

May 11 2020

Clerk, Environmental Appeals Board
INITIALS *[Signature]*

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

In re:)
City and County of San Francisco) NPDES Appeal No. 20-01
NPDES Permit No.: CA0037681/)
R2-2019-0028)
)

**ORDER DENYING MOTION TO STAY OR, IN THE ALTERNATIVE, TO REMAND
NOTICE OF STAYED CONTESTED PERMIT CONDITIONS AND DENYING
MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW**

The U.S. Environmental Protection Agency (“EPA”) Region 9 (“EPA Region 9”) and the California Regional Water Quality Control Board for the San Francisco Bay Region (“California RWQCB”) jointly issued a National Pollutant Discharge Elimination System (“NPDES”) permit to the City and County of San Francisco (“San Francisco”) authorizing discharges from San Francisco’s existing wastewater facility.¹ EPA Region 9 and California RWQCB issued the

¹ San Francisco owns and operates the Oceanside Water Pollution Control Plant and its waste collection system. Fact Sheet at F-3, Attachment F to EPA Region 9 and CA RWQCB, Wastewater Discharge Requirements and NPDES Permit for San Francisco Oceanside Water Pollution Control Plant, Westside Collection System and Westside Recycled Water Project, Order No. R2-2019-0028, NPDES No. CA0037681, (2009) (Admin. Record (“A.R.”) No. 17) (“Permit”). This plant and system were last permitted in 2009. See CA RWQCB and EPA, NPDES Permit for San Francisco Oceanside Water Pollution Control Plant, Westside Wet Weather Facilities, and Collection System, NPDES No. CA0037681, Order R2-2009-0062 (A.R. No. 81); *see also* Fact Sheet at F-4. During the term of this next permit, San Francisco plans to construct, own and operate the Westside Recycled Water Project. Fact Sheet at F-3. Collectively, the Oceanside Water Pollution Control Plant, waste collection system, and the Westside Recycled Water Project are referred to in the latest permit and in this decision as the “Facility.”

permit together because San Francisco’s facility discharges into the Pacific Ocean, and those discharges are regulated by both EPA (for discharges more than three miles offshore) and the State (for discharges inside of three miles offshore).

In January 2020, San Francisco petitioned the Environmental Appeals Board (“EAB”) to review the permit, contesting three of the permit’s conditions. City and County of San Francisco Petition for Review (Jan. 13, 2020) (“Petition”). Pursuant to 40 C.F.R. § 124.16, EPA Region 9 notified San Francisco and the EAB that the three contested provisions of the permit were stayed pending EAB review and final agency action. In its notification, EPA Region 9 also explained that the stay of the contested permit conditions had no effect on the requirements in the permit that were authorized by the California RWQCB and that it had the authority to enforce the permit for violations of those state requirements. In February 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” (Feb. 28, 2020) (“Motion”), in which San Francisco argues that the contested permit conditions should be stayed as to *all* discharges, regardless whether the discharges are federally or state authorized because the contested provisions are the exact same permit conditions. San Francisco maintains that because of the permitting framework that EPA Region 9 has established in this matter, including the possibility of enforcement of the permit conditions by EPA Region 9, the force and effect of the contested conditions are not, *in fact*, stayed. Motion at 4. EPA Region 9 filed its response to the Motion in March 2020 (“Response”), and San Francisco filed its reply to the Motion in April 2020 (“Reply”). For the reasons explained below, including the fact that the EAB does not adjudicate concerns about potential enforcement actions in the context of permit review under part 124, the EAB denies San Francisco’s motion.

RELEVANT FACTS AND LEGAL PRINCIPLES

NPDES permits can be issued either by EPA or by states with authorized programs. *See generally* Clean Water Act (“CWA”) § 402, 33 U.S.C. § 1342. States that have received authorization from EPA under CWA section 402(b) administer the NPDES permit program *within their boundaries* in lieu of the Federal government. *See* 33 U.S.C. § 1342(b), (c); 40 C.F.R. § 123.1(d)(1). EPA has authorized the State of California to implement the NPDES Program through the State Water Resources Control Board and its nine Regional Water Quality Control Boards. *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). Nearshore waters, i.e., waters in the Pacific Ocean within three miles from shore, are considered within the boundary of California (they are also referred to as the “territorial waters” of the state). *See* Fact Sheet at F-6. Discharges into the Pacific Ocean that are beyond three miles from shore are not within the boundary of California. Thus, California is not authorized to administer the NPDES program as to those discharges, and it is EPA who must issue NPDES permits for any such discharges.² *Id.*

² This distinction between the state-authorized and the EPA-authorized discharges does not alter the fact that all of the discharges from the San Francisco facility are into the Pacific Ocean, which is considered “navigable waters” and falls under the scope of NPDES regulation for purposes of the CWA. *See* 33 U.S.C. § 1362(7), (8). The parties use the term “state waters” to refer to the “navigable waters” that are subject to California’s approved NPDES program and “federal waters” to refer to the “navigable waters” that are not part of California’s approved program and are instead under EPA’s NPDES authority.

The discharges authorized by the jointly issued Permit in this matter occur through seven nearshore combined sewer discharge structures (“CSD”) that discharge into the waters within California’s boundary and one deepwater ocean outfall that terminates approximately 3.9 nautical miles offshore, which is beyond the State’s authority to regulate. Thus, for the discharges from San Francisco’s facility, San Francisco requires an NPDES authorization from the California RWQCB as well as an NPDES authorization from EPA Region 9.

The NPDES permitting regulations contemplate that the EPA and approved state permitting authorities may agree to coordinate decisionmaking and jointly issue permits whenever a facility or activity requires an NPDES permit from both the EPA and an approved state. 40 C.F.R. §§ 123.24(b)(5), 124.4(c)(2). Consolidation promotes efficiency in the processing of permit applications (avoiding duplication and inconsistency) through joint preparation of the statement of basis or fact sheets, consolidation of the administrative record, coordination of the timing and submission of public comments, and jointly holding public hearings. *See* 40 C.F.R. § 124.4(a)(2), (b); *see also* Part 124 - Procedures for Decisionmaking, 48 Fed. Reg. 14,264, 14,265 (Apr. 1, 1983) (“[T]his Part allows applications to be jointly processed * * * whenever EPA and a State agree to take such steps in general or in individual cases.”).³ In this case, EPA Region 9 and the California RWQCB consolidated the permitting

³ In its reply, San Francisco argues that this permitting matter cannot be “consolidated” pursuant to section 124.4, emphasizing language in subsection 124.4 (a)(1) that refers to consolidation of permits under *more than one statute*, and distinguishing this case because both the state and the federal authorities are derived from the same statute – i.e., the Clean Water Act. Reply at 11. In so arguing, San Francisco ignores subsections 124.4(a)(2), (b), (c)(2), as well as 123.24(b)(5), which contemplate consolidating multiple permits that are issued under a single

process for the NPDES permit issued to San Francisco. *See, e.g.*, Permit, generally (identifying both EPA Region 9 and the California RWQCB as the permit issuers), Fact Sheet (jointly issued), California RWQCB and Region 9, Response to Comments (Aug. 30, 2019) (A.R. No. 10) (jointly responding to comments that were received in a joint public comment period).⁴ Even though the permits were consolidated for the purpose of processing, San Francisco was required to contest the permit authorizations using separate state and federal avenues for appeal. The California RWQCB authorization must be challenged through the State’s administrative and judicial processes.⁵ *See* Fact Sheet at F-35; 40 C.F.R. § 123.30; Letter from Michael Montgomery, California RWQCB, to Michael Carlin, San Francisco Public Utilities Commission (Oct. 29, 2019) (A.R. No. 134) (citing Cal. Water Code §§ 13320, 13321, 13330) (“RWQCB Letter”). EPA Region 9’s authorization must be appealed through the EAB using the administrative process outlined in 40 C.F.R. § 124.19, before proceeding to the federal judicial process. Fact Sheet at F-35; 40 C.F.R. § 124.19.

statute and, in particular, contemplate consolidation in circumstances where an NPDES permit is required from both the EPA and a state permitting authority.

⁴ San Francisco suggests that these permits cannot have been consolidated under Section 124.4 because EPA Region 9 failed to follow procedures “required” for permit consolidation and did not document its agreement or intent to “consolidate” the permits under section 124.4. Reply at 11-12. Section 124.4, however, does not specify required procedures to consolidate; nor does Section 124.4 require any particular documentation of the agreement or intent to consolidate. The record in this case reflects EPA Region 9’s and the California RWQCB’s agreement and intent to consolidate their permit processes and to jointly issue their NPDES authorizations in one combined document.

⁵ In addition to the petition for review filed with the EAB, San Francisco is separately challenging the Permit in the California state court system. Petition at 2, n.1.

In San Francisco's petition for review filed with the EAB, San Francisco challenges three provisions of the permit: (1) the generic water quality based effluent limitations at Section V and Attachment G.I.I.1; (2) the long-term control plan update at Section VI.C.5.d.; and (3) the reporting and other regulation of isolated sewer overflows at Section VI.C.5.a.ii.b. Petition at 2. None of the contested provisions are specific as to whether they were imposed by the California RWQCB or EPA Region 9; nor are they specific as to the relevant discharge location (i.e., nearshore versus offshore). *See* Permit at 9, 17, 21, and Attach. G.2. Rather the three contested provisions are requirements of both the California RWQCB and EPA Region 9 to control discharges to both nearshore and offshore waters. *Id.*

The relevant federal permitting regulations provide that when a request for review of an NPDES permit under 40 C.F.R. § 124.19 is filed,⁶ the effect of the contested permit conditions are stayed pending final agency action. 40 C.F.R. §§ 124.16(a), 124.60(b). (Uncontested permit conditions that are not severable from the contested provisions are also stayed. *Id.* §§ 124.16(a)(2), 124.60(b)). Under the regulations, the Regional Administrator identifies the stayed permit provisions and must provide notice to (among others) the EAB and the discharger of what provisions of the permit are uncontested and enforceable. *Id.* Put another way, the Regional Administrator identifies the stayed permit provisions, and those that are not stayed are enforceable. *Id.*

Here, EPA Region 9 provided notice in February 2020, advising that it was staying the three contested provisions of the permit and that all other provisions were effective 30 days after

⁶ And 40 C.F.R. § 124.19 provides for an “[a]ppeal from [an] * * * NPDES * * * final permit decision issued under [40 C.F.R.] § 124.15.”

the notice. Region 9 Notice of Stay of Contested Conditions for NPDES Permit No. CA0037681, Order No. R2-2019-0028, EAB Appeal No. NPDES 20-1 at 2 (Feb. 7, 2020) (EAB Filing No. 2) (“Notice of Stay”). EPA Region 9 also stated that it was only staying the contested provisions to the extent of its authority (i.e., only as the contested provisions apply to discharges within EPA Region 9’s NPDES authority). *Id.* (“[I]n light of the federal permit conditions that have been challenged * * * the [contested] permit conditions are * * * stayed pending final agency action on the federal [authorization].”). EPA Region 9 stated that it was not staying those provisions as they apply to state’s nearshore waters. *Id.* (“[T]his stay has no impact on the California-issued NPDES [authorization].”).⁷ Finally, EPA Region 9 added that it nonetheless was authorized under 33 U.S.C. § 1342(i) to enforce those provisions as to discharges regulated by the State.⁸ *Id.*

⁷ The California RWQCB, in its letter to San Francisco on October 29, 2019, indicated that it did not consider any of the provisions contested in this permit appeal to be federal-only requirements as they are “provision[s] required to control discharges to both federal and state waters,” and do not “relate only to federal waters.” RWQCB Letter at 4. Again, as noted above, the term “federal waters” refers to “navigable waters” over which EPA Region 9 has NPDES authority and the term “state waters” refers to “navigable waters” over which the California RWQCB has NPDES authority.

⁸ The CWA specifically provides that EPA retains the authority to enforce permits issued under authorized state programs. *See* 33 U.S.C. § 1342(i); *see also* NPDES Memorandum of Agreement Between U.S. EPA and the Cal. State Water Resource Control Brd. (“MOA”) at 39-40 (Sept. 22, 1989) (Attach. 7 to Reply) (providing that although the EPA retains the ability to enforce permit provisions, the State serves as the primary enforcement authority for state authorizations, and EPA “will defer formal enforcement activities whenever the state initiates an enforcement action determined by EPA to be timely and appropriate for the violation, except when there is an overriding federal interest.” MOA at 40).

Analysis

San Francisco does not disagree with the permit provisions that EPA Region 9 identified in its notice of stayed of contested permit conditions. Motion at 11 (“[T]here is no dispute about which permit conditions are contested.”). Instead, San Francisco’s disagrees with the conclusions that EPA Region 9 included in its notice as to the effect of the stay on the enforceability of those provisions. Specifically, San Francisco’s contention is that EPA Region 9’s stay “render[s] the contested permit conditions fully enforceable, instead of staying their force and effect,” as required by 40 C.F.R. §§ 124.16(a)(1) and 124.60(b)(1). San Francisco bases that argument on EPA Region 9’s statement that the contested provisions as to nearshore waters (i.e., waters over which the California RWQCB has NPDES authority) are not stayed, that the contested provisions apply to both state and federally regulated discharges, and EPA Region 9’s statement that it is authorized to enforce those provisions as to discharges regulated by the State. Motion at 12-14. According to San Francisco, EPA Region 9’s analysis in its notice is based on a first-time assertion that there are two separate NPDES permits (a federal and a state one) rather than a single, jointly issued NPDES permit. *See Motion 4-10; Reply at 1,4,8-20.*

We begin by acknowledging the permitting complexity that results from the fact that San Francisco’s facility discharges into waters that are subject to California RWQCB NPDES authority and other waters that are subject to EPA Region 9 NPDES authority. San Francisco has been issued dual authorizations in a combined document that contains provisions that apply equally to discharges from separately regulated discharge points. San Francisco has contested three specific provisions of the permit in both state and federal forums. The California RWQCB has informed San Francisco that the contested provisions do not relate only to discharges to

federal waters and are therefore effective under the state authorizations irrespective of whether they are effective under the federal authorization.⁹ RWQCB Letter at 3. And, as stated, EPA Region 9 has informed San Francisco that it is staying the contested provisions pending the outcome of the EAB’s decision. Notwithstanding our acknowledgement of the permitting complexity here, the regulations authorizing the consolidation of two permitting processes does not expand or contract the authority of either the EPA or the approved state over the issued permit. For the reasons below, we deny San Francisco’s motion in its entirety.

First, the EAB will not consider any potential future enforcement action by EPA Region 9 in this permit appeal. The EAB does not offer advisory opinions in the context of permit review under part 124 on theoretical enforcement actions that may never occur. Cf. *In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 507 (EAB 2009) (describing the EAB’s disinclination to issue advisory or premature opinions); *In re Salt River Project Agricultural Improvement Dist.*, 17 E.A.D. 312, 320 n.10 (EAB 2016) (explaining that the EAB generally declines to review a permit based on concerns regarding enforcement for noncompliance with permit terms and citing EAB cases declining to review permit cases where “fear of lax enforcement” or other concerns regarding compliance with a permit were raised). If, in the future EPA Region 9, were to seek to enforce the contested provisions of the permit, even while it has stayed the force and effect of those same provisions, San Francisco may raise any concerns it has about such an enforcement action at that time and in the appropriate forum, whether such action is brought administratively or in federal court. Because the EAB will not opine on theoretical future enforcement actions

⁹ Based on the records available to the EAB, the California RWQCB’s authorization to discharge to nearshore waters does not appear to be stayed pending current state court litigation.

and any potential justification there may be for such actions, the EAB will not resolve San Francisco’s argument as to EPA Region 9’s potential to enforce the contested permit provisions as they apply to discharges that the State is authorized to regulate.

Next, 40 C.F.R. §§ 124.16 and 124.60(b), require EPA Region 9 to stay the force and effect of any contested permit conditions and to notify (among others) the EAB and the discharger as to which provisions of the permit are stayed. Under this regulation, EPA Region 9’s power to stay is necessarily limited by its own permitting authority. EPA Region 9’s authority to issue permits is not expanded by consolidating the permitting process with a state permitting authority. As such, EPA Region 9 stayed the contested permit conditions only as they apply to discharges that are regulated by EPA Region 9. Notice of Stay at 2. Similarly, the EAB’s jurisdiction does not extend to the review of permitting decisions issued by a state permitting authority under an EPA-authorized NPDES program. *See In re Coastal Energy Corp.* (MO Permit No. MO-G-491369), NPDES Appeal No. 17-04 (EAB Sept. 25, 2017) (explaining that the EAB’s authority to review NPDES permits “does not extend to state-issued permits” from authorized programs as the EAB’s jurisdiction is circumscribed by its governing regulations); *see also* 40 C.F.R. § 123.1 (“Upon approval of a State program, the [EPA] shall suspend the issuance of Federal permits for those activities subject to the approved State program.”); 40 C.F.R. § 124.19 (authorizing EAB review of permits issued under part 124). Thus, San Francisco’s request that the EAB issue an order staying the contested provisions as they apply to discharges regulated by the California RWQCB is denied.

Finally, the parties debate whether this matter involves one permit or two. *See Motion 4-10; Response at 1-9* (distinguishing between the “federal permit” and the “state permit”); *Reply at 1,4,8-20*. San Francisco argues that if the permit is one permit, it “would not be required to

comply with [contested permit provisions]” and on that same basis San Francisco also seeks to amend its petition to argue whether the permit should be considered as one permit or two.

Motion at 16; Reply at 4. We need not resolve that issue to dispose of San Francisco’s Motion or this appeal. Whether the permit authorizations in this case are considered as contained in one or two permits ultimately cannot change the authority of either the State or EPA to authorize the discharges under the CWA and its implementing regulations. EPA Region 9 can only stay the contested provisions to the extent that it has the authority to do so, i.e., to the extent EPA Region 9 is the relevant NPDES authority (which in this case, as explained above, is the authority to permit *offshore* discharges into the Pacific Ocean). As such, there is no need to allow San Francisco to amend its petition or for us to characterize the jointly issued NPDES authorization as one permit or two.¹⁰

¹⁰ While we need not resolve whether San Francisco’s NPDES authorizations constitute one permit or two, we observe that both permitting authorities have referred to the authorizations in the Permit in both singular and plural terms. For example, the California RWQCB describes the jointly issued permit (singular) as “properly viewed” as two permits (plural), because the permit issuers regulate different discharges, even if the requirements overlap. RWQCB Letter at 2. EPA Region 9 also frames what was issued as two permits in their Notice of Stay (though even in the Notice of Stay, EPA Region 9 also refers to a singular Permit as “jointly issued by EPA Region 9 and the [California] RWQCB,”), yet it referred to a single permit being issued in its response to the Petition. *E.g.*, Notice of Stay at 2-3; EPA Region 9 Response to City and County of San Francisco Petition for Review 1, 13, 14 (Mar. 15, 2020). Neither the Permit nor the Fact Sheet describe two permits being issued; the Permit is identified with both an EPA and a Regional WQB identification number; and all of the descriptions in these two documents appear as though one permit is being jointly authorized. Further confusing things is the fact that the Regional WQB signed the authorization on September 12, 2019, but EPA Region 9 signed the authorization on December 10, 2019, resulting in different issuance dates and different effective dates, but identical expiration dates. See Permit at 2-3, and appended EPA Region 9 signature

Conclusion

For all the reasons stated above, San Francisco's Motion is denied.

So ordered.¹¹

ENVIRONMENTAL APPEALS BOARD

Dated: May 11, 2020

By: 
Aaron P. Avila
Environmental Appeals Judge

page. The apparent confusion in this case suggests that it may behoove all involved if each of the permitting authorities provide greater clarity for permittees in future permitting decisions.

¹¹ The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that copies of the *Order Denying Motion to Stay or, in the Alternative, to Remand Notice of Stayed Contested Permit Conditions and Denying Motion for Leave to Amend Petition for Review* in the matter of City and County of San Francisco, NPDES Appeal No. 20-01, were sent to the following persons by email:

Attorneys for the City and County of San Francisco

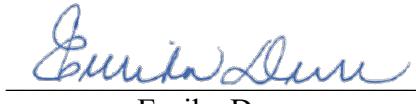
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Dated: **May 11 2020**



Eurika Durr
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