice, the applicable law, and the administrative record for the Oceanside Permit. In contrast, applicable law does not support “separating” the Oceanside Permit, as currently drafted, into component “federal” and “state” parts, nor is there a practical methodology for dividing the current compliance obligations for the single, unified, and integrated combined sewer system. The only lawful and practical conclusion is that the Oceanside Permit is not effective, and will not be effective on November 1, in the absence of an immediate, yet unlikely, EPA action. The status

quo must be maintained, in part, to avoid complete confusion on the applicable permit terms and obligations. Maintaining authorization of the SFPUC's discharges under the existing Order No. R2-2009-0062, while the EPA evaluates Order No. R2-2019-0028, will continue to protect receiving water quality and human health.

As noted above, on October 11, 2019, the SFPUC filed a Request for a Stay of the Oceanside Permit with State Water Resources Control Board (State Board). Granting this request prior to November 1, 2019 is appropriate and necessary. The SFPUC is open to an alternative administrative action(s) by the State Board or, potentially, the Regional Board, which explicitly recognizes that the Oceanside Permit is not effective until the EPA, as the co-permitting authority, issues the Oceanside Permit.

In a letter to you dated October 18, 2019, the SFPUC set forth its perspective on this topic, explaining that: (1) there is no legal support for the position that the Oceanside Permit, or any portion thereof, can become effective absent EPA's joint issuance; (2) there is a need for clear, substantiated direction from the Regional Board on this topic; and (3) the SFPUC would like to meet with you to discuss its concern and ultimately receive a written response that can help eliminate the current confusion. These issues have also been raised on several occasions in various telephone conversations initiated by SFPUC management and its counsel with Regional Board and State Board representatives.

As is made evident by the above inquiries and requests, the SFPUC is very concerned about the effective date of the Oceanside Permit, the associated confusion regarding the applicable permit provisions, and the potential consequences that are likely to result from this confusion. The SFPUC must have certainty about which permit is applicable to its operations. Given the lack of a resolution, the failure of the State Board, to date, to take action on the Stay Request, and the seriousness of the issues, the SFPUC reluctantly must take steps necessary to protect itself and the interests of the residents of San Francisco.

We have been authorized to file a Petition for Writ of Mandate in California Superior Court before November 1, 2019, if the State Board does not grant the Stay Request, or the State Board or Regional Board fails to take an action that makes it adequately clear that – absent action by the EPA – the Oceanside Permit is not effective on November 1. The SFPUC deeply values its long standing, working relationship with the State Board and the Regional Board. However, the SFPUC must have a clear, mutual understanding about the applicability of the Oceanside Permit and that understanding must be memorialized in a formal manner by the State Board or the Regional Board. The SFPUC welcomes and anticipates meaningful engagement with you, not only with regard to the Oceanside Permit and the immediate concerns, but also with regard to long-term performance-related opportunities, resolution of any compliance-related concerns, and ongoing environmental protection initiatives involving San Francisco, the State of California, and the federal government.

We welcome a conversation with State Board and Regional Board staff and counsel at your earliest convenience. Please have your counsel contact John Roddy at (415) 554-3986 or Estie Kus at (415) 554-3924. We are available for consultation as well.

Sincerely,



Samuel L. Brown



J. Tom Boer

cc: Phil Wyles, Assistant Chief Counsel, State Water Resources Control Board
Marni Ajello, Counsel, State Water Resources Control Board
Michael Carlin, Deputy General Manager, San Francisco Public Utilities Commission
John Roddy, Deputy City Attorney, San Francisco City Attorney's Office
Estie Kus, Deputy City Attorney, San Francisco City Attorney's Office



San Francisco Bay Regional Water Quality Control Board

October 29, 2019

Michael Carlin
San Francisco Public Utilities Commission
525 Golden Gate Avenue, 13th Floor
San Francisco, CA 94102

Dear Mr. Carlin:

This letter responds to your and your counsel's inquiries from October 18, 25, and 28 about the effective date of Order No. R2-2019-0028 (Oceanside permit). We appreciate your expressed need in the letters for certainty regarding the effective date of the permit as well as the specific provisions of the permit that will be effective as of that date. As stated in the permit itself, and reiterated in our October 1, 2019 transmittal and our October 25, 2019 response to the interim objection of the United States Environmental Protection Agency (U.S. EPA), the effective date of the Oceanside permit remains November 1, 2019. With this response, we provide a summary of the legal basis for permit effectiveness, as well as clarification on the provisions of the permit that go into effect on November 1, 2019. We hope that this serves to eliminate any confusion and set the stage for us to continue to work together on implementation of the permit's relevant requirements.

Although permits for the Oceanside Water Pollution Control Plant have historically been issued jointly by the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) and U.S. EPA, adoption by U.S. EPA is not required to effectuate permit provisions that the Regional Water Board already has authority to issue. U.S. EPA's and the Regional Board's respective authorities over the discharges covered by the permit are not overlapping, and the language of the permit does not make the effectiveness of state-issued provisions contingent on adoption or signature by U.S. EPA. Thus, because the Regional Water Board has adopted the Oceanside permit, the provisions relating to discharges the state is authorized to regulate will become effective whether or not U.S. EPA adopts (or signs) the permit. We have enumerated the provisions outside the Regional Board's authority to adopt in order to provide San Francisco with clarity about its regulatory requirements.

As San Francisco is aware, the Regional Water Board has authority under the Clean Water Act to issue National Pollutant Discharge Elimination System (NPDES) permits. See 54 Fed. Reg. 40664-01, 40664-40665 (Oct. 3, 1989); Wat. Code § 13370 *et seq.*;

JIM McGRATH, CHAIR | MICHAEL MONTGOMERY, EXECUTIVE OFFICER

see also generally *NPDES Memorandum of Agreement Between the U.S. Environmental Protection Agency and the California State Water Resources Control Board (NPDES MOA)* (Sept. 22, 1989). As a result, U.S. EPA retains only limited jurisdiction to issue NPDES permits in California. *NPDES MOA*, pp. 4-5. The authority of the two agencies is not concurrent. See 33 U.S.C. § 1342, subd. (c); 40 CFR § 123.1 (“Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.”)

U.S. EPA participates in permitting for the Oceanside Water Pollution Control plant only because Discharge Point 001 is located outside the waters of the State. See Order No. R2-2019-0028, at p. F-6. Accordingly, U.S. EPA retains jurisdiction over the provisions related to this ocean discharge. *City and County of San Francisco* (EAB 1993) 4 EAD 559, at p. *1, fn. 1 (“While California has been delegated NPDES permitting authority for discharges into ‘navigable waters’ within its jurisdiction, the subject outfall extends into ocean waters beyond that three-mile jurisdiction, consequently EPA is the NPDES permitting authority for discharges from the subject outfall.”) The Regional Water Board is the permitting authority for discharges within the three-mile boundary, that is, discharges from the nearshore outfalls (Discharge Points CSD-001 through CSD-007).

As a result, the joint permit is properly viewed as two separate permits, one issued by U.S. EPA and one issued by the Regional Water Board; each permit regulates different discharges, even if the requirements to control these discharges overlap.¹ Contrary to your assertions, the language of the permit, applicable law, and both Environmental Appeals Board (EAB) and State Water Resources Control Board (State Water Board) precedent support the view that joint permits are in fact dual permits. See Order No. R2-2019-0028, pp. 2 (requiring both ROWD and NPDES application), 3 (certifying that order is both a duly adopted WDR and an NPDES permit), 5 (establishing that order is both WDRs and an NPDES permit adopted by U.S. EPA); 40 CFR §§ 123.1; 124.4, subd. (a) (providing for consolidation of multiple permits for the same facility and specifying that “[t]hey need not be issued together if in the judgment of the Regional Administrator or State Director(s), joint processing would result in unreasonable delay in the issuance of one or more permits.”); *Matter of City and County of San Francisco*, supra, 4 EAD, at p. *3 (describing permit requirements for nearshore outfalls as elements of state-issued NPDES permit); State Water Board Order No. WQ 2002-0013 (*Point Loma Wastewater Treatment Plant*), p. 2 (joint permit issued by San Diego Regional Water Board contained both federal 301(h) waiver and State WDRs, “a separate permit that ensures compliance with state water quality standards”); State Water Board Order No. WQ 86-17 (*Rimmon Fay*), p. 5 (“Thus, for 301(h) waivers, the discharger needs both waste discharge requirements issued by the Regional Board and an NPDES permit issued by the Environmental Protection Agency.”)

Supporting the view that the Oceanside permit is a vehicle for separate state and federal permits is its invocation of parallel administrative review by the State Water Board and the EAB, which do not have overlapping jurisdiction. Cf. 40 CFR § 124.19 and Wat. Code § 13320; see also Environmental Appeals Board Practice Manual (Aug.

¹ For instance, implementation of the Long-Term Control Plan and the Nine Minimum Controls is necessary to control both nearshore and ocean discharges.

2013), p. 38. “EPA–issued permits must initially be challenged before the Environmental Appeals Board and then in the appropriate court of appeals.” *Southern California Alliance of POTWs v. EPA* (E.D. Cal. 2018) 297 F.Supp.3d 1060, 1071; see also *Southern California Alliance of POTWs v. EPA* (9th Cir. 2017) 853 F.3d 1076, 1081, 1083 n.4. By contrast, “[t]he [NPDES] permits issued by the state are subject to administrative and judicial review in accordance with state law.” *Southern California Alliance of POTWs v. EPA*, *supra*, 853 F.3d at 1081; see also *Southern California Alliance of POTWs v. U.S. EPA*, *supra*, 297 F.Supp.3d at 1071–1072 (citing 40 C.F.R. § 123.30 [judicial review of permits issued by the state is limited to state court]); Cal. Water Code §§ 13320, 13321, 13330 (providing for review and petition for stay by State Water Board, and review in state superior court).

In decisions arising out of joint permits, the State Water Board and the EAB have reviewed only the provisions within, respectively, state or federal authority to impose. See Order No. WQ 2002-0013 (*Point Loma*), *supra* (reviewing TSS limit imposed by the Regional Water Board in a joint permit); *In the Matter of City and County of San Francisco*, *supra*, 4 EAD 559 (reviewing provisions controlling discharges beyond State waters); see also *In re Great Lakes Chemical Corp.* (July 7, 1994) 5 E.A.D. 395, at p. *2 (denying review of RCRA permit conditions imposed under Arkansas’ authorized program and concluding that EAB “has no basis upon which to exercise its power of review.”); *In re Carlton, Inc.* (Feb. 28, 2001) 9 E.A.D. 690, at *3 (finding that EAB’s “jurisdiction to hear PSD permit appeals under 40 C.F.R. pt. 124 does not extend to appeals of state-issued minor NSR permits in approved States. Such permits are regarded as creatures of state law that can be challenged only under the state system of review.”). The Ninth Circuit has likewise recognized that the federal portions of joint NPDES permits are appealable to the EAB. See *City of San Diego v. Whitman* (9th Cir. 2001) 242 F.3d 1097, 1101-1102 (if city was aggrieved with decision regarding its 301(h) renewal application, recourse was to appeal decision to the EAB). The limited jurisdiction of each administrative appeals body over joint permit provisions indicates that the state and federal provisions are separable and may go into effect separately.

The Regional Water Board has already followed required procedures for the state WDRs within the Oceanside permit to go into effect separately. The Regional Water Board exercises its NPDES permitting authority when its board members vote to adopt a tentative permit at a public board meeting. See Wat. Code §§ 13223, 13263, 13377, 13378; *NPDES MOA*, pp. 3, 6. Here, board members voted in favor of the Oceanside permit at the September 11, 2019 board meeting. Neither the board members nor the text of the permit conditioned the effectiveness of the permit on U.S. EPA adoption.² The Regional Water Board’s adoption was all that was needed to effectuate the provisions of the permit related to the control of nearshore discharges; accordingly, the implementation of these provisions is not thwarted by U.S. EPA’s failure to sign the permit.

² The Regional Water Board could have made permit effectiveness contingent on U.S. EPA issuance, but chose not to. For instance, the 1990 iteration of the Oceanside permit provided that “[t]his order shall...become effective 30 days after the date of its adoption by the Regional Administrator, Environmental Protection Agency.” Order No. R2-1990-0093, p. 17.

The absence of a signature from a U.S. EPA representative is likewise not meaningful. See 40 CFR § 124.15 (requiring the Regional Administrator to issue “final permit decision” for U.S. EPA-issued permits but not requiring signature as means of communicating such decision); see also Order No. R2-1990-0093, p. 18 (signature of U.S. EPA representative absent on final 1990 Oceanside permit). Indeed, the current permit does not assign any consequence to either agency’s failure to sign it, nor is the permit’s effective date linked to the date of signature. Both signatures serve, not to issue or effectuate the permit, but to certify that the signed document is a copy of the permit that the agencies have already decided to issue.³ See Order No. R2-2019-0028, p. 3.

Having established that the permit provisions to control discharges within the Regional Water Board’s authority to regulate have in fact been adopted by the Regional Water Board, we disagree that this interpretation will cause “complete confusion” regarding applicable permit terms and obligations. If U.S. EPA has not issued its portion of the permit by November 1, the federal discharges – that is, the discharges to Discharge Point 001 – will be unpermitted. Because San Francisco has timely submitted a permit application, and “through no fault of the permittee,” U.S. EPA will not have issued a new permit, the conditions applicable to the ocean discharge under the 2009 Oceanside permit would continue in effect until U.S. EPA formally adopts the permit. See 40 CFR § 122.6, subd. (a). Accordingly, until U.S. EPA formally adopts the permit, San Francisco will be subject to the provisions of the 2019 permit to the extent that they are authorized pursuant to State law. Generally, San Francisco will not be subject to provisions in the 2019 permit relating exclusively to Discharge Point 001 because these provisions are required under U.S. EPA authority; San Francisco may thus continue to comply with the equivalent 2009 provisions. Where a provision is required to control discharges to both federal and state waters, however, San Francisco is still bound by it.

Because most of the permit will go into effect on November 1, we have for ease of reference enumerated below only the provisions that will **not** go into effect, because they relate only to discharges to federal waters:

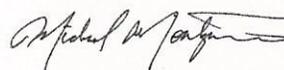
- **Provisions III.B, III.C, and III.E (Discharge Prohibitions).** These provisions relate only to Discharge Point 001.
- **Provision IV (Effluent Limitations and Discharge Specifications).** This provision relates only to Discharge Point 001. (Note that during wet weather San Francisco must comply with Provisions VI.C.5.a [Nine Minimum Controls] and VI.C.5.c [Long-Term Control Plan] because their implementation is also necessary to control discharges to the nearshore outfalls.)
- **Provisions VI.A.2.c (Standard Provisions).** This exception to the Regional Standard Provisions in Attachment G relates only to Discharge Point 001.
- **Provision VI.C.2 (Effluent Characterization Study and Report).** This provision relates only to Discharge Point 001.

³ Because the Executive Officer has no authority to issue permits (Wat. Code § 13223), his signature cannot make the permit effective.

- **Provision VI.C.6 (Westside Recycled Water Project Operations Notification).** This provision relates only to Discharge Point 001.
- **Provision VI.C.7 (Flame Retardant Special Study).** This provision relates only to Discharge Point 001.
- **Monitoring and Reporting Program (MRP) Provision III (Influent Monitoring Requirements).** While San Francisco is not subject to dry weather influent monitoring at Monitoring Location INF-001A; it must comply with wet weather influent monitoring at Monitoring Location INF-001B so we can understand the performance of the entire facility during wet weather.
- **MRP Provision IV.A.2 (Effluent Monitoring Requirements: Oceanside Water Pollution Control Plant).** While San Francisco is not subject to dry weather effluent monitoring at Monitoring Location EFF-001A; it must comply with wet weather effluent monitoring at Monitoring Location EFF-001B so we can understand the performance of the entire facility during wet weather.
- **MRP Provision IV.C (Effluent Monitoring Requirements: Westside Recycled Water Project).** This provision relates only to Discharge Point 001.
- **MRP Provisions IV.D and V (Chronic Toxicity Monitoring Requirements).** These provisions relate only to Discharge Point 001.
- **MRP Provision VI.B (Offshore Monitoring).** This provision relates only to Discharge Point 001.

My staff and I would be happy to go over specific provisions with you in more detail and to answer any questions you have. Please feel free to reach out to me directly or to call Bill Johnson at (510) 622-2354. We appreciate the need to avoid any confusion as to permit effectiveness and implementation going forward and hope that we have been able to provide clarity with this response. We value our longstanding and productive partnership with San Francisco and are eager to continue to work with you collaboratively toward protecting water quality.

Sincerely,



Digitally signed by Michael
Montgomery
Date: 2019.10.29 12:56:06
-07'00'

Michael Montgomery
Executive Officer

cc: **U.S. EPA, Region 9:**

Tomas Torres, Director, Water Division (torres.tomas@epa.gov)

Becky Mitschele, Permits Branch (mitschele.becky@epa.gov)

California Regional Water Quality Control Board, San Francisco Bay Region:

Tom Mumley, Assistant Executive Officer (Thomas.Mumley@waterboards.ca.gov)

Bill Johnson, NPDES Division Chief (Bill.Johnson@waterboards.ca.gov)

Jessica Watkins, NPDES Section Leader (Jessica.Watkins@waterboards.ca.gov)

Marnie Ajello, Attorney (Marnie.Ajello@waterboards.ca.gov)

State Water Resources Control Board:

Eileen Sobeck, Executive Director, (Eileen.Sobeck@waterboards.ca.gov)

Michael Lauffer, Chief Counsel, (Michael.Lauffer@waterboards.ca.gov)

Phil Wyels, Assistant Chief Counsel, (Philip.Wyels@waterboards.ca.gov)

Emel Wadhvani, Assistant Chief Counsel, (Emel.Wadhvani@waterboards.ca.gov)

Department of Justice:

Dan Harris, Deputy Attorney General (Daniel.Harris@doj.ca.gov)

Marc Melnick, Deputy Attorney General (Marc.Melnick@doj.ca.gov)

San Francisco:

Amy Chastain (AChastain@sflower.org)

Samuel Brown (slbrown@HuntonAK.com)

Tom Boer (JTBoer@hunton.com)

John Roddy (John.S.Roddy@sfcityatty.org)

Estie Kus (Estie.Kus@sfcityatty.org)



Via Email

October 29, 2019

Michael Montgomery
 Executive Officer
 San Francisco Bay Regional Water Quality Control Board
 1515 Clay Street, Suite 1400
 Oakland, CA 94612
 (510) 622-2399
michael.montgomery@waterboards.ca.gov

Dear Mr. Montgomery,

I am confirming receipt of your letter dated October 29, 2019 regarding Order No. R2-2019-0028, the Oceanside National Pollutant Discharge Elimination System Permit (#CA0037681) (Oceanside permit), which states "the effective date of the Oceanside permit remains November 1, 2019." The SFPUC fundamentally disagrees with your position and the legal basis included in your October 29 letter. The Oceanside permit cannot be effective on November 1, absent the U.S. Environmental Protection Agency issuing the permit.

Contrary to basic principles of administrative law and NPDES permitting requirements, your October 29 letter creates a fiction that there are two permits – one federal, one state. This position conflicts with the permitting process used for approval of the Oceanside permit by the Regional Board members, the associated administrative record, the terms of the permit, and the reality of the design of the combined sewer system on the Westside of San Francisco.

The SFPUC will continue to comply with the currently effective 2009 Oceanside permit (Order No. R2-2009-006) until EPA takes action and the Oceanside permit is effective, absent further administrative action(s) by the Regional Board or the State Board or judicial action by a Superior Court.

I am providing notice that the SFPUC has reluctantly authorized counsel to present to the Superior Court for the County of San Francisco, on October 31, 2019 at 11:00am in Department 302, its application for an Ex Parte Temporary Restraining Order and for an Order to Show Cause regarding a Preliminary Injunction, seeking the Court's assistance in formally maintaining the status

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Francesca Vietor
 Vice President

Anson Moran
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Sophie Maxwell
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Tim Paulson
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Harlan L. Kelly, Jr.
 General Manager



quo in connection with the permitting of the Oceanside sewer treatment plant and associated collection system and to cure the lack of action by the State Water Resources Control Board in response to the SFPUC's request for a stay.

Sincerely,

A handwritten signature in blue ink that reads "M. P. Carlin". The signature is written in a cursive, slightly stylized font.

Michael P. Carlin
Deputy General Manager
San Francisco Public Utilities Commission

cc: Eileen Sobeck, Executive Director, State Water Resources Control Board
Michael Lauffer, Chief Counsel, State Water Resources Control Board
Phil Wyels, Assistant Chief Counsel, State Water Resources Control Board
Emel Wadhvani, Assistant Chief Counsel, State Water Resources Control Board
Tom Mumley, Assistant Executive Officer, San Francisco Bay Regional Board
Bill Johnson, NPDES Division Chief, San Francisco Bay Regional Board
Jessica Watkins, NPDES Section Leader, San Francisco Bay Regional Board
Marnie Ajello, Attorney, San Francisco Bay Regional Board
Dan Harris, Deputy Attorney General, California Department of Justice
Marc Melnick, Deputy Attorney General, California Department of Justice
Tiffany Yee, Deputy Attorney General, California Department of Justice
William Jenkins, Deputy Attorney General, California Department of Justice
Tomas Torres, Director, Water Division, U.S. EPA Region 9
Sylvia Quast, Regional Counsel, U.S. EPA Region 9
Becky Mitschele, Permits Branch, U.S. EPA Region 9
Harlan Kelly, San Francisco Public Utilities Commission
Greg Norby, San Francisco Public Utilities Commission
Amy Chastain, San Francisco Public Utilities Commission
John Roddy, San Francisco Office of the City Attorney
Estie Kus, San Francisco Office of the City Attorney
Tom Boer, Hunton Andrews Kurth
Samuel Brown, Hunton Andrews Kurth



Via Email (michael.montgomery@waterboards.ca.gov)

December 11, 2019

Michael Montgomery
 Executive Officer
 San Francisco Bay Regional Water Quality Control Board
 1515 Clay Street, Suite 1400
 Oakland, CA 94612

Re: Oceanside NPDES Permit Effective Date

Dear Mr. Montgomery,

I am writing on behalf of the San Francisco Public Utilities Commission (“San Francisco”) regarding the effective date for Order No. R2-2019-0028, the Oceanside National Pollutant Discharge Elimination System Permit (#CA0037681) (“2019 Oceanside Permit” or “2019 Permit”). This topic has been the raised by San Francisco in a variety of correspondence, conversations, and other documents, and in your letter to San Francisco dated October 29, 2019.

Yesterday, the United States Environmental Protection Agency (“EPA”) sent a letter informing San Francisco that it adopted the 2019 Oceanside Permit and stating that, “[t]he effective date of the permit is February 1, 2020, unless a petition for permit review is filed with the Environmental Appeals Board (EAB).”¹ In light of this development, San Francisco is reaching out to you to seek clarity on the current position of the San Francisco Bay Regional Water Quality Control Board (“Regional Board”) on the effective date of the Permit. A brief summary of the history relating to this topic follows.

- On October 1, 2019, you sent a letter enclosing a copy of the Oceanside Permit signed by the Regional Board, but not the EPA, which stated that “[t]he requirements of this Order are effective starting November 1, 2019.”
- On October 18, 2019, San Francisco sent a letter to you requesting clarification of the Regional Board’s perspective on the effectiveness date in light of the EPA’s failure to jointly adopt the Permit. The letter also explained San Francisco’s perspective that, to be effective, the

¹ As of the date of this letter, San Francisco has received a courtesy copy of EPA’s letter, but has not received the original letter or any of the attachments, including the adopted Oceanside Permit.

OUR MISSION: To provide our customers with high-quality, efficient and reliable water, power and sewer services in a manner that values environmental and community interests and sustains the resources entrusted to our care.

London N. Breed
 Mayor
Ann Moller Caen
 President
Francesca Viotor
 Vice President
Anson Moran
 Commissioner
Sophie Maxwell
 Commissioner
Tim Paulson
 Commissioner
Harlan L. Kelly, Jr.
 General Manager



2019 Oceanside Permit must be adopted by both the Regional Board and the EPA.

- On October 29, 2019, the Regional Board sent a letter acknowledging that the EPA had not yet adopted the 2019 Permit, but nevertheless stating that “the effective date of the Oceanside permit remains November 1, 2019.”
- October 29, 2019, San Francisco sent a letter explaining that the Regional Board’s “position conflicts with the permitting process used for approval of the Oceanside permit by the Regional Board members, the associated administrative record, the terms of the permit, and the reality of the design of the combined sewer system on the Westside of San Francisco.” The letter also provided notice that San Francisco would be presenting to the San Francisco Superior Court an application for an Ex Parte Temporary Restraining Order and an Order to Show Cause regarding a Preliminary Injunction, seeking the Court’s assistance in formally maintaining the status quo in connection with the permitting of the Oceanside sewer treatment plant and associated collection system.
- On October 31, 2019, there was a hearing in San Francisco Superior Court on San Francisco’s ex parte application; however, the Court determined that, due to a Motion to Transfer Venue filed by the Regional Board on October 30, 2019, it was prohibited from taking any action on the matter.
- On November 22, 2019, San Francisco’s counsel sent an email to the Regional Board’s counsel informing it that San Francisco intends to file a first amended writ petition, on or before December 16, 2019. Due to the U.S. EPA’s continued failure to adopt the 2019 Oceanside Permit, San Francisco planned to maintain its claims related to the lack of effectiveness of the 2019 Oceanside Permit in its amended writ petition.
- On December 9, 2019, San Francisco’s counsel sent a follow-up letter to the Regional Board’s counsel confirming its continued intention to file a first amended writ petition on or before December 16, 2019. The letter also reiterated San Francisco’s position that the 2019 Oceanside Permit cannot become legally effective absent EPA’s adoption of the jointly issued permit without changes.
- On December 10, 2019, San Francisco received a copy of a letter from the EPA, which indicates that EPA adopted the 2019 Oceanside Permit. The letter states that, “[t]he effective date of the permit is February 1, 2020, unless a petition for permit review is filed with the Environmental Appeals Board (EAB).”

In sum, as it currently stands, San Francisco has been informed that the Regional Board believes the effective date of the 2019 Oceanside Permit is November 1, 2019, while the EPA believes the effective date of the same permit is February 1, 2020, unless San Francisco petitions for permit review with the EAB. This situation is unreasonable and untenable.

Consistent with the rationales set forth in the aforementioned correspondence, San Francisco maintains its perspective that the 2009 Oceanside Permit (Order No. R2-2009-006) is currently effective and, pursuant to EPA's direction, the 2019 Oceanside Permit will not become effective until February 1, 2020, unless a petition for permit review is filed with the EAB. We are requesting that you respond, in writing, to clarify whether you concur with this perspective, or if you will continue to maintain your position that the 2019 Oceanside Permit became effective on November 1, 2019. As a matter of professional courtesy, we request that you inform us of your position no later than close of business on December 12, 2019, so that we may revise our arguments on this topic in our first amended writ petition accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read "M. P. Carlin". The signature is fluid and cursive, with a horizontal line extending from the end.

Michael P. Carlin
Deputy General Manager
San Francisco Public Utilities Commission

cc: Tom Mumley, Assistant Executive Officer, San Francisco Bay Regional Board
Bill Johnson, NPDES Division Chief, San Francisco Bay Regional Board
Marc Melnick, Deputy Attorney General, California Department of Justice
Dan Harris, Deputy Attorney General, California Department of Justice
John Roddy, San Francisco Office of the City Attorney
Tom Boer, Hunton Andrews Kurth



XAVIER BECERRA
Attorney General

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December 13, 2019

Via E-mail and U.S. Mail

Mr. J. Tom Boer
Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, CA 94111

RE: City & County of San Francisco v. State Water Resources Control Board
Superior Court of California, County of Alameda, Case No. RG19042575

Dear Tom:

My client has asked me to respond to Michael Carlin's letter of December 11, 2019 to Michael Montgomery.

After consideration and discussion, including discussion with folks at Region IX of the U.S. Environmental Protection Agency, I can confirm that my client's position regarding the Oceanside permit effective date has not changed since Mr. Montgomery's letter of October 29, 2019. Our position is that the provisions of the permit that "relate only to discharges to federal waters" have an effective date as determined by the U.S. Environmental Protection Agency, and that the remaining provisions of the permit (that relate to discharges to state waters) have an effective date of November 1, 2019. Mr. Montgomery's letter described where that line is to be drawn.

To the extent your client perceives any ambiguities, we remain willing, as we have since October 29, 2019, to discuss those perceived ambiguities.

Thank you for your courtesy and cooperation.

Sincerely,

MARC N. MELNICK
Deputy Attorney General

For XAVIER BECERRA
Attorney General

MR. J. TOM BOER
December 13, 2019
Page 2

cc: Michael Montgomery, RWQCB
Daniel S. Harris, DAG
Samuel L. Brown

MNM:

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