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

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

CITY AND COUNTY OF SAN FRANCISCO'S REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

REGULATIONS

I. INTRODUCTION

In its Motion for Partial Reconsideration or, in the Alternative, Motion for Leave to Amend Petition for Review ("Motion"), the City and County of San Francisco ("San Francisco") seeks the opportunity to challenge the consequences arising from the United States Environmental Protection Agency Region 9's ("EPA Region 9" or "Region") *post hoc* articulation of the Two Separate Permits Theory. Had the Region raised the concept of two separate permits during the roughly six-year permitting process leading to the adoption of San Francisco's National Pollution Discharge Elimination System ("NPDES") permit no. CA0037682 ("Oceanside Permit" or "Permit"), San Francisco would not be in the position of requesting leave to amend its Petition for Review ("Petition"). Instead, the Region provided no notice of its Two Separate Permits Theory prior to adoption of the Oceanside Permit. As a result, we are here now, asking the Environmental Appeals Board ("Board") to provide an opportunity to remedy the deficiencies resulting from the Region's actions.

EPA Region 9 alone is responsible for the circumstances at the heart of San Francisco's Motion. The Region could seek to cure the procedural morass it has created by acknowledging its error and properly supplementing the administrative record, including by providing adequate notice and opportunity to comment on the claimed intent to issue two separate permits and on the basis and ramifications of the Two Separate Permits Theory. Instead, EPA Region 9 attempts to game the system. Worse than its reliance on a flimsy administrative record to support its increasingly convoluted arguments attempting to rationalize its position, are the Region's efforts to silence San Francisco's legitimate objections and concerns by seeking to preclude review of the substantive issues by the Board. The Board must reject this gamesmanship and put a stop to EPA Region 9's hide-the-ball approach to NPDES permitting by granting San Francisco the opportunity to amend its Petition to challenge the Two Separate Permits Theory.

Rather than respond to the merits of San Francisco's Motion, EPA Region 9 raises a host of specious arguments in its opposition. First, the Region erroneously claims that the Board lacks authority under 40 C.F.R. § 124.19 to hear San Francisco's Motion. The Region also erroneously claims San Francisco has not met its burden to identify the demonstrable error of fact and law in the Board's order denying San Francisco's February 2020 Motion for Leave to Amend.

In a failed effort to excuse all of its missteps, the Region seeks to rely on the consolidation provisions in 40 C.F.R. § 124.4 to provide justification for issuance of the Oceanside Permit and support for the Two Separate Permits Theory. This position, however, is not supported by the facts or the law and highlights the Region's flagrant disregard for basic principles of administrative procedure and due process. In an effort to defend its position, the Region not only disingenuously claims San Francisco is now precluded from challenging the Two Separate Permits Theory because it should have done so in its February Motion, but it also misleadingly claims that San Francisco effectively had notice of the theory when it challenged the Oceanside Permit in State and federal forums. Finally, the Region pursues an argument regarding the "interrelatedness" of San Francisco's combined sewer system that is wholly irrelevant to the Board's decision on San Francisco's Motion and, in fact, undermines the Region's own Two Separate Permits Theory.

San Francisco's Motion demonstrates the Board's error and is supported by the law and facts. Moreover, EPA Region 9 fails to raise any legitimate arguments in opposing the Motion. Therefore, the Board should grant San Francisco's request for reconsideration of its denial of San Francisco's February 2020 Motion for Leave to Amend, or in the alternative, grant San Francisco leave to amend its Petition.

II. RELEVANT PROCEDURAL HISTORY

While San Francisco's prior pleadings before the Board detail the procedural history relevant to this Motion, the following timeline provides the core dates.

- December 10, 2019: EPA Region 9 approved the same Oceanside Permit previously approved by the San Francisco Bay Regional Water Quality Control Board ("California RWQCB") on September 11, 2019. AR# 17.
- January 13, 2020: San Francisco timely filed its Petition with this Board contesting three permit conditions. At the time that San Francisco filed its Petition, it understood EPA Region 9's position to be that the Oceanside Permit was a single, jointly issued permit. San Francisco had no knowledge of EPA Region 9's yet to be articulated Two Separate Permits Theory. Dkt. No. 1.
- February 7, 2020: EPA Region 9 issued a Notice of Stay of Contested Permit Conditions. Dkt. No. 2. This notice represents the first time in the roughly six-year permitting process for the Oceanside Permit that EPA Region 9 articulated its Two Separate Permits Theory and claimed the Oceanside Permit consisted of separate State and federal NPDES permits. *Id*. at 2.
- February 28, 2020: San Francisco filed a Motion to Stay Contested Permit Conditions, or in the Alternative, Motion to Remand Notice of Stay ("Motion to Stay"). Dkt. No. 5. San Francisco contemporaneously filed a Motion for Leave to Amend Petition for Review ("Motion to Amend") separately requesting the opportunity to amend the Petition to include a substantive challenge to EPA Region 9's newly minted Two Separate Permits Theory. *Id.*

- March 16, 2020: EPA Region 9 filed a Response to San Francisco's Motion to Stay and Motion to Amend. Dkt. No. 8. In its Response, EPA Region 9 claimed, for the first time, that the Oceanside Permit was consolidated under 40 C.F.R. § 124.4. Dkt. No. 8 at 1, 3, 6-8, 10.
- May 11, 2020: The Board issued an Order denying both San Francisco's Motion to Stay and Motion to Amend ("Order"). Dkt. No. 14.
- May 21, 2020: Concerned by the overly narrow basis by which the Board denied its February Motion to Amend, San Francisco filed its Motion for Partial Reconsideration or in the alternative Motion for Leave to Amend Petition for Review ("Motion"). Dkt. No. 15.

III. ARGUMENT

In its Motion, San Francisco provided a sound legal and factual basis for the Board to grant the requested leave to amend the Petition to address the substantive and procedural deficiencies in the Oceanside Permit flowing from EPA Region 9's *post hoc* adoption of the Two Separate Permits Theory. The Region utterly fails to respond to, much less rebut, many of San Francisco's substantive arguments supporting its request for leave to amend. Instead, EPA Region 9 spends the majority of its response cherry picking and highlighting Board statements from the May 2020 Order that are irrelevant to the limited scope of San Francisco's motion, *i.e.*, a request for reconsideration or, in the alternative, for leave to amend. *See* Opp. at 1-6. The Board should not be sidetracked by EPA Region 9's attempts at distraction. The Board has the authority to, and should, grant San Francisco's request for reconsideration, or in the alternative, its request for leave to amend.

A. Contrary to EPA Region 9's Assertion Otherwise, 40 C.F.R. § 124.19 Provides the Board Ample Authority to Hear San Francisco's Motion.

The Board has broad authority to adjudicate "[a] request for an order or other relief" by written motion. 40 C.F.R. § 124.19. Pursuant to Section 124.19, and the Board's independent authority to manage its docket, the Board has the ability to grant leave to amend the Petition. *See, e.g., In re Peabody W. Coal Co.,* 14 E.A.D. 712, 716 (EAB 2010) (Order Granting Motion for Voluntary Remand) (recognizing, before the codification of Section 124.19(f) – which explicitly addressed motion practice – the Board's broad discretion "to manage its permit appeal docket by ruling on motions presented to it for various purposes . . . "). Here, the procedural relief sought by San Francisco – *i.e.*, an opportunity to brief the substantive issues before this tribunal – furthers justice and equity. In such circumstances, the Supreme Court has noted the authority of administrative agencies to grant relief. *Cf. Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("[I]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."); *see also* 40 C.F.R. § 124.19(n).

San Francisco was forced to seek leave to amend its Petition solely because of EPA Region 9's effort to redefine the Oceanside Permit after its issuance and, again, after San Francisco filed its Petition with the Board. Having caused San Francisco's current predicament, EPA Region 9 now seeks to use every possible avenue to avoid the consequence of its errors, including the outright denial of the Board's ability to adjudicate the relevant issues.

As part of its assault on administrative procedure and equity, the Region claims that San Francisco cannot seek reconsideration or request leave to amend because such motions are not specifically identified as permissible under 40 C.F.R. § 124.19. EPA Region 9's argument is without any merit and the Board should reject it. First, Section 124.19 does not enumerate any

particular list of motions as permissible. To the contrary, the drafting of Section 124.19 clearly provides the Board with considerable discretion to hear a range of motions. For example, subsection 124.19(f)(1) allows filing of motions seeking "an order or other relief." 40 C.F.R. § 124.19(f)(1). Further, the fact that subsection 124.19(f)(6) provides a specific procedure for the Board to respond to a "motion for a procedural order" indicates that the scope of the Board's authority *also* extends to substantive motions not otherwise enumerated. Further, subsection 124.19(n) confers the Board with authority to "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal . . . ." 40 C.F.R. § 124.19(n). These provisions provide the Board with ample authority to grant a request for leave to amend San Francisco's Petition. In fact, the Board has relied on these regulatory provisions as a basis for its authority to act on numerous motions not explicitly articulated by Section 124.19. *See e.g.*, *In re Peabody W. Coal Co.,* 14 E.A.D. 712, 716 (EAB 2010) (Order Granting Motion for Voluntary Remand) (articulating Board's inherent authority to rule on motions and fill other "gaps" in its procedural rules); *In re Town of Newmarket, N.H.*, 16 E.A.D. 182, 255-56 (EAB 2013) ("Board has full authority and discretion to manage its docket" pursuant to § 124.19(n)); *Id*. at 256, n.5 (citing cases articulating the "Board's inherent authority to rule on motions and fill other 'gaps' in its procedural rules" and "manage its docket [under] general and well-established principles of administrative law").

Next, EPA Region 9 incorrectly asserts that San Francisco's request for reconsideration should be denied because the Board's Order "is not a final disposition subject to reconsideration pursuant to 40 C.F.R. § 124.19(m)." Opp. at 12. San Francisco, however, cited specific Board precedent as supporting a request for reconsideration of an order on a motion (as opposed to a final dispositive order). As described in San Francisco's Motion, *In re City of Taunton*, NPDES

Appeal No. 15-08 (Order Denying Motion for Reconsideration of Order on Pending Motions and Setting Oral Argument) (EAB Nov. 24, 2015) and *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 (Order Denying Motion for Reconsideration of Order Denying Motion for Leave to Supplement Briefing) (EAB Mar. 16, 2011) provide examples of the Board ruling on motions for reconsideration relating to orders issued on motions. Mot. at 6. San Francisco cited these orders to establish clear precedent for the Board's authority. EPA Region 9's opposition simply ignores them. The Board must not tolerate EPA Region 9's failure to address the substance of San Francisco's Motion nor its attempts to misrepresent the Board's authority to hear San Francisco's Motion.[1]

Contrary to EPA Region 9's disingenuous claims otherwise, the Board has ample authority to grant San Francisco's request for reconsideration, or in the alternative, request for leave to amend, and should allow San Francisco to amend its Petition.

B. San Francisco's Motion Clearly Identifies the Demonstrable Errors of Law and Fact the Board Made in Denying San Francisco's Motion for Leave to Amend.

EPA Region 9's repeated claims that San Francisco did not demonstrate that the Board committed a "demonstrable error of fact or law" in denying San Francisco's request for leave to amend are simply wrong. *See e.g.*, Opp. at 4, 6, 7, 9, 12, 13, 14. San Francisco clearly identified the error; EPA Region 9 chose to ignore it. As San Francisco explained:

> [T]he Board's decision to deny San Francisco's Motion to Amend was erroneous. The Denial was incorrectly predicated on an assumption that the Motion to Amend was substantively linked to the Motion to Stay and had no independent basis. As such, the

[1] In February 2020, the Region argued the Board lacked authority to hear San Francisco's Motion to Stay (Dkt. No. 8 at 6), but chose not to argue lack of authority with respect to the San Francisco's Motion for Leave to Amend. Accordingly, the Region should be estopped from questioning the Board's authority to hear a motion for leave to amend now. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989) (failure to argue in brief in opposition is a waiver of argument); *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (failure to address issue in opposition deemed waiver).

> Board failed to consider how the Two Permits Theory was inextricably relevant to deficiencies in (i) the administrative record required to support EPA Region 9's issuance of the permit conditions contested by the Petition, and (ii) the process underlying EPA Region 9's purported consolidation of the Permit.

Mot. at 6.[2]

EPA Region 9's opposition does not mention, let alone respond to, San Francisco's inappropriate linkage argument. By failing to address this inappropriate linkage, EPA Region 9 effectively concedes the Board's demonstrable error of fact and law. *See City of Canton, Ohio v. Harris*, 489 U.S. at 383 (failure to argue in brief in opposition is a waiver of argument); *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d at 1037 (failure to address issue in opposition deemed waiver). Accordingly, the Board should grant San Francisco's Motion and allow San Francisco leave to amend its Petition to challenge EPA Region 9's belated reliance on the Two Separate Permits Theory as justification for its glaring errors.[3]

C. EPA Region 9 Cannot Rely on 40 C.F.R. § 124.4's Consolidation Provision to Overcome Its Failures That Occurred Prior to Issuance of the Oceanside Permit.

EPA Region 9 belatedly argues that the Oceanside Permit was consolidated under Section 124.4 in an effort to avoid addressing substantive arguments San Francisco raises in its Motion. Consolidation, however, is not a cure-all for the Region's errors. Even if this is in fact what the Region did, it would not solve the Region's non-compliance with mandated administrative procedures or its violations of San Francisco's due process rights. It cannot

[2] As explained in its Motion, the Board's inappropriate linkage incorrectly presumed that the Region acted within the scope of its authority regardless of whether there is one Permit or two, and that the Region's purported consolidation of the Permit under 40 C.F.R. § 124.4(c)(2) was properly executed. Mot. at 9-16.

[3] The Region's reference to disagreement over consolidation requirements is irrelevant and the Board should ignore it. Opp. at 13. While San Francisco outlines procedural deficiencies associated with the Region's purported consolidation, San Francisco's Motion solely challenges the Board's denial of its Motion for Leave to Amend based on the Board's inappropriate linkage of that motion to the February Motion to Stay. Mot. at 6-8. San Francisco has in fact demonstrated the Board's error, which is not, as the Region suggests, predicated on a "disagreement . . . regarding the appropriate reading of the regulations." Opp. at 13.

explain away the discrepancies between EPA Region 9's and the California RWQCB's positions on the "consolidated" record. Nor can the Region reasonably maintain its position that consolidation of separate State and federal permits occurred when it admits that there are "no state-only provisions of the Oceanside Permit;" this plainly undermines the existence of a separate State-only permit. Opp. at 9. And, it does not remedy the problems caused by the Region's failure to timely raise consolidation.

1. Consolidation Does Not Excuse the Region's Failure to Raise the Two Separate Permits Theory During the Permitting Process.

EPA Region 9 attempts to justify its efforts to deny San Francisco the opportunity to amend its Petition to challenge the Two Separate Permits Theory by arguing the consolidated permitting provisions under 40 C.F.R. § 124.4 did not "require" the Region to disclose it was proceeding with a consolidated permit throughout the Oceanside Permit's roughly six-year permitting process. Opp. at 7 ("40 C.F.R. § 124.4 does not *require* EPA to notify San Francisco that it is consolidating the Federal and State Permits . . . .") (emphasis added).[4] The Board must reject the Region's argument and hold that the Region must explicitly notify the permittee, and the public, when issuing a consolidated permit pursuant to Section 124.4.

The Region was obligated to disclose that it was proceeding under Section 124.4's consolidated procedures in the Fact Sheet for the Oceanside Permit. The regulations mandate that the Fact Sheet "set forth the principal facts and the significant factual, *legal*, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8(a) (Emphasis added). They also require the Fact Sheet to include a "brief summary of the basis for the draft

[4] The Region wrongly claims that the Board "held in its May 11, 2020 Order [that] 40 C.F.R. § 124.4 does not require EPA to notify San Francisco that it is consolidating the Federal and State Permits." Opp. at 7. The Board made no such ruling. Rather, the Board held that "Section 124.4 . . . does not specify required procedures to consolidate; nor does Section 124.4 require any particular documentation of the agreement or intent to consolidate." Order at 5, n. 4.

permit conditions including references to applicable statutory or regulatory provisions" and a "description of the procedures for reaching a final decision on the draft permit." 40 C.F.R. § 124.8(b)(4), (6). The Fact Sheet itself claimed that it provided "the legal requirements and technical rationale that serve as the basis for the requirements of this Order" (AR #17 at F-3) and provided a description of the "Legal Authorities" supporting issuance of the Permit. *Id.* at F-4. Despite these regulatory requirements, and representations about the scope of the Fact Sheet, EPA Region 9 remained entirely silent with regard to the use of a consolidated process or its reliance on 40 C.F.R. § 124.4.

Further, regardless of what Section 124.4 may independently require, basic administrative procedure and due process both dictate that EPA Region 9 notify San Francisco and the public of consolidation under Section 124.4 and of its Two Separate Permits Theory *during the permitting process*. *See e.g.*, 40 C.F.R. § 124.10(d)(1)(x) (public notice must include "[a]ny additional information considered necessary or proper."); *Natural Res. Defense Council v. U.S. E.P.A.*, 279 F.3d 1180, 1187 (9th Cir. 2002) (adequate notice depends upon "whether interested parties reasonably could have anticipated the final rulemaking from the draft permit") (citation omitted); *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) ("the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table'"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (citations omitted). EPA Region 9 provides no

substantive response to its failure to meet basic administrative procedure and due process requirements.

As the Board recognizes, San Francisco had no notice that two separate permits were being issued, let alone that EPA Region 9 was relying on the Two Separate Permits Theory, *during the permitting process*. *See* Order at 11, n. 10. Despite the critical consequences of separate State and federal permits to EPA Region 9's administration of the Oceanside Permit, the Region waited until roughly two months after issuance of the Permit to raise the Two Separate Permits Theory. *See* Dkt. No. 2. The Board should not condone the Region's failure to raise such essential information until after the conclusion of the public comment process. Likewise, the Board should disregard the Region's reliance on a questionable reading of Section 124.4 as a basis to jettison its remaining obligations under Part 124 and deprive San Francisco of its due process rights. Instead, the Board should grant San Francisco's Motion and allow San Francisco leave to amend its Petition to address its concerns with the Two Separate Permits Theory.

2. The Agencies' Actions Undermine the Region's Claims of Consolidation.

In an effort to fortify its explanation about the administrative process undertaken in adopting the Permit, EPA Region 9 claims that the Oceanside Permit "has a consolidated administrative record." Opp. at 3. In stark contrast to that statement, counsel for the California RWQCB admits there are differences between the administrative record in the state court proceedings and the administrative record before the Board. In correspondence to San Francisco counsel regarding the preparation of the administrative record for the state court appeal of the Oceanside Permit, the California RWQCB counsel explains as follows:

> I am confident that our record would be much more extensive than the EAB record. My understanding is that the EAB record does not include a great number of documents in our possession . . . It is

> also true that the EAB record include some documents that would not be in our record.

Att. 1 at 2 (May 28, 2020 Letter from California RWQCB Counsel to San Francisco Counsel). Counsel for the California RWQCB also explains that "records in California state court cases handled by my office [Attorney General of California] are generally more comprehensive than records in federal review cases." *Id.* These statements refute EPA Region 9's claims of a "consolidated administrative record" and undermine the Region's efforts to rely on consolidation under Section 124.4 as a basis to justify its blatant errors.

As San Francisco explains in its Motion, by definition, consolidation envisions issuance of two separate permits. Mot. at 15-16. By asserting "[t]here are no state-only provisions of the Oceanside Permit" (Opp. at 9), EPA Region 9 effectively concedes that the Oceanside Permit was never two separate permits. If there are "no state-only provisions," there cannot be a standalone State-only permit.[5] Rather, consistent with San Francisco's original understanding, the Oceanside Permit is a single jointly issued permit. The Board should afford San Francisco the opportunity to address this fundamental issue of one versus two permits by granting leave to amend its Petition.

3. <u>The Region's Untimely Claim of Consolidation Should Preclude It from Relying on Consolidation to Support the Purported Issuance of Two Separate Permits.</u>

The Board should disregard EPA Region 9's attempt to rely on the consolidation provision at 40 C.F.R. § 124.4 to support its ill-timed claim that the Oceanside Permit is in fact two separate permits. Even if consolidation may not need to adhere to specific procedures, and

[5] As San Francisco's Petition highlights, the Region's claim that there are separate State and federal permits cannot be reconciled with its justification of the Permit terms that require regulation and reporting of isolated sewer overflows. *See* Dkt. No. 1 at 35 ("Nowhere in the response [to San Francisco's comments on the draft permit] did the Region assert it had independent federal authority over isolated sewer overflows.").

may not require formal documentation (Order at 5, n. 4), that does not excuse EPA Region 9's complete failure to mention consolidation at any point prior to opposing San Francisco's Motion for Stay, including during the public comment period and in the Oceanside Permit's Fact Sheet.

The consolidation provision at 40 C.F.R. § 124.4 comes within subpart A of Part 124, which:

> [D]escribes the steps EPA will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits. Subpart A also covers assembling an administrative record, responding to comments, issuing a final permit decision, and allowing for administrative appeal of the final permit decisions.

40 C.F.R. § 124.1(b). Despite the fact that provisions of subpart A apply to actions occurring prior to permit issuance, the Region waited to raise consolidation until forced to respond to San Francisco's February 2020 Motion for Stay, months after the Oceanside Permit was issued. The Board should not endorse the Region's attempts to turn the provisions of subpart A of Part 124 on their head, and use them as a basis to defend the Region's failure to comply with its administrative and due process obligations, rather than as road map for the Region to follow during the permitting process.

Moreover, like its approach to so many of the arguments in the Motion, EPA Region 9 provides no response to the procedural deficiencies San Francisco identifies (Mot. at 14-16) that preclude the Region from relying on consolidation as a basis to justify its belated claims regarding two separate permits. The Region's failure to respond to the procedural deficiencies San Francisco raises is tantamount to an admission that it cannot rely on a *post hoc* argument that consolidation supports the purported issuance of separate State and federal permits. *See City of Canton, Ohio v. Harris*, 489 U.S. at 383; *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d at 1037.

D. San Francisco's February 2020 Request for Leave to Amend Is Not a Basis for Denying San Francisco's Motion.

EPA Region 9 misconstrues the relief sought by San Francisco's February 2020 Motion for Leave to Amend when it claims the February request somehow bars San Francisco from seeking partial reconsideration or leave to amend now. *See* Opp. at 9, 12, 13. San Francisco's February Motion was limited – it only requested permission to amend its Petition to challenge the Two Separate Permits Theory *in the future*; it contained no substantive or procedural challenges to the theory. *See* Dkt. No. 1 at 2 (Introduction), 16 (Request for Relief).

The Board denied San Francisco's February 2020 request for leave to amend based on the erroneous linkage of the separately requested Motion for Stay and Motion for Leave to Amend, *i.e.*, that San Francisco requested leave to amend solely to support arguments related to its Motion for a Stay. *See* Mot. at 6-8. The Board's linkage of the two issues misinterpreted the relief requested and was an inappropriate basis for denying the request for leave to amend.

San Francisco's Motion contained examples of the types of challenges it would bring to the Two Separate Permits Theory, once granted leave to amend its Petition, to illustrate that its February 2020 Motion for Stay and Motion for Leave to Amend sought separate, discrete, and unrelated types of relief. Rather than an exhaustive list of challenges to the Two Separate Permits Theory, San Francisco's Motion identified *some* of the challenges it intends to raise once granted leave to amend. *See* Mot. at 10 ("The following paragraphs illustrate *some of the evident deficiencies as examples of the types of arguments* that San Francisco must be permitted to raise in an amended Petition.") (Emphasis added). In neither its February Motion nor its present Motion has San Francisco had the opportunity to raise, much less fully brief, all of its procedural and substantive challenges to the Two Separate Permits Theory.

EPA Region 9 does not directly respond to the deficiencies in the administrative record. Nor does it address San Francisco's lack of fair notice, or the due process violations caused by the Region's *post hoc* adoption of the Two Separate Permits Theory. Trying to sidestep a response, the Region argues "San Francisco had the opportunity to comment on and challenge all of the draft and final permit terms[]" and "San Francisco had the opportunity to question EPA's authority for the challenged permit terms." Opp. at 7. These arguments miss the mark. Without leave to amend its Petition, San Francisco will be denied the opportunity to challenge both the application and ramifications of the Two Separate Permits Theory to such terms. Finally, EPA Region 9's assertion that the Board has already considered and ruled on all of San Francisco's challenges to the Two Separate Permits Theory is disingenuous as best. Opp. at 13 ("the Board considered the issues raised and ruled upon them in the May 2020 Order."). Because San Francisco's February Motion contained no discussion of its challenges to the Two Separate Permits Theory in the context of its request for leave to amend, it was not possible for the Board to have ruled on such challenges in its May 2020 Order.

Accordingly, the Board should grant San Francisco's request for reconsideration or, in the alternative, leave to amend, to both allow San Francisco the chance to raise all of its concerns.

E. San Francisco Properly Appealed the Contested Permit Terms in Two Separate Forums Because There are Two Separate Permitting Authorities, Not Two Separate Permits.

EPA Region 9 incorrectly claims, "San Francisco availed itself of the opportunity to challenge the Federal Permit and State Permit by filing separate challenges to the State Permit through the State Water Board and the Alameda Superior Court and the Federal Permit via its Petition to the EAB." Opp. at 11. San Francisco did no such thing. Rather, San Francisco challenged the *single* Oceanside Permit in two forums because both the California RWQCB and

EPA Region 9 were involved in jointly issuing the Permit, not because it believed there were two separately issued permits. As the Board recognized, "[t]he California RWQCB authorization must be challenged through the State's administrative and judicial process" while "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." Order at 5. In fact, if San Francisco had not challenged the Oceanside Permit in both forums, it would have exposed itself to a risk that the California RWQCB or the Region would argue that San Francisco waived its right to appeal the challenged permit terms.

EPA Region 9 twists the relevant procedural history in an effort to construct a misleading argument that San Francisco somehow had advance notice of the Two Separate Permits Theory. The history of San Francisco's challenge to the Oceanside Permit demonstrates the weakness of the Region's position and, in fact, confirms that San Francisco had every reason to believe the agencies adopted a single, jointly issued Permit. The California RWQCB adopted the Oceanside Permit on September 11, 2019, two months before EPA Region 9 issued the Permit in December 2020. AR #15. As mandated by Water Code § 13320, on October 11, 2019, San Francisco filed a protective appeal of the Oceanside Permit to the State Water Resources Control Board ("State Board"). AR #140. Despite the lack of any EPA Region 9 action on the Permit, the California RWQCB insisted that the Permit would be effective as of November 1, 2019. AR #134. As the alleged November 1 effective date approached, and without any action by the Region to approve the Permit, San Francisco filed a Petition for Writ of Mandate in California Superior Court, accompanied by an Application for Order to Show Cause Re: Preliminary Injunction and Ex Parte Temporary Restraining Order ("TRO"). See Att. 2.[6] In its TRO, San Francisco clearly

[6] On October 30, 2019, a day before the TRO hearing, the California RWQCB filed a Motion to Change Venue based on Water Code § 13361(b) and Code of Civil Procedure § 394. At the October 31, 2019 hearing on the

articulated its position – based upon the administrative record and public permitting process conducted by the California RWQCB and EPA Region 9 – that there was only a *single* permit stating, for example:

- "The Regional Board and the EPA conducted an administrative process intended to jointly issue the 2019 Permit. However, it has been 49 days since the Regional Board's September 11 adoption hearing and the EPA has not yet approved, issued, or signed *the 2019 Permit*." Att. 2 at 2 (Emphasis added).
- "Absent EPA action to issue the 2019 Permit without change, there is <u>no</u> final 2019 Permit and by legal necessity the 2009 Permit remains the currently effective permit. This is the only lawful conclusion absent EPA action approving, issuing and signing the 2019 Permit without changes." *Id.* at 7 (Emphasis in original).
- "Contrary to all plain evidence, the Regional Board is trying to arbitrarily create a fiction that there are <u>two</u> permits – one federal, one state – that were subject to public notice, comment, development of an administrative record and vote by the Regional Board members. … The Petition for Writ of Mandate and Complaint for Declaratory Relief further identifies numerous instances where the terms of the 2019 Permit clearly demonstrate there is one permit, to be jointly issued and administered concurrently by the Regional Board and the EPA." *Id.* at 16 (Emphasis in original).

TRO, the judge in the San Francisco Superior Court declared that that the court was prohibited from taking *any* action on the TRO due to the California RWQCB's motion and recommended that the parties stipulate to change venue before the then-scheduled December 3, 2019 hearing. Shortly thereafter, the parties stipulated to change venue to Alameda Superior Court and, with the passage of the California RWQCB's claimed November 1, 2019 effective date, San Francisco chose not to renew the TRO but maintains its substantive challenge to the permit.

Because EPA Region 9 had not yet adopted the Permit, the only avenue for San Francisco to preserve its right to challenge the Permit and the California RWQCB's alleged November 1 effective date was to file suit in state court. After the State Board dismissed San Francisco's October 11 Petition and the Request for Stay, San Francisco filed an amended Petition for Writ of Mandate on December 16, 2019. AR #144. When EPA Region 9 issued the Permit on December 10, 2019 (AR #17), San Francisco filed its Petition for Review before the Board. Dkt. No. 1.

San Francisco's multi-front challenges to the Permit reflects its understanding of the Permit's dual permitting authorities and each agency's respective regulatory regime for appealing a jointly issued NPDES permit. Contrary to EPA Region 9's claims otherwise, the Board should read nothing more into than that. As evidenced by the TRO, San Francisco's State court challenge assumed there was a single jointly issued Oceanside Permit. San Francisco could not possibly have known of the Region's Two Separate Permits Theory at the time of its State court filings because the Region did not announce the theory until several months later. The Region also ignores the reality that the scope and substance of San Francisco's challenges would have been different had it known that the Region views the Permit as separate State and federal permits. Without notice of the Two Separate Permits Theory, San Francisco was unable to provide relevant comments during the public comment period nor mount effective challenges to the Permit in either forum. Accordingly, the Board should grant San Francisco's Motion and allow it the opportunity to amend its Petition so it has the chance to present its challenges to the Two Separate Permits Theory to the Board.

F. The "Interrelated Nature" of San Francisco's System Is Not a Basis for EPA Region 9 to Shirk Its Responsibility to Comply with Its Basic Administrative Procedure and Due Process Obligations.

EPA Region 9's efforts to argue the interrelated nature of the Deepwater Outfall and the nearshore combined sewer discharges (Opp. at 9-11) were unnecessary to resolution of the issues raised in this Motion. San Francisco agrees that its Westside system operates as a single combined system. *See e.g.*, Mot. at 4; Dkt. No. 1 at 3-7. In fact, San Francisco maintains that unless and until the administrative record is amended to explain how separate permits are intended to operate and what conditions are appropriate for each of the permits, this interrelatedness precludes EPA Region 9's *post hoc* reliance on the Two Separate Permits Theory to justify its attempted division of the Oceanside Permit into separate federal and State-only NPDES permits.

San Francisco disagrees that the Oceanside Permit is actually two separate permits and the Board has yet to make any decision to that effect. *See* Order at 11, n. 10 ("[W]e need not resolve whether San Francisco's NPDES authorizations constitute one permit or two."). Accordingly, EPA Region 9's suggestion that the Board already made a "determination regarding the two permit issue" is misleading. Opp. at 9.

Perhaps most egregious is EPA Region 9's attempts to use the interrelated nature of the Oceanside Permit to argue that it is not required to provide "support in the administrative record how each provision of the Federal Permit is related to the federal outfall." Opp. at 12. The Region cites no authority for this proposition because none exists. As San Francisco's Motion explains, both due process and basic administrative procedure mandate that the Region provide support in the administrative record explaining the basis for each of contested permit conditions in the so-called "Federal Permit." Mot. at 9-16. Apparently recognizing the weakness of its argument, EPA Region 9 not only does not even attempt to justify how the interrelated nature of

San Francisco's system allows the Region to disregard its obligations to comply with the procedural requirements of 40 C.F.R. Part 124 and fundamental principles of due process, but also completely undermines its position by asserting that there are no State-only provisions in the permit. Opp. at 9. The bottom-line is that EPA Region 9's claims regarding the interrelatedness of San Francisco's system are a red-herring that the Board should ignore. Basic administrative procedural requirements and due process principles support the Board granting San Francisco's Motion and allowing it the opportunity to amend its Petition to incorporate all of its challenges to the Two Separate Permits Theory. Mot. at 13-14.

The interrelated nature of San Francisco's system is not unique. Many municipal NPDES permit holders have jointly issued permits for their interrelated systems. The Board's decision here will impact those permit holders as well. If the Board does not demand transparency during the permitting process, these permittees could find themselves in the unenviable position that San Francisco now faces. Such permittees could spend years negotiating a seemingly jointly issued permit, only to learn after the permit is issued that they have two separate permits and then have to face the practical implications of that unilateral finding by the agency. Without such knowledge during the permitting process, these permittees, like San Francisco, will likely not have an administrative record that supports the two separate permits. If the Board stymies San Francisco's chance to challenge the Region's hide-the-ball approach to permitting, these permittees could likewise be left without due process rights or appropriate recourse.

IV. CONCLUSION

San Francisco respectfully requests that the Board reconsider its denial of San Francisco's Motion to Amend Petition for Review, or in the alternative, grant San Francisco's Motion for Leave to Amend Petition for Review because San Francisco has demonstrated the Board's error in denying its request for leave to amend the Petition while EPA Region 9 has

provided no valid basis for denying San Francisco's Motion. Such action by the Board will ensure compliance with basic administrative procedural requirements afforded under 40 C.F.R. Part 124 and protect San Francisco's due process rights.

V. STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

In accordance with 40 C.F.R. §§ 124.19(d)(1)(iv) & (f)(5), the undersigned counsel hereby certify that this Reply Brief does not exceed 7,000 words. Not including the caption, table of contents, table of authorities, signature block, statement of compliance with the word limitation, list of attachments, and certification of service, this Motion contains 6,642 words.

VI. LIST OF ATTACHMENTS

Attachment 1: May 28, 2020 Letter from California RWQCB Counsel to San Francisco Counsel

Attachment 2: October 30, 2019 Application for Order to Show Cause Re: Preliminary Injunction and Ex Parte Temporary Restraining Order

Dated: June 15, 2020

Respectfully submitted,

/S/ J. Tom Boer

J. Tom Boer
Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, California 94111
Telephone: (415) 975-3700
Email: jtboer@hunton.com

Diana Pfeffer Martin
Hunton Andrews Kurth LLP
550 S. Hope Street, Suite 2000
Los Angeles, California 90071
Telephone: (213) 532-2162
Email: martindp@hunton.com

John Roddy
Office of City Attorney Dennis Herrera
City and County of San Francisco

1 Dr. Carlton B Goodlett Pl.,
San Francisco, California 94102
Telephone: (415) 554-3986
Email: John.S.Roddy@sfcityatty.org

Estie Kus
Office of City Attorney Dennis Herrera
City and County of San Francisco
1 Dr. Carlton B Goodlett Pl.,
San Francisco, California 94102
Telephone: (415) 554-3924
Email: Estie.Kus@sfcityatty.org

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, a true and correct copy of the foregoing Reply Brief was filed electronically using the EAB eFiling System and was served on the parties by electronic mail at the addresses specified below:

Dustin Minor
Office of Regional Counsel (ORC-3)
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415) 972-3888
Email: Minor.Dustin@epa.gov

Marcela von Vacano
Office of Regional Counsel (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415) 972-3905
Email: Vonvacano.Marcela@epa.gov

Peter Z. Ford
Office of General Counsel
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Telephone: (202) 564-5593
Email: Ford.Peter@epa.gov

Jessica Zomer
Office of General Counsel
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Telephone: (202) 564-3376
Email: Zomer.Jessica@epa.gov

/S/ J. Tom Boer

J. Tom Boer
Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, California 94111
Telephone: (415) 975-3700
Email: jtboer@hunton.com