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

In re: City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Plant NPDES Permit No. CA0037861	)	Appeal No. NPDES 20-01

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Regulations

Federal Register Notices

Legislative Materials

Other Authorities

STATEMENT OF INTEREST AND SUMMARY

Amici represent public entities from across the United States and California that provide water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public. The National Association of Clean Water Agencies ("NACWA") is a nonprofit trade association representing the interests of publicly-owned wastewater and stormwater utilities across the country. NACWA's members include more than 320 municipal clean water agencies that own, operate, and manage publicly-owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and disposal. *Amicus* California Association of Sanitation Agencies ("CASA") is a nonprofit mutual benefit corporation comprised of more than 125 local public agencies that provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries, and institutions.[1]

Members of both *amici* organizations, including the City and County of San Francisco ("San Francisco" or the "City"), own, manage, and operate combined sewer systems ("CSSs"). These utilities serve communities ("CSS communities") that have spent many billions of dollars to upgrade and improve their CSSs consistent with long-term control plans ("LTCPs") developed pursuant to the U.S. Environmental Protection Agency's ("EPA" or the "Agency") 1994 *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18688 (Apr. 19, 1994) (the "CSO Policy"). These measures have resulted in substantial reductions in the number and

[1] The San Francisco Public Utilities Commission, an agency of Petitioner City and County of San Francisco, is a member of NACWA and CASA.

volume of combined sewer overflow ("CSO") discharges to surface waters and concomitant improvements to water quality across the nation.

Amici urge the Board to affirm that neither the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1251 *et seq.*, nor the CSO Policy authorizes permit writers to impose vague, open-ended obligations like those found in the 2019 Oceanside Permit (the "Permit"), NPDES No. CA0037681, on CSS communities and other National Pollutant Discharge Elimination System ("NPDES") permit holders. In issuing the Permit, EPA Region 9 (the "Region") overstepped multiple limits on its authority and shirked its responsibility to ensure that CSS communities' CWA obligations are clear and well defined. The Region's failure to adhere to the CWA's requirements will impose substantial regulatory uncertainty and unjustifiable costs on San Francisco. Unless the Board grants review and enforces both the Act and the CSO Policy, other CSS communities and NPDES permittees nationwide could face similar burdens.

The Region's decision to include generic prohibitions against causing or contributing to violations of water quality standards ("WQS") in San Francisco's permit ignored multiple mandates for permit writers to fashion clear and individualized water quality-based effluent limitations ("WQBELs"). The Act, EPA's NPDES regulations, and Agency guidance prescribe a process for permit writers to develop WQBELs designed to protect applicable WQS based on rigorous scientific analyses. CSS communities and other dischargers rely on this process, which results in effluent limits that impose precise compliance obligations, in order to understand their CWA obligations and make decisions about how to allocate limited resources for compliance activities.

The Region's inclusion of generic prohibitions —rather than individualized WQBELs— will make it impossible for San Francisco to assess prospectively whether it complies with the

Permit or what it will need to do to comply during the Permit's term. This result is anathema to the structure of the CWA, which Congress enacted specifically to reform an ineffective regulatory regime that—like the generic language employed by the Region—unsuccessfully attempted to define compliance by reference to a discharge's effect on receiving water quality. The CWA cured this problem by creating the NPDES permit program, which requires permit writers to define each discharger's specific water quality compliance obligations in the form of WQBELs, so that both the regulated entity and regulators understand exactly what may—and may not—be lawfully discharged under a permit. The Region's inclusion of generic receiving water restrictions in the Permit undermines the CWA's objectives and effectively nullifies one of the NPDES program's central objectives: providing CSS communities and other dischargers with clear compliance standards.

The CSO Policy also intended LTCPs to ensure the protection of water quality. The immense costs involved in developing and implementing CSO controls demand that a CSS community be asked to revisit its LTCP only when doing so is necessary to protect water quality. EPA recognized this imperative by carefully limiting in the CSO Policy when and how a permit-writing agency can require a CSS community to re-evaluate and update its LTCP. The Region failed to observe these limits by requiring San Francisco to reassess its CSO controls without finding that the City's current LTCP is insufficient to protect WQS. Subjecting LTCPs to such unjustified reassessments puts at risk the billions of dollars that CSS communities across the country have invested, consistent with the CSO Policy, to improve water quality. *Amici* ask that the Board affirm the CSO Policy's limits—codified by Congress—on permit writers' authority to demand additional costly controls from CSS communities.

Finally, the Region's attempt to require San Francisco to report isolated overflows from its CSS exceeds the scope of EPA's jurisdiction under the CWA. *Amici* recognize that isolated overflows pose concerns to many in San Francisco and that this issue should be addressed consistent with applicable state and local regulatory programs. Congress, however, chose not to extend the CWA to cover releases that—like these isolated overflows—never reach navigable waters. Multiple federal appeals courts have made clear that the CWA confers no authority on EPA to impose requirements on activities that do not actually result in discharges to navigable waters. *Amici* urge that the Board remand to the Region to correct this fundamental error in the Permit's reporting provisions.

ARGUMENT

I. Generic Receiving Water Requirements Are Inconsistent with the Act and Unjustifiably Burden CSS Communities.

The Region abandoned the Act's directives for setting clear, individualized WQBELs in NPDES permits by including in the Permit a generic prohibition against any discharge that would "cause or contribute to a violation of any applicable water quality standard …." AR No. 17, Oceanside Permit (the "Permit") § V; *id.* at Attachment G, § I.I.1 (prohibiting the creation of "pollution, contamination or nuisance, as defined by California Water Code 13050"). As EPA has noted, "despite commonly held beliefs, water quality standards are not directly enforceable."[2] Instead, the CWA protects WQS—the water quality goals for receiving waters—through WQBELs in dischargers' NPDES permits.

These WQBELs must be developed consistent with the process set out in the NPDES regulations and the *NPDES Permit Writers' Manual*, which the Region should have followed to determine whether the Permit needed additional WQBELs at all, and, if so, what those precise limitations should have been.[3] EPA has described this process as one in which "the burden [is] on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit."[4] The Region failed to meet this burden and instead inappropriately imposed a sweeping and generic requirement not to cause or contribute to violations of WQS.

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[2] EPA, *Watershed Web Academy: Introduction to the Clean Water Act* § 34, *available at* https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2673

[3] *See* 40 C.F.R. § 122.44(d)(1)(i)-(vii); EPA, *NPDES Permit Writers' Manual* Ch. 6 (Sep. 2010) (*Permit Writers' Manual*).

[4] EPA, *Consolidated Permit Regulations*, 45 Fed. Reg. 33290, 33312 (May 19, 1980).

This type of generic prohibition against violating WQS makes it exceedingly difficult for San Francisco or any other municipal discharger to understand its precise compliance obligations.[5] As the Region itself concedes, determinations of noncompliance with these types of undefined mandates are made only *after the fact*, during an enforcement proceeding.[6] This result fundamentally conflicts with the principle objectives underpinning the 1972 CWA.[7] Congress intended NPDES Permits to impose clear, tailored limitations on CSS communities and other municipal dischargers so that they could know the extent of their compliance obligations *prior to* the onset of any enforcement proceeding. The Region's departure from the Act's directives, congressional intent, and EPA's regulations and policies constitutes clear error that warrants remand. *See* 40 C.F.R. § 124.19(a)(4)(i).

A. The Region Disregarded the Process for Setting WQBELs.

1. The Region Was Required to Develop Any WQBELs Consistent with Prescribed Processes.

The Region correctly asserts that a "permitting authority has discretion" in setting WQBELs, but the Agency's regulations and guidance cabin this discretion. AR No. 10a, Response to Comments ("RTC") at 12. By ignoring these strictures, the Region shunned its responsibility to determine what precise permit limits, if any, are necessary to protect WQS. EPA has prescribed a two-phased process for imposing WQBELs that involves (1) determining whether a permit requires any WQBELs and then (2) setting effluent limits that will achieve

[5] *Accord id.* ("a permittee may rely on its EPA-issued permit document to know the extent of its enforceable duties ….").

[6] *See* Region 9 Opp. Br. 24 (Dkt. No. 7) (defending the generic receiving water limitations on the basis that a court, in an enforcement proceeding, can "engage[] in a fact-specific inquiry to determine what levels of pollutants would result in a non-attainment of the narrative WQS").

[7] *See Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976) ("It was this dissatisfaction with water quality standards as a method of pollution control that led to the proposal that they be replaced or supplemented with 'effluent limitations'…. Thus, although water quality standards and effluent limitations are related, . . . the two are entirely different concepts and the difference is at the heart of the 1972 Amendments.").

WQS. These limits ensure that a permit writer imposes a WQBEL only to the extent "necessary to meet water quality standards …." 33 U.S.C. § 1311(b)(1)(C).

Determining the Need for a WQBEL

EPA first requires permit writers to determine if WQBELs are necessary by assessing whether a discharge "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard …." 40 C.F.R. § 122.44(d)(1)(i). At the outset of this first phase, the permit writer must (a) identify the applicable WQS, including water quality criteria, *Permit Writers' Manual* § 6.1, and (b) "characterize both the effluent discharged by the facility … and the receiving water for that discharge." *Id.* at p. 6-12. This characterization process involves multiple steps:[8]

- Identifying pollutants of concern in the effluent (*i.e.*, pollutants for which further analysis is needed), *id.* § 6.2.1;
- Determining whether applicable WQS allow consideration of a dilution allowance or mixing zone, *id.* § 6.2.2;
- Selecting an approach to model effluent and receiving water interactions, *id.* § 6.2.3;
- Identifying effluent and receiving water critical conditions, such as effluent flow and pollutant concentrations, and receiving water flow and background pollutant concentrations, *id.* § 6.2.4; and
- Establishing appropriate dilution allowances or mixing zones. *Id.* § 6.2.5.[9]

[8] The characterization process, in addition to helping the permit writer identify the need for a WQBEL, provides information used to calculate WQBELs. *Permit Writer's Manual* at p. 6-12.

[9] *See also* 40 C.F.R. § 122.44(d)(1)(ii) ("the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing … and where appropriate, the dilution of the effluent in the receiving water.").

Upon completing these characterization steps, "a permit writer determines whether WQBELs are needed" by conducting a "reasonable potential analysis": an assessment of "whether a discharge, alone or in combination with other sources of pollutants … could lead to an excursion above an applicable water quality standard." *Id.* at pp. 6-22 to 6-23. The *NPDES Permit Writers' Manual* specifies how a permit writer should conduct this analysis *quantitatively*, "using effluent and receiving water data and modeling techniques," *id.* § 6.3.2, or *qualitatively*, using a variety of different types of information that may be available. *Id.* § 6.3.3. Under either the quantitative or the qualitative approach, the permit-writing agency must document its reasonable potential analysis in the permit's fact sheet.[10]

Setting WQBELs

Having determined that a pollutant in a discharge has the reasonable potential to cause or contribute to a WQS violation, a "permit writer must develop WQBELs for that pollutant …." *Id.* § 6.4. The NPDES regulations demand that WQBELs be set at a level that is "derived from, and complies with all applicable" WQS. 40 C.F.R. §122.44(d)(1)(vii)(A). The *NPDES Permit Writers' Manual* contemplates that deriving a WQBEL requires substantial analysis; EPA expects permit writers to "identify the data and information used to determine the applicable water quality standards and how that information … was used to derive WQBELs …." *Permit Writers' Manual* § 6.4.1.5. The Agency further requires that the fact sheet "provide the NPDES permit applicant and the public a transparent, reproducible, and defensible description of how the permit writer" derived the WQBELs. *Id.*

[10] *Permit Writers' Manual* § 6.3.2.4 ("permit writers need to document the details of the reasonable potential analysis in the NPDES permit fact sheet"); *id.* ("The permit writer should clearly identify the information and procedures used to determine the need for WQBELs."); *id.* § 6.3.3 ("The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis ….").

2. The Region Followed None of the Requirements for Setting WQBELs.

The Region's use of generic receiving water requirements short-circuits all of the above procedures, which EPA designed to ensure that permits contain WQBELs that specify limitations to the extent necessary to protect water quality. The Region's justifications for using these restrictions consist solely of a series of bald assertions that these terms were "necessary to ensure compliance with [WQS]" and were somehow "directly derived" from applicable WQS. AR No. 17, Attachment F – Fact Sheet ("Fact Sheet") at F-26; RTC at 11. Despite these claims, nothing in the Fact Sheet or in the Region's opposition brief provides any indication that it conducted *any* reasonable potential analysis based on San Francisco's effluent, the quality of receiving waters, and any existing controls on discharges. *See* Region 9 Opp. Br. 16-17 (repeating assertions from the Fact Sheet and the RTC). The Region has similarly failed to present any factual or analytical basis for the requirements it set in the permit, despite the Agency's directive that the basis for WQBELs be "transparent, reproducible, and defensible." *Permit Writers' Manual* § 6.4.1.5.

Instead, the Region imposed these sweeping, non-specific requirements by fiat, without setting the tailored limits for protecting water quality contemplated by the Act and EPA's regulations. If the Region or any other permit-issuing authority believes that protecting water quality requires the imposition of more stringent standards on any CSS community, it must do so in a manner that sets specific effluent limitations consistent with EPA's regulations and guidance. The Region's failure to adhere to these processes constitutes clear error that warrants granting review and remanding to the Region. *See* 40 C.F.R. § 124.19(a)(4)(i).

B. Inclusion of Generic Receiving Water Limitations in San Francisco's Permit Is Inconsistent with Congressional Intent.

The Region's retreat to a generic prohibition against discharges that cause or contribute to violations of WQS undermines a key objective of the NPDES program: to define dischargers'

compliance obligations clearly and well in advance of any enforcement action. When Congress passed the CWA in 1972, it sought to supplant a statute that relied solely on receiving water quality with a permitting system that sets clear and specific limits that apply to a discharger's facility. Generic receiving water limitations, like those in the Permit, undermine the CWA's goal of providing CSS communities and other dischargers compliance obligations that can be ascertained prior to an enforcement proceeding.[11]

Congress passed the CWA with the aim of addressing a number of deficiencies in the Water Quality Act of 1965,[12] which relied solely on states setting "ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters" without specifying end-of-pipe compliance requirements for individual sources. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976) ("*SWRCB*"). Instead, the 1965 statute allowed enforcement whenever "the wastes discharged by polluters reduce[d] water quality below the standards." S. Rep. No. 92-414, at 4 (1971). Defining compliance by reference to receiving waters' quality proved unworkable because dischargers lacked specific "standards to govern the conduct of individual polluters." *SWRCB*, 426 U.S. at 203. Whether a discharge caused violations of WQS could only be determined after the fact, such that

[11] Federal courts have not, as the Region claims, ever upheld the validity of generic receiving water limitations like those in the Permit. *See* Region 9 Opp. Br. 18-19. The cases cited by the Region addressed only the interpretation of permit terms in citizen suits, not those terms' *validity*, an issue that was not properly before the courts. *See Ohio Valley Envtl. Coal. v. Fola Coal Co.*, 845 F.3d 133, 139 (4th Cir. 2017) (issue involved interpretation of permit in a citizen suit); *NRDC v. Cnty. of L.A.*, 725 F.3d 1194, 1205 (9th Cir. 2013) (interpreting permit term for the purposes of enforcement); *NRDC v. Cnty. of L.A.*, 636 F.3d 1235, 1248-49 (9th Cir. 2011) (rejecting argument about the enforceability of permit terms in a citizen suit); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (concluding that "CWA § 505 authorizes citizens to enforce *all* permit conditions. (emphasis in original)). In each of the cases cited by the Region, the court could not have ruled on the validity of any permit terms because federal courts lack jurisdiction to evaluate that substance of an NPDES permit in citizen suits or other enforcement actions. *See* 33 U.S.C. § 1369(b)(2) (prohibiting "judicial review in any civil or criminal proceeding for enforcement" of, among other things, decisions to issue or deny NPDES permits); *accord NRDC v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988) ("Section 1369(b) does not permit review of a non-EPA-objected-to state-issued permit in any federal court.").

[12] Pub. L. 89-234, 79 Stat. 903 (1965).

dischargers could not adjust their operations in order to ensure compliance. *Accord NRDC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990) (evaluating compliance under the 1965 statute required regulators to "work backward" from polluted waters to identify potentially responsible dischargers).

Congress replaced this unworkable ambient water quality-driven scheme with NPDES permits, which would set end-of-pipe effluent limits to provide "'clear and identifiable' discharge standards." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (quoting S. Rep. No. 92-414, at 81). Congress specifically intended these effluent limits—even effluent limits needed to protect water quality—to apply at *the point of discharge* rather than in the receiving water itself.[13] EPA's experience in the first years of implementing the CWA confirmed that all effluent limitations needed to be precise to provide "an identifiable standard upon which to determine … compliance." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).

Amici join San Francisco in asking that the Board remand the Permit because their member utilities depend on NPDES permits to set precise WQBELs and other effluent limits so they can readily identify their compliance obligations and appropriately allocate limited public funds to maintain compliance and achieve maximum protection of the environment and public health. The Permit's generic prohibitions against causing or contributing to exceedances of WQS effectively resurrect one of the central problems in federal water pollution law prior to 1972: determining compliance by reference to a discharger's impact on ambient water quality.[14]

[13] *See* H. Rep. No. 92-911, at 102 (1972) (§ 301(b)(1)(C) demands "more stringent *effluent limitations* … to be established consistent with … water quality standards." (emphasis added)); 33 U.S.C. § 1362(11) (effluent limitations are restrictions "on quantities, rates, and concentrations of … constituents … *discharged from point sources*." (emphasis added)).

[14] *See supra* note 7.

These types of determinations can only be made after the fact, in enforcement proceedings, at which point municipal dischargers could incur enormous defense costs, civil penalties, and the cost of implementing injunctive relief. Deferring these determinations to enforcement actions could also subject *amici*'s members and other dischargers to disparate "court-developed definition[s] of water quality," an outcome that Congress intended to avoid when it created the NPDES program.[15] Remand is necessary to ensure that permit writers cannot impose these burdens on CSS communities or any other dischargers inconsistent with congressional intent.

II. The Permit's LTCP Update Provisions Depart from the CSO Policy's Directives.

The Region has overstepped the limits that the CSO Policy places on EPA's authority to require additional controls after a CSS community has implemented its LTCP. As the Board is aware, development and implementation of an LTCP requires a major financial commitment from a CSS community. To protect communities' investments, the CSO Policy contains safeguards to ensure that permit writers can only require a community to revisit its LTCP when substantial reasons exist for doing so. Specifically, the Policy prescribes how a permittee must conduct post-construction monitoring and reassess discharges to sensitive areas. *See* AR No. 96, CSO Policy § IV.B.2.d., e., 59 Fed. Reg. at 18696. The CSO Policy then defines the narrow circumstances under which EPA may require a CSS community to revisit its LTCP and potentially incur enormous capital expenses to develop and implement additional controls.

Although the Region invoked the CSO Policy to justify the Permit's LTCP update requirements, it ignored how the Policy constrains its authority to require CSS communities to

[15] S. Rep. No. 92-414, at 79.

revisit their plans.[16] The Region may not simply discard the Policy's directives for how to set terms in CSO permits. Congress has directed that the Permit—and every other permit issued to a CSS community—must "conform to" the CSO Policy. 33 U.S.C. § 1342(q)(1). For this reason, the Region's failure to adhere to the Policy constitutes clear error that warrants the Board's review. *See* 40 C.F.R. § 124.19(a)(4)(i).

A. EPA Cannot Require an LTCP Update Without Finding that Existing Controls Fail to Protect Water Quality Standards.

The Region has committed San Francisco to adopting additional CSO controls without adhering to procedures designed to ensure that a CSS community must revisit an already-implemented LTCP only if there is a demonstrated, water quality-based need for doing so. Under the CSO Policy, a post-construction CSS community can be required to revisit its LTCP and develop additional controls only if the permitting agency "determin[es] that the CSO controls fail to meet WQS or protect designated uses." CSO Policy § IV.B.2.g., 59 Fed. Reg. at 18696. The Policy further specifies that NPDES permits must use a reopener clause, rather than some other procedural mechanism, to facilitate the LTCP update. *Id.*

Ignoring these requirements, the Region has committed San Francisco to develop additional CSO controls without making any finding that its LTCP has failed to protect WQS. Although the Permit's update provisions require some assessment of the LTCP's efficacy, this evaluation plays no role in determining *whether* San Francisco must develop and implement additional controls. *See* Permit Part VI.C.5.d, Table 7 at 1.e. Rather, the Permit requires San Francisco to develop and "propose[] control alternatives" in addition to those in its existing LTCP without first requiring EPA to make a finding that the City's existing controls are

[16] *See* Region 9 Opp. Br. 26-27; RTC at 16 (citing CSO Policy §§ IV.B.2.b, IV.B.2.d., IV.B.2.e., and IV.b.2.f.).

insufficient to protect WQS. *Id.* at Part VI.C.5.d., Table 7 at 3. Pursuant to the CSO Policy, the Region cannot force a post-construction CSS community to revisit its LTCP without the requisite factual demonstration.

The Region also cannot accurately assert that it has made the factual findings required to demand reopening an LTCP. Although the Region cites some water and effluent quality data in the Response to Comments, it uses them only to support a conclusion that San Francisco's LTCP could "*better* protect beneficial uses." RTC at 20 (emphasis added). In other words, the Region has found that the LTCP protects WQS but that there may be room for improvement. *Accord id.* at 18 ("we find it unlikely that no improvement can be made."). This finding falls far short of what the CSO Policy requires for EPA to demand that a CSS community invest in additional controls: a "determination that the CSO controls *fail* to meet WQS or protect designated uses." CSO Policy § IV.B.2.g., 59 Fed. Reg. at 18696 (emphasis added). The CSO Policy prohibits EPA from burdening CSS communities in the name of achieving marginal gains beyond compliance with WQS. Allowing the Region to do so here would set a dangerous precedent that would put at risk billions of dollars of community investments in CSO improvements nationwide.

B. The Policy's Post-Construction Monitoring Provisions Do Not Authorize EPA to Require Post-Construction CSS Communities to Re-Characterize Their Systems.

In the LTCP Update provisions, the Region has also inappropriately applied the label "post-construction monitoring" in an attempt to send a CSS community back to the drawing board to develop a new LTCP. Rather than give EPA wide-ranging authority to make demands of CSS communities, the CSO Policy's post-construction monitoring provisions authorize monitoring that serves two narrow purposes: (a) "verify[ing] compliance with water quality standards," and (b) "ascertain[ing] the effectiveness of CSO controls." CSO Policy § IV.B.2.d.,

59 Fed. Reg. at 18696; *id.* § II.C.9., 59 Fed. Reg. at 18694. To accomplish these goals, post-construction monitoring consists of "effluent and ambient monitoring" of water quality, as well as "other monitoring protocols" that may be necessary to assess the condition of CSO receiving waters. *Id.* § II.C.9., 59 Fed. Reg. at 18694. The Policy thus envisions post-construction monitoring to involve only those tasks needed to assess effluent and receiving water quality.

The "post-construction monitoring" required by the Permit's LTCP Update provisions, however, requires San Francisco to conduct assessments that differ markedly from what the CSO Policy authorizes. Specifically, the Region demands preparation of "a comprehensive characterization of the combined sewer system" that will require San Francisco to describe and assess the sewer system itself. Permit Part IV.C.5.d., Table 7 at 1. This task bears no resemblance to measures that would determine whether an already-implemented LTCP is achieving compliance with WQS.

Instead, these requirements amount to an attempt to send a CSS community back to square one. Specifically, the "System Characterization Report" that the Permit requires bears a striking similarities with the requirements of Section II.C.1 of the CSO Policy, which dictates the *first* steps in LTCP development. For instance, the Permit requires San Francisco to (a) describe how its CSS responds to different storm events and (b) identify the location, frequency, and composition of its CSO discharges. Permit Part VI.C.5.d, Table 7 at 1.a., c. These components are virtually identical to the CSO Policy's initial system characterization requirements. *See* CSO Policy § II.C.1., 59 Fed. Reg. at 18691 (permittee should assess "a range of storm events, [and] the response of its sewer system to wet weather events"); *id.* § II.C.1.b., 59 Fed. Reg. at 18692 (system characterization should identify "the number, location, and frequency of overflows"). The Region cannot invoke the Policy's post-*construction* requirements to impose obligations that

EPA—and Congress—intended to apply only to communities just starting to develop their LTCPs.

C. EPA Cannot Use Sensitive Area Reassessments to Impose New CSO Controls.

Finally, the Region misuses the CSO Policy's process for reassessing CSOs to sensitive areas to require the evaluation and implementation of additional controls. *See* Fact Sheet at F-31 (citing CSO Policy § IV.B.2.e.); RTC at 16 (same). Specifically, the Region relies on this portion of the CSO Policy to justify requiring San Francisco to reevaluate its already-built CSO controls and propose new ones. *See* Permit Part VI.C.5.d, Table 7 at 3 (requiring a Consideration of Sensitive Areas Report that "evaluates, prioritizes, and proposes control alternatives"). These additional controls could include a range of alternatives that span green infrastructure, increasing storage capacity in the City's CSS, and providing additional treatment. *Id.* at 3.b.

The CSO Policy's provisions for sensitive area reassessments do not authorize EPA to require a CSS community to take a fresh look its CSO controls in this manner. Rather than entailing a broad examination of a CSS community's LTCP, a sensitive areas reassessment consists of an examination only of any "new or improved techniques to eliminate or relocate" CSOs or "changed circumstances that influence economic achievability" of CSO elimination or relocation. CSO Policy § II.C.3.c., 59 Fed. Reg. at 18692; *id.* § IV.B.2.e., 59 Fed. Reg. at 18696. The Region, without any explanation, has attempted to expand an assessment of CSO elimination or relocation into a requirement to reevaluate San Francisco's LTCP and even develop new controls.

As explained above, the Region must base any such attempt to revisit the controls in an already implemented LTCP on a specific finding that some portion of an LTCP has failed to

protect WQS. Having made no such finding, the Region cannot manipulate portions of the CSO Policy that require limited assessments of a discrete set of overflows into sweeping reanalysis directives.

III. The Region Lacks Authority to Regulate Overflows that Do Not Result in Discharges.

The Region has further overstepped the limits on its authority by seeking to regulate overflows that do not cause discharges regulated by the Act. Permit Section IV.C.5.a.ii.(b) (the Reporting Provision) obligates San Francisco to report, without any limitation or qualification, any "sewer overflows from the combined sewer system." The Region concedes that this obligation extends even to those overflows that do not reach waters of the United States. *See* Petition 32-33 (discussing the Fact Sheet and the RTC). By making this concession, the Region admits that it seeks to exercise authority over releases that fall outside the NPDES program.[17]

Although the Region invokes various aspects of the CWA and NPDES regulations in defense of the Reporting Provision, it ignores the fundamental limits of its authority under the Act. The requirement to obtain an NPDES permit and the entire NPDES program itself apply only to "discharge[s] of any pollutant." *See* 33 U.S.C. §§ 1311(a), 1342(a). The Act then limits "discharges" subject to the program to releases of pollutants to "navigable waters." *Id.* § 1362(12)(A). The Reporting Provision thus sweeps in isolated sewer overflows that, by definition, cannot be "discharges" subject to Sections 301 and 402 of the Act.

The Region's attempt to impose requirements on these isolated releases should meet the same fate as EPA's previous attempts to regulate activities that do not result in discharges. Over

[17] *Amici* recognize that overflows from wastewater collection systems present a serious problem that utilities should address as part of the management of their utilities. Any regulatory effort to require or encourage utilities to address overflows, however, must be conducted within the limits of applicable law. EPA's attempt to regulate isolated overflows in the Permit oversteps these limits.

thirty years ago, the D.C. Circuit rejected the Agency's attempt to impose through NPDES permits requirements governing aspects of a facility beyond its discharges, explaining how "the CWA does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction … is limited to regulating the *discharge* of pollutants." *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (emphasis added). Two courts of appeals have also rejected EPA's attempts to impose obligations on concentrated animal feeding operations (CAFOs) that do not actually discharge on the basis that "EPA [may] regulate, through the NPDES permitting system … only the discharge of pollutants," not a source's activities generally. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) ("there must be an *actual discharge* into navigable waters to trigger the CWA's requirements and the EPA's authority" (emphasis added)). In the absence of a discharge, both courts explained, EPA has no authority under the CWA to impose regulatory obligations.[18] The Region thus exceeded the authority afforded it by the CWA by trying to impose requirements on San Francisco's isolated overflows.

The Region's claim that the Reporting Provision will help it to identify potential discharges does not excuse the Region's overreach.[19] The Second Circuit rejected EPA's use of this type of justification to support its requirement that all CAFOs—even those that do not actually discharge—obtain NPDES permits in *Waterkeeper Alliance*. 399 F.3d at 505. While acknowledging why EPA would have valid policy justifications for regulating a possible discharge, the court found that the CWA grants "EPA jurisdiction to regulate and control only

[18] *See Waterkeeper*, 399 F.3d at 505 ("in the absence of an actual addition of any pollutant to navigable waters …, there is … no statutory obligation of point sources to comply with EPA regulations for point source discharges"); *Nat'l Pork Producers Council*, 635 F.3d at 751.

[19] *See* RTC at 23 ("Monitoring and reporting sewer overflows from the combined sewer system are also necessary to determine whether an overflow reaches waters of the State or United States.")

actual discharges—not potential discharges ….” *Id.* (emphasis in original). The Board should not countenance this attempt to extend EPA’s authority to cover releases that cannot be regulated under the CWA.

CONCLUSION

The Act imposes on EPA a number of obligations and limits related to setting effluent limits and otherwise imposing burdens on CSS communities and other NPDES permittees. In promulgating the Permit, the Region has flouted a number of these requirements and overstepped these limits, at times with minimal explanation. The Region should not be allowed to overstep its authority and burden *amici*’s members, including San Francisco. For these reasons, *amici* ask that the Board grant review and remand the Permit to the Region.

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Respectfully submitted**,**

/s/ Andrew C. Silton

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) and (d)(3), I certify that this Brief of *Amici Curiae* National Association of Clean Water Agencies and California Association of Sanitation Agencies in Support of Petitioner does not exceed 7,000 words. Based on the word count feature in Microsoft Word 2016 and not including those portions of this Brief excluded from the word limitation by 40 C.F.R. § 124.19(d)(3), this Brief contains 5,703 words.

/s/ Andrew C. Silton
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CERTIFICATE OF SERVICE

I certify that on April 15, 2020, a true copy of the foregoing Brief of *Amici Curiae* National Association of Clean Water Agencies and California Association of Sanitation Agencies in Support of Petitioner was filed electronically using the EAB eFiling System and served on the parties via e-mail (*see* Dkt. No. 3 at 3) at the following addresses:

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