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 SAN FRANCISCO'S

SUPPLEMENT TO 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 joint 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 (the "Westside Facilities"), NPDES No. CA0037681 / Order No. R2-2019-0028 ("Oceanside Permit") pursuant to 40 C.F.R. § 124.4. The Oceanside Permit is both a federal permit and a state permit by operation of law.

California issues NPDES permits for discharges into nearshore waters within three miles 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 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 became effective on March 9, 2020 ("Federal Permit").[2]

The City and County of San Francisco ("San Francisco") requires a permit from both EPA and the State for its combined sewer system because 1) the principal NPDES permitted

[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 Contested Conditions for NPDES Permit No. CA0037681 ("Notice of Stay").

outfall at Discharge Point 001 (the "Deepwater Outfall") is more than three miles offshore, which is beyond the State's authorized NPDES program, and 2) because San Francisco also discharges equivalent to primary treated sewage through seven combined sewer discharge structures ("CSDs") into nearshore waters within the State's authorized NPDES program. EPA and the RWQCB worked together, as was done for previous permits, to issue joint consolidated State and Federal Permits authorizing discharges from the Westside Facilities so that San Francisco would not have conflicting permit terms in the Federal and State Permits which are necessary to operate its Westside Facilities.

In October and December of 2019, 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 with current information at Section VI.C.5.d.; and 3) the requirement to report all overflows from the combined sewer system at Section VI.C.5.a.ii.b.

On February 7, 2020, EPA Region 9 informed San Francisco and the Board in the Notice of Stay that the contested provisions of the Federal Permit are stayed pending review by the Board on the Federal Permit. The Notice of Stay noted that since the State Permit was issued by

[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.

the California RWQCB, EPA's Notice of Stay had no effect on the State Permit or EPA's ability to enforce it.[4]

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." On May 11, 2020, the Board issued an "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 ("May 11, 2020 Order")." On May 21, 2020, San Francisco filed a "Motion For Partial Reconsideration Or, In The Alternative, Motion For Leave To Amend Petition For Review."

On June 18, 2020, the Board issued an "Order Denying Motion For Reconsideration And Granting Petitioner Leave To Supplement Petition For Review, With Limitations" ("June 18, 2020 Order"). The Board's June 18, 2020 Order permits San Francisco to raise "any issues or arguments allegedly arising from the Region's inconsistent characterization of the Oceanside Permit as both one permit and two." June 18, 2020 Order at 4-5. The Board's June 18, 2020 Order provides that in "supplementing its petition for review, San Francisco may only raise new issues or arguments pertaining to any potential consequences allegedly arising from the Region's

[4] More specifically, EPA noted the following:

> 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).

post-petition characterization of the Oceanside Permit as two permits." *Id.* at 6. The Board's June 18 Order further requires San Francisco to explain why such issues were not "reasonably ascertainable, " citing 40 C.F.R. § 124.13, when San Francisco filed its comments on the Draft Permit and Fact Sheet. *Id.* at 6.

On June 30, 2020, San Francisco filed its "Supplement To Petition For Review" ("Supplement"). On July 7, 2020, the Board issued an "Order Granting Extension Of Time, Scheduling Oral Argument, And Directing Parties To Provide Notice Of Participation" which provides, among other things, that the Region must file its response to the Supplement on or before July 23, 2020, and San Francisco must file its reply to the Region's response to the Supplement on or before August 12, 2020. This response is limited to issues raised in San Francisco's Supplement.

As set forth below, the Board should deny review of San Francisco's Supplement. San Francisco failed to meet the threshold procedural requirement in the Board's June 18, 2020 Order to demonstrate that the issues it now raises in its Supplement were not reasonably ascertainable at the time of proposal. The Draft Permit and Fact Sheet expressly stated that there could be independent review of the RWQCB's and Region 9's respective permit decisions in separate federal and state proceedings.[5] Thus, San Francisco had notice that the Oceanside Permit was both a Federal Permit and a State Permit by operation of law and should have raised the issue in its comments pursuant to 40 C.F.R. § 124.13. San Francisco also had due process and fair notice because San Francisco had express notice of the permit terms, commented on, and challenged them.

[5] Draft Fact Sheet at F-35. AR #4.

If the Board does not dismiss the claims in San Francisco's Supplement on procedural grounds, the Board should deny review on the merits because San Francisco failed to articulate any consequences allegedly arising from the Region's post-petition characterization of the Oceanside Permit as two permits that warrant Board review. The alleged consequences raised by San Francisco are 1) lack of notice pursuant to 40 C.F.R. § 124.4, 2) concerns about how federal and state courts may interpret the same terms in theoretical future enforcement actions, and 3) separate effective dates may require San Francisco to submit deliverables on different due dates.[6] As the EAB held in its May 11, 2020 Order, 40 C.F.R. § 124.4 does not require notice of consolidation and the EAB does not offer advisory opinions regarding potential enforcement actions as part of a permit review under Part 124. May 11, 2020 Order at 9. Thus, the Board should deny review of the claims in San Francisco's Supplement.

II. LEGAL BACKGROUND AND ARGUMENT

Pursuant to 40 C.F.R. § 124.19, Petitioner bears the burden of demonstrating that Board review is warranted. Under 40 C.F.R. § 124.19(a)(4), the Board will deny review of a permit decision unless the petition demonstrates that each challenge is based on 1) a clearly erroneous finding of fact or conclusion of law, or 2) an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. *In re City of Sandpoint*, 17 E.A.D. 763, 772 (EAB 2019).

[6] If San Francisco is concerned about having different effective dates pursuant to the Federal and State Permits, San Francisco may submit deliverables to EPA early at the same time they are submitted to the RWQCB.

A. San Francisco Had Notice That The Oceanside Permit Was Separately Reviewable In Federal and State Proceedings And Could Have Raised Concerns About The Dual Nature Of The Oceanside Permit In Its Comments on the Draft Permit.

The Board's June 18, 2020 Order requires San Francisco to address whether the issues raised in the Supplement were reasonably ascertainable during the public comment period on the Draft Permit. *See* June 18, 2020 Board Order at 6. San Francisco claims the consequences regarding the "two permit issue" were not reasonably ascertainable because the Region did not expressly refer to the Federal and State Permit at the time of proposal. Supplement at 1, footnote 1. As noted below, San Francisco fails to meet this threshold procedural requirement of the Board's June 18, 2020 Order because it was reasonably ascertainable for San Francisco to raise its concerns during the comment period on the Draft Permit as required by 40 C.F.R. § 124.13.

Although EPA did not expressly refer to separate Federal and State Permits at the time of proposal, San Francisco had express notice in the Draft Permit and Fact Sheet of each agency's independent authority for the Oceanside Permit and that San Francisco could independently challenge each agency's separate permit decisions. More specifically, the Draft Fact Sheet notes that the Oceanside Permit may be challenged independently in state and federal proceedings (as San Francisco has done) and expressly provides that a petition before the State Water Board is a challenge to the State's decision and that a petition before the EAB is a challenge to EPA's decision.[7] Thus, San Francisco knew or it was reasonably ascertainable pursuant to 40 C.F.R. §

[7] With respect to the State's Permit, the Draft Fact Sheet at F-35 provides:

> **D. Reconsideration of Waste Discharge Requirements.** Any aggrieved person *may petition the State Water Board to* review *the Regional Water Board decision regarding the final WDRs*. The *State Water Board must receive the petition* at the following address within 30 calendar days of the Regional Water Board's action. *(emphasis added).*

124.13 that the jointly issued Oceanside Permit was by operation of law separate Federal and State Permits.[8] Thus, San Francisco could have raised any concerns about the "two permit issue" in its comments on the Draft Permit.

Even if the Board determines that San Francisco has met its threshold procedural burden, San Francisco's Supplement fails to identify a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion or an important policy consideration that the Board should, in its discretion, review pursuant to 40 C.F.R. § 124.19(a)(4).

B. The Oceanside Permit Is a Joint Consolidated Federal and State Permit By Operation of Law Issued By EPA and the RWQCB Pursuant to Our Respective Federal and State Authorities.

The Region has referred to the Oceanside Permit in both the singular and plural because the Oceanside Permit is a joint consolidated Federal and State Permit by operation of law that

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With respect to the Federal Permit, the Draft Fact Sheet provides:

> **E. Federal NPDES Permit Appeals.** *When U.S. EPA issues a final NPDES permit, it becomes effective on its effective date unless a request for review is filed*. If a request for review is filed, only those permit conditions that are uncontested go into effect pending disposition of the request for review. *Requests for review* must be filed within 33 days following the date the final permit is mailed and *must meet the requirements of 40 C.F.R. section 124.19. Requests for review should be addressed to the Environmental Appeals Board*. *(emphasis added).*

See also, 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").

[8] It was also reasonably ascertainable that the State Permit could be enforceable by EPA. CWA section 309 authorizes EPA to enforce the terms of state issued NPDES permits. 33 U.S.C. § 1319.

EPA and the State issued pursuant to our respective authorities and consolidated pursuant to 40 C.F.R. § 124.4.[9] When EPA refers to the Oceanside Permit in the singular, it is referring to the consolidated State and Federal Permits. EPA worked closely with the RWQCB to issue the joint consolidated State and Federal Permits to avoid inconsistent provisions, but it was not necessary to refer to the Federal and State Permits separately until San Francisco challenged the RWQCB's decision on the State Permit with the State Water Board and Region 9's decision on the Federal Permit with the EAB.

C. EPA Appropriately Consolidated The Oceanside Permit As Authorized By 40 C.F.R. Section 124.4.

The Oceanside Permit is a consolidated Federal Permit and a State Permit pursuant to 40 C.F.R. § 124.4. As the Board held in its May 11, 2020 Order at 9-10:

> The NPDES permitting regulations contemplate that the EPA and approved state permitting authorities may agree to coordinate decision making and jointly issue

[9] As noted on page 5 of the Oceanside Permit:

> The California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), and the U.S. Environmental Protection Agency (U.S. EPA) find:
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> **A. Legal Authorities.** This Order serves as WDRs pursuant to California Water Code article 4, chapter 4, division 7 (commencing with § 13260). This Order is also issued pursuant to federal Clean Water Act (CWA) section 402 and implementing regulations adopted by U.S. EPA and Water Code chapter 5.5, division 7 (commencing with § 13370). *It shall serve as a National Pollutant Discharge Elimination System (NPDES) permit authorizing the Discharger to discharge into waters of the United States as listed in Table 2 subject to the WDRs and NPDES permit requirements in* this *Order (emphasis added).*

See also, Fact Sheet at F-9 to F-14 (setting forth the respective legal authorities for EPA and the RWQCB for the Oceanside Permit); and Fact Sheet at F-14 through F-36 setting forth the legal justification for various provisions of the permit.

See also, Draft Fact Sheet at F-35.

> 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,[10] 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 Decision making, 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.").FN3 In this case, EPA Region 9 and the California RWQCB consolidated the permitting 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).FN4 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.

In footnote 3, the Board found the following:

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

[10] As noted in EPA's June 22, 2020 Notice of Errata, although EPA and the RWQCB consolidated the Permit, Fact Sheet, and Response to Comments; EPA and the RWQCB did not consolidate their respective administrative records for the State and Federal Permits. EPA filed the Index of its record with the EAB on February 28, 2020, and the RWQCB is compiling a separate record for its permit decision as noted in the May 28, 2020 Letter to San Francisco from the California Attorney General's Office. This is consistent with 40 C.F.R. § 124.4(a) which allows for but does not require consolidation of the administrative records.

San Francisco's Supplement makes unfounded claims about the EPA's Notice of Errata. However, the fact that EPA and the RWQCB have separate administrative records for their independent permit decisions is consistent with the fact that EPA's approval of the Federal Permit and the RWQCB's approval of the State Permit were independent decisions that are reviewable and enforceable in separate state and federal proceedings.

In footnote 4, the Board also held:

> 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.

San Francisco's Supplement disagrees with the Board's holding on consolidation and argues that EPA cannot consolidate the Federal and State Permits because San Francisco claims that the Region did not follow the requirements for consolidation pursuant to 40 C.F.R. § 124. San Francisco makes numerous arguments that are not supported by the regulations. A summary of each claim San Francisco raises on pages 23-27 of its Supplement regarding consolidation and EPA's response to it is provided below.

San Francisco claims consolidation under 40 C.F.R. § 124.4 envisions the issuance of two physically separate permits and that the agencies must prepare each draft at the same time and coordinate on the draft permits during the public comment process citing 40 C.F.R. § 124.4(a)(1). However, 40 C.F.R. § 124.4 does not require two separate physical permits. EPA and the RWQCB prepared the Federal and State Permits together, used the same terms to avoid inconsistency, coordinated drafting the permits and issued a joint consolidated Draft Permit for public comment. Furthermore, as noted by the Board above in footnote 3 of its May 11, 2020 Order, San Francisco ignores 40 C.F.R. § 124.4(b) and (c) which allow for consolidation of federal and state permits that are issued pursuant to the same statute.

San Francisco claims EPA and the RWQCB did not consolidate the Federal and State Permits pursuant to 40 C.F.R. § 124.4 because the Federal and State Permits have different effective dates and due dates for deliverables, termination, and reapplication. San Francisco's concern about different termination dates is misplaced as the Federal and State Permit actually have the same reapplication and expiration dates.[11] San Francisco makes much about the burden of different effective dates and due dates for submittals. If San Francisco is concerned about different deadlines then it could simply provide the deliverables to both agencies at the earliest time, thus satisfying both permits. However, the fact that EPA and the RWQCB did not sign the Federal and State Permits at the same time does not preclude consolidation pursuant to 40 C.F.R. § 124.4.

San Francisco also asserts that since 40 C.F.R. § 124.4(a) allows consolidation of the administrative record, consolidation is not proper for the Federal and State Permits because EPA and the RWQCB have separate administrative records. Once again, San Francisco refers to 40 C.F.R. § 124.4(a) which allows consolidation of permits under separate programs, instead of 40 C.F.R. §§ 124.4(b) and (c) which allows for consolidation of federal and state permits under the same statute and should be read as a whole with 40 C.F.R. § 124.4(a-c). EPA and the RWQCB consolidated the Draft Permit, the response to comments, and the final permit terms, which San Francisco relied upon to file its challenge to the respective State and Federal Permits. The fact that the agencies

[11] *See*, pages 2 of the State Permit and 3 of the Federal Permit providing February 1, 2024 as the reapplication date and October 31, 2024 as the expiration date of both the Federal and State Permits.

signed the permits on different dates and relied upon separate administrative records does not preclude consolidation pursuant to 40 C.F.R. § 124.4.

San Francisco asserts that EPA may not consolidate permits pursuant to 40 C.F.R. § 124.4 without stating so in the record. However, as the Board noted in its May 11, 2020 Order quoted above, 40 C.F.R. § 124.4 does not require EPA to state that it is consolidating permits to do so. Thus, the Board should reaffirm its May 11, 2020 holding that the Federal and State Permits were appropriately consolidated pursuant to 40 C.F.R. § 124.4.

San Francisco also claims it was denied due process and fair notice because EPA did not state in the record that EPA was consolidating the permits pursuant to 40 C.F.R. § 124.4. San Francisco's due process claim is without merit or support. San Francisco had express notice of the Draft Permit and Fact Sheet which provide for separate review of EPA's and the RWQCB's permit decisions, notice of all of the Draft Permit terms, the ability to comment on them, and the opportunity to challenge the final Federal and State Permits in federal and state proceedings respectively, as it is doing.[12] San Francisco also had notice of the statutory authorities EPA and the RWQCB relied upon to support the Federal and State Permits and in fact challenged such authority. None of the examples that San Francisco provides in its Supplement regarding due process and fair notice are related to consolidation of permits or analogous to the Oceanside Permit.[13] San

[12] As noted above, San Francisco could have commented during the comment period regarding whether EPA and the RWQCB were consolidating the permits because San Francisco had notice in the Draft Permit and Fact Sheet that the RWQCB's and Region's decisions were separately reviewable in separate fora.

[13] EPA also has the authority to enforce State issued permits in authorized states. CWA section 309, 33 U.S.C. § 1319, expressly authorizes enforcement of state issued NPDES permits. Thus,

Francisco does not articulate a deprivation of life, liberty, or property as a result of allegedly not having notice. The only impacts San Francisco can articulate are different due dates for submissions required by the State and Federal Permits.

D. The Federal Permit Includes Permit Terms For All of the Westside Facilities, Including the CSDs, Because San Francisco Operates an Integrated Combined Sewer System That is Authorized Pursuant to CWA Section 402(q) and the CSO Control Policy.

EPA has authority to include all of the Westside Facilities in the Federal Permit because in order for EPA to permit discharges from the Deepwater Outfall, EPA must ensure the whole combined sewer system conforms to the CSO Policy as required by section 402(q).[14] 33 U.S.C. §

San Francisco's due process challenge based on consolidation is a veiled attempt to seek to invalidate both the Federal and State Permit if it prevails in its challenge in either the federal or state proceeding.

[14] EPA explained the statutory and regulatory background and the substantive requirements of the Combined Sewer Overflow (CSO) Control Policy ("CSO Control Policy") in its February 28, 2020 Response, but reiterates key provisions in this response to highlight the integrated nature of the CSO Control Policy as it relates to San Francisco's Westside Facilities. AR #96, 59 Fed. Reg. 18,688-18,698 (April 19, 1994). The Wet Weather Water Quality Act of 2000 amended the CWA to add section 402(q), which requires that permits for combined sewer systems "shall conform" to the CSO Control Policy. 33 U.S.C. § 1342(q)(1). The CSO Control Policy establishes Nine Minimum Controls ("NMCs") as the minimum technology-based requirements for combined sewer systems pursuant to 40 C.F.R. § 125.3. AR #96 at 18,688; 18,695. The relevant NMCs include: proper operation and maintenance; maximum use of the collection system for storage; maximization of flow to the plant for treatment; public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and monitoring to effectively characterize CSO impacts and the efficacy of CSO controls. *Id.* at 18,691. See AR #95a, NMC Guidance, Combined Sewer Overflows, Guidance for Nine Minimum Controls (EPA 832-B-95- 003, May 1995). The CSO Control Policy requires permittees with combined sewer systems to develop and implement a Long-Term Control Plan ("LTCP") that will ultimately result in compliance with the CWA, including CWA section 301(b)(1)(C). *Id.* at 18,688; 18,691. A primary objective of the LTCP is "to meet WQS, including the designated uses through reducing risks to human health and the environment by eliminating, relocating or controlling CSOs to the affected waters." *Id.* at 18,694. As described in the CSO Control Policy, the LTCP should be designed to allow cost-effective expansion or cost-effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses. *Id.* at 18,693. The LTCP must also include a Post

1342(q). The Westside Facilities, as an integrated system, are designed to maximize the discharge from the Deepwater Outfall and minimize exposure to sewage discharged from the CSDs.

San Francisco acknowledges the interrelated nature of the Westside Facilities. As San Francisco noted in its Supplement:

> San Francisco's system is neither designed nor operated according to a "State" and "federal" distinction. Rather, the Westside Facilities operate as one integrated, interdependent system; discharges occur at the nearshore CSD structures after the quantity of combined treated wastewater and stormwater discharging through the Deepwater Outfall is maximized. AR #17 at F-5–F-6. Operating the Deepwater Outfall in compliance with permit terms requires total reliance on infrastructure located across the Westside Facilities, including pump stations, transport-storage boxes, and conveyance pipes that perform the same precise functions for nearshore discharges under State jurisdiction. *Id.* To operate the Westside Facilities as designed, San Francisco must discharge to the Deepwater Outfall and, when conditions so necessitate, from the CSDs. Given the inherent design of San Francisco's combined sewer system, since 1979, the Westside Facilities have operated pursuant to a NPDES Permit jointly issued by Region 9 and the RWQCB that has never distinguished between "State" and "federal" terms.

Supplement at 4. Given the interrelated nature of the Westside Facilities, it is appropriate for EPA to include all of the Westside Facilities in the Federal Permit in order to implement the CSO Control Policy and CWA section 402(q). 33 U.S.C. § 1342(q).

San Francisco now asserts that, if the Oceanside Permit is both a Federal Permit and a State Permit, EPA does not have CWA authority to include the challenged conditions in the Federal Permit regarding narrative water quality based effluent limitations ("WQBELs"), the Long Term Control Plan Update, or the reporting of all overflows from the combined sewer

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Construction Compliance Monitoring Program adequate to verify compliance with WQS as well as to ascertain the effectiveness of CSO controls.

system,[15] as well as other CSD-specific requirements, because San Francisco claims that these provisions are not related to EPA's authorization of discharges from the Deepwater Outfall. Supplement at 16. As San Francisco itself acknowledges, and inherent in all CSO systems, the operation of the Westside Facilities cannot be so neatly segregated. Nor does the CWA require such a cramped reading.

First, CWA section 402(q), 33 U.S.C. § 1342(q), and the CSO Policy could not be implemented without evaluating San Francisco's entire combined system. EPA has authority to include all of the Westside Facilities in the Federal Permit because management of the onshore facilities, including the CSDs, directly affects the discharges from the Deepwater Outfall. The onshore actions are designed to maximize the discharge from the federal outfall and minimize discharges of sewage from the CSDs. The Nine Minimum Controls and the requirement to update the Long Term Control Plan require a holistic evaluation of the Westside Facilities as it relates to operations that impact both the federal outfall and the CSDs. For example, some of the Nine Minimum Controls directly relate to both the nearshore and offshore outfalls, such as operation and maintenance; maximum use of the collection system for storage; maximization of flow to the treatment plant and minimizing the amount of untreated sewage that is discharged from the federal outfall without undergoing secondary treatment. Although certain provisions relate to the CSDs which discharge to waters subject to the State's authorized NPDES program;

[15] With respect to sewer overflows, as noted in the Region's February 28, 2020 Response, San Francisco implicitly concedes there is both authority and record support for reporting sewer overflows related to operation and maintenance, regardless of whether they reach surface waters. See Pet. at 39, note 7. In fact, Petitioner acknowledged that reporting the occurrence, cause and location of sewer overflows from the combined sewer system is necessary "to facilitate EPA, Regional Water Board, and the public's evaluation of the effectiveness of the City's operation and maintenance of the collection system." AR #10b, RTC Attachment 1 A.9 at 5.

the performance and evaluation of the CSD requirements are necessary to determine 1) the effectiveness of the entire system, 2) whether San Francisco is in compliance with the CSO Control Policy, and 3) whether additional measures should be evaluated or required in the future to ensure compliance with water quality standards.[16] Thus, EPA could not comply with its federal permitting obligations under the CSO Control Policy and CWA section 402(q), 33 U.S.C. § 1342(q), without looking at the operation of the whole combined system including the CSDs, which includes provisions related to narrative WQBELs, the Long Term Control Plan Update, and the reporting of combined sewer overflows.[17]

E. The Board Does Not Have Authority To Review the State Permit and San Francisco's Characterization of the Oceanside Permit as a Joint Permit Does Not Expand the Board's Authority To Do So.

The Board should deny review of the claims in San Francisco's Supplement because it is a thinly veiled attempt to have the State Permit invalidated by the EAB. Even if the Board were to determine the Oceanside Permit is only a "joint permit" as requested by San Francisco, it would still be a Federal permit and a State permit issued pursuant to EPA's and the RWQCB's

[16] *See also*, AR # 17, F-12-13, F-18, F-25, F-30-31, and F-32.

[17] With respect to the narrative WQBELs, San Francisco incorrectly states at pages 16-17 of the Supplement that EPA had no basis other than state water quality standards for these provisions. In addition to CWA section 402(q), CWA section 403(c) provides authority for inclusion of narrative WQBELs in the Federal Permit. 33 U.S.C. § 1343. CWA section 403(c) prohibits issuance of a permit except in compliance with regulations for implementing ocean discharge criteria, which, in turn, specify that "[d]ischarges in compliance with . . . State water quality standards shall be presumed not to cause unreasonable degredation of the marine environment" (40 C.F.R. § 125.122(b)), thus authorizing issuance of a NPDES permit for such discharge. As discussed in the record, EPA also appropriately included narrative WQBELs in the Federal Permit to meet the requirements of CWA section 403(c). *See* Fact Sheet at F-14; AR # 123 (403(c) memo to file).

respective permitting authorities and would be reviewable and enforceable as such.[18] The Board cannot impact the reviewability or enforceability of the State's Permit by characterizing it is a "joint permit" as requested by San Francisco. The Board's May 11, 2020 Order's holding that the Board does not have authority to review the State Permit in the context of the Notice of Stay applies equally to the claims in San Francisco's Supplement.[19]

To allege a consequence from the joint versus consolidated nomenclature, San Francisco expresses concern about inconsistent enforcement actions based on differing interpretations of the State and Federal Permits. As noted by the Board in its May 11, 2020 Order, however, a potential future enforcement action is not reviewable by the EAB. May 11, 2020 Order at 9. In addition, San Francisco's concerns about differing interpretations in potential future enforcement actions are not based on EPA's characterization of the Oceanside Permit as two permits; by

[18] As the Board noted in its May 11, 2020 Order at 11: "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."

[19] As the Board noted in its May 11, 2020 Order, in the context of the Notice of Stay, neither Region 9 nor the Board have authority to review the State Permit. The Board found the following:

> 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).

Similarly, neither the State Water Board nor the state court has the authority to review the Federal Permit.

operation of law the permits may be reviewed and enforced in separate state and federal proceedings.[20]

In addition, the Board previously noted the following in its May 11, 2020 Order:

> 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.

May 11, 2020 Order at 9. The Board also noted the following:

> Because the EAB will not opine on theoretical future enforcement actions 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.

May 11, 2020 Order at 10.

Thus, the Board has already unequivocally held that San Francisco's alleged consequences regarding potential theoretical inconsistent enforcement actions are not redressable by the Board.

F. San Francisco's Supplement Fails to Raise Policy Considerations That Warrant Board Review.

San Francisco's alleged consequences from the alleged lack of notice do not raise policy considerations that warrant Board review. San Francisco's Supplement articulates three alleged consequences. First, San Francisco claims that "different effective dates create havoc,

[20] CWA section 309 explicitly authorizes federal enforcement of state issued permits. 33 U.S.C. § 1319. The potential for differing interpretations is always present in the enforcement framework of the CWA, though CWA section 309(g)(6) minimizes those impacts. 33 U.S.C. § 1319(g)(6).

uncertainty, and unnecessary expenditures of taxpayer funds i.e., requiring submittal of identical reports to Region 9 and the RWQCB for review and approval, but at different times. Similarly, the different effective dates trigger different permit reapplication and termination dates." Supplement at 30. As noted previously, if San Francisco is concerned about submittal dates for reports, San Francisco may simply submit them to both agencies at the earliest due date. There is no penalty for early submittal of reports. This inconvenience to San Francisco is not an important policy consideration or exercise of discretion that warrants Board review pursuant to 40 C.F.R. § 124.19(a)(4)(i)(B). Furthermore, San Francisco's statements of concern about different dates for reapplication and expiration are inaccurate, as both the Federal and State Permit have the same reapplication and expiration dates.[21]

Second, San Francisco alleges that the Board should require that the Permit clearly identify consolidation in the record, delineate the separate provisions of each permit, and identify the appropriate support for each provision within the corresponding agency's jurisdiction. San Francisco claims that "Board intervention is necessary to ensure the Region 'provide[s] greater clarity for permittees in future permitting decisions.'" However, San Francisco had knowledge of and the ability to comment on and challenge all of the terms of the Oceanside Permit, it had notice that each agency's permit decisions were reviewable in separate state and federal proceedings, and San Francisco in fact commented on the permit terms and sought review in both state and federal fora. In addition, the permit terms were the same to avoid conflicting requirements. Thus, San Francisco's concern about clarity for future permittees is not an

[21] *See*, page 2 of the State Permit and page 3 of the Federal Permit providing February 1, 2024 as the reapplication date and October 31, 2024 as the expiration date of both the Federal and State Permits.

important policy consideration or exercise of discretion that warrants Board review pursuant to 40 C.F.R. § 124.19(a)(4)(i)(B).

Finally, San Francisco articulates concern about potential inconsistent enforcement actions or legal interpretations in state and federal court. However, as noted by the Board, San Francisco may not use a permit challenge pursuant to 40 C.F.R. § 124.19 to get the Board to opine on a theoretical potential enforcement action. Thus, San Francisco's concerns about how the Federal and State Permits may be interpreted in future enforcement actions are not an important policy consideration or exercise of discretion that warrants Board review pursuant to 40 C.F.R. § 124.19(a)(4)(i)(B).

III. CONCLUSION

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

July 23, 2020

Respectfully submitted,

For EPA

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response is less than 10,000 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 San Francisco's Supplement To 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.

July 23, 2020

Respectfully submitted,

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