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January 13, 2020

Via EAB eFiling System

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460

Re: City and County of San Francisco - Petition for Review of NPDES Permit No. CA0037681

Dear Ms. Durr:

Please find enclosed for filing the City and County of San Francisco's Petition for Review of NPDES Permit No. CA0037681 issued to the City and County of San Francisco's Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project.

The Environmental Protection Agency Region 9 issued this permit on December 10, 2019. San Francisco received the permit by email that same day. Pursuant to 40 C.F.R. § 124.19 and 40 C.F.R. § 124.20, the deadline for filing a petition for review of this permit is January 13, 2020.

The enclosed petition was prepared in compliance with the formatting and length requirements contained in 40 C.F.R. § 124.19 and the Environmental Appeals Board Practice Manual. Because the attachments to this petition exceed 50 pages, hard copies of all documents will be mailed to the Environmental Appeals Board separate from this petition.

Thank you for your attention to this matter.

Sincerely,

J. Tom Boer

Samuel L. Brown

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

In re:	)
City and County of San Francisco	)
NPDES Permit No. CA0037681	)

PETITION FOR REVIEW OF
CITY AND COUNTY OF SAN FRANCISCO'S OCEANSIDE WASTEWATER TREATMENT PLANT'S NPDES PERMIT ISSUED BY EPA REGION 9

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I. INTRODUCTION

This Petition involves National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0037681 ("2019 Permit") issued to the City and County of San Francisco ("San Francisco") by the U.S. Environmental Protection Agency ("EPA"), Region 9 ("Region"). San Francisco is a permittee operating a combined sewer system that is on the leading edge of Combined Sewer Overflow Control Policy ("CSO Policy") process. San Francisco completed construction and commenced operation of its combined system three years after promulgation of the CSO Policy in 1994. The Region has issued several NPDES permits for these facilities since that time, each with an acknowledgement that the beneficial uses of receiving waters are protected.

Perhaps because of this frontrunner status, on issues of water quality based effluent limitations ("WQBELs"), the long term control plan ("LTCP"), and isolated sewer overflows, the Region appears to be unsure of the appropriate scope of its authority. This uncertainty has resulted in the Region including the following provisions in the Permit: (1) Section V and Attachment G.I.I.1, imposing generic WQBELs; (2) Section VI.C.5.d, requiring an "LTCP Update"; and (3) Section VI.C.5.a.ii.b, requiring the reporting of isolated sewer overflows. The Region's inclusion of these provisions is based on clearly erroneous findings of fact and conclusions of law and an abuse of discretion. Additionally, the generic WQBELs involve important policy considerations that warrant review.

There is no basis for the Region's actions. The facts are clear and undisputed. The law, governing regulations, and long-standing guidance support Petitioner. Accordingly, San Francisco requests that the Board remand the Permit for revisions consistent with the relevant facts and law.

II. PERMIT CONDITIONS FOR REVIEW

Pursuant to 40 C.F.R. § 124.19(a), San Francisco petitions for review of NPDES Permit No. CA0037681 issued on December 10, 2019 by the Region.[1] See Att. 1, 2019 Permit. San Francisco contends that the following permit conditions are based on clearly erroneous findings of fact and conclusions of law or an abuse of discretion: (1) the generic water quality based effluent limitations at Section V and Attachment G.I.I.1; (2) the "LTCP Update" at Section VI.C.5.d; and (3) the reporting and other regulation of isolated sewer overflows[2] at Section VI.C.5.a.ii.b.

III. FACTUAL AND STATUTORY BACKGROUND

A. The Clean Water Act and CSO Policy

Clean Water Act ("CWA") jurisdiction exists over "waters of the United States." 33 U.S.C. § 1362(7). The NPDES permitting program is authorized under section 1342 of the CWA and supplemented by regulations at 40 C.F.R. § 122. All combined sewer systems are governed by EPA's CSO Policy, which contains requirements for developing appropriate, site-specific NPDES permits. Congress codified the CSO Policy via an amendment of the CWA. *See* CWA § 402(q). The CSO Policy represents a national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a coordinated effort to achieve cost-effective CSO controls meeting health and environmental objectives. 59 Fed. Reg. at 18,689. The CSO Policy "recognizes the site-specific nature of CSOs and their impacts and

[1] The Permit is jointly issued by California and EPA because San Francisco's main outfall discharges to territorial waters outside California's jurisdiction, and other outfalls discharge within California's jurisdiction. The Regional Water Quality Control Board authorized the Permit pursuant to State law as Order No. R2-2019-0028. San Francisco is separately challenging the Permit in State court. *See City and County of San Francisco v. RWQCB*, Case RG19042575 (Alameda Superior Court).

[2] In Permit these isolated sewer overflows are referred to as Sewer Overflows from the Combined Sewer System ("SOCSS"). Because these overflows do not reach a water of the United States, the Petition refers to these overflows as "isolated sewer overflows."

provides the necessary flexibility to tailor controls to local situations." *Id*. The CSO Policy allows a phased approach for implementation of CSO Controls. *See* Att. 2, CSO Guidance for Permit Writers at 1-3.

The CSO Policy provides that permitted combined sewer systems are responsible for implementing the Nine Minimum Controls ("NMC") and developing and implementing a long-term control plan ("LTCP") to address attainment of water quality standards and protection of beneficial uses. *Id.* at 3-3, 3-10. After selected LTCP CSO controls are implemented, the NPDES permitting authority issues a "post-Phase II permit," including requirements to continue NMC implementation, properly operate and maintain the completed CSO controls, and implement post-construction monitoring. *Id.* at 5-1–5-4; *See* CSO Policy at II.C.9 (to "verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of [CSD] controls."). San Francisco operates pursuant to a post-Phase II permit. *See* CSO Policy at VI.B.

B. Factual Background

1. Design of San Francisco's Combined Sewer System

San Francisco operates a combined sewer system, collecting stormwater and domestic wastewater in one collection system for transport to San Francisco's wastewater treatment plants for treatment prior to discharge. The Oceanside Water Pollution Control Plant, the deep water Southwest Ocean Outfall, the Wastewater Collection System, and the Westside Recycled Water Project (collectively the "Westside Facilities") handle wastewater from hundreds of thousands of San Francisco residents across western San Francisco.

During precipitation events, combined sewer systems are designed to maximize the treatment of the combined stormwater and sewage at a treatment plant before discharging to surface waters. The combined system allows San Francisco to annually capture and treat billions

of gallons of stormwater via secondary or primary treatment before discharging to receiving waters (i.e., the Pacific Ocean), which results in cleaner discharges as compared to separate sanitary sewage and stormwater systems. In large precipitation events, where the volume of stormwater exceeds the system's capacity, the system is designed to discharge combined effluent to surface waters via permitted outfalls. *See* Att. 3, San Francisco Bay Basin Plan Chapter 4 at 4-24. These discharges – Combined Sewer Discharges ("CSDs") – receive equivalent-to-primary treatment. *See* Att. 1 at F-6. The 2019 Permit authorizes discharges from the Westside Facilities, including the Oceanside Treatment Plant and CSDs from seven CSO outfalls. *See* Att. 1 at 1, Table 2.

2. History of the Westside Facilities Relevant to Contested Permit Terms

The development of San Francisco's combined sewer system is explained in the *Wastewater Long Term Control Plan Synthesis*, which identifies and explains the various documents making up San Francisco's LTCP, consistent with the CSO Policy. *See* Att. 4; *see also* 59 Fed. Reg. 18,688 (April 19, 1994) codified in CWA § 402(q).

San Francisco was among the first municipalities to invest substantial resources to reduce wet weather discharges from its combined sewer system. In the early 1970s, San Francisco began developing its *San Francisco Master Plan for Waste Water Management* ("Master Plan") based on findings in the CSO Report. *See* Att. 5. As part of the master planning effort, San Francisco initiated automated monitoring of rainfall and sewer levels, created its first computational model of the system, and undertook effluent studies and modeling to analyze water quality, currents, drift, and mass water movement. The monitoring and modeling undertaken to develop the Master Plan, and subsequent analyses, are consistent with the requirements in the CSO Policy at 59 Federal Register 18688. *Id.* at VI-1–VI-32. The Master Plan included control alternatives to

reduce the average CSD frequency from the Westside facilities by an order of magnitude: from 82 annual CSDs to eight CSDs per year. *Id.* at II-2.

Subsequent to enactment of the CWA, San Francisco, with the participation and approval of EPA, modified the Master Plan in 1974 via an Environmental Impact Report and Statement conducted by EPA. *See* Att. 6. Next, extensive surveys of beach recreational use and monitoring and modeling were conducted to evaluate the relationship between receiving waters and wet weather discharges from the Westside Facilities. *See id.*

In 1975, the Regional Water Quality Control Board ("Regional Board") adopted the first comprehensive Basin Plan for the San Francisco Bay Region, which prompted a series of requirements for San Francisco to further evaluate the relationship between wet weather discharges and the Pacific Ocean and San Francisco Bay. *See* Att. 4 at 22. Based upon the record generated by San Francisco, Order 79-12 approved the current design of San Francisco's combined system, which, in part, set a long-term average discharge criterion of eight CSDs, per typical year, for each hydrological section of the Westside Facilities. *Id.* at 1.

San Francisco designed and constructed the existing combined sewer system to protect beneficial uses during wet weather in compliance with, and reliance on Order 79-12. The State Board later amended Order 79-12 by adopting State Board Order 79-16, which granted an exception to the statewide Ocean Plan for planned CSDs from the Westside Facilities because it was "inappropriate to apply Ocean Plan standards strictly to combined waste and storm water discharges." *See* Att. 7.B. App. 1, Order 79-16 at 9. Order 79-16 became the basis for all subsequent design and construction of Westside's wet weather control facilities. In adopting Order 79-16, the State Board made a finding that operation of the Westside Facilities would <u>*not*</u> impair beneficial uses. *Id.* at 10; Att. 7.B. App. 4, 2009 Oceanside NPDES Permit at F-13.

In reliance on the State Board and EPA approved design configuration and the exception to the Ocean Plan authorized by Order 79-16, San Francisco began construction of the Westside Facilities in the early 1980s. *See* Att. 4 at 14. The Westside Facilities were substantially completed in 1993, while the complete Master Plan addressing both Westside Facilities and bayside facilities was completed in 1997, at a cost of nearly $2 billion. *See* Att. 8, San Francisco Basin Plan Chapter 7 at 7-57.

Since 1997, San Francisco has implemented a post-construction monitoring program consistent with the CSO Policy. CSO Policy at II.C.9. Based on actual wet weather monitoring data, the current CSD frequency from the Westside collection system, which includes maximizing treatment at the Oceanside Plant and discharge through near-shore and deep-water outfalls, averaged over a 20-year period, is below the long-term annual average of eight CSDs, per typical year, identified by Order 79-12. *See* Att. 7.B. App. 10, Technical Memorandum on Performance of Westside System During Wet Weather ("Tech Memo"). In addition, San Francisco uses a hydrologic and hydraulic model ("H&H Model"), to simulate performance of the combined sewer system. *Id.* at 1, n.2. The H&H Model demonstrates that the frequency of CSDs in a typical year for each hydrologic segment of the Westside collection system is below the long-term annual average of eight CSDs, per typical year, identified in Order 79-16. *Id.* at 1–2.

As part of its long-term planning, in 2004, San Francisco began evaluating its combined sewer system and investment needs. *See* San Francisco Public Utility Commission's Sewer System Improvement Plan ("SSIP").[3] To assist with the analyses, San Francisco developed and calibrated a receiving water quality model ("RWQ Model") of the Pacific Ocean and San

[3] Available at https://sfwater.org/index.aspx?page=116.

Francisco Bay. *See* Att. 7.B. App. 10 at 2. The RWQ Model indicates that the current performance of the Westside Facilities results in attainment of water quality standards. *Id.*

The post-construction monitoring program conclusions are consistent with findings by the Regional Board. In 2018, the Regional Board delisted as impaired for bacteria receiving waters offshore Baker Beach, near CSD Outfalls Nos. 005-007, because, based on "[s]ixteen lines of evidence," the "applicable water quality standards for [bacteria] *are not being exceeded*." *See* Att. 7.B. App. 13, 2014 and 2016 California Integrated Report (emphasis added). When approving the San Francisco Bay Bacteria Total Maximum Daily Load ("TMDL"), the Regional Board determined that San Francisco's CSDs were not a significant source of bacteria to receiving waters. *See* Att. 7.B. App. 20, Staff Report, TMDL for San Francisco Bay Beaches. This finding is reflected in the Basin Plan. *See* Att. 8 at 7-57. In both instances, the Region approved the Regional Board's actions pursuant to the delegation agreement between EPA and California.

The performance of the Westside Facilities is consistent with its approved design criteria and protects beneficial uses in receiving waters. *See* Att. 7.B. App. 10. This conclusion is supported by decades of information gathering and the ongoing post-construction monitoring program, including modeling of the collection system and receiving waters. *See* Att. 4. San Francisco's concerns with the Permit terms at V, V1.C.5.d and Attachment G, Provision G.I.I.1, originate, in part, from the Region's failure to incorporate this history and the available evidence into the permit development process and the Permit terms.

3. Draft Permit and San Francisco's Comments

On April 19, 2019, the EPA and the Regional Board issued a public notice and opportunity to comment on the draft permit. *See* Att. 9, Tentative Order. On May 20, 2019, San Francisco submitted comments on the draft permit, objecting to the terms described in this

Petition. *See* Att. 7, San Francisco Comments. EPA and the Regional Board responded to comments on September 19, 2019. *See* Att. 10, Response to Comment.

4. Issuance of 2019 Oceanside Permit

On September 11, 2019, EPA and the Regional Board held a hearing to receive oral comments and consider approval of the permit. EPA and Regional Board staff worked hand-in-hand to issue this Permit. Att. 11, Staff Report Summary at 1 (stating "[s]ince this permit covers discharges to both State and federal waters, we have worked closely with U.S. EPA to facilitate joint reissuance").

San Francisco raised objections at the hearing to the draft permit, including the terms challenged in this Petition. In reliance on EPA's representation of support for the 2019 Permit, and in disregard of San Francisco's comments, the Regional Board adopted Order No. R2-2019-028 on September 11, 2019. EPA did not sign the permit until ninety days later, on December 10, 2019, after months of correspondence from San Francisco about the Region's delay.

IV. THRESHOLD PROCEDURAL REQUIREMENTS

San Francisco satisfies the threshold requirements for filing this petition under 40 C.F.R. part 124:

1. San Francisco is the Permittee and has standing to petition for review of the 2019 Permit because it participated in the comment period. *See* 40 C.F.R. § 124.19(a)(2); Att. 7, San Francisco Comments; Att. 11, Staff Summary Report prepared for San Francisco Bay Regional Water Quality Control Board hearing on September 11, 2019; Att. 12, Regional Board hearing transcript.

2. The issues raised in this petition were raised during the comment period and therefore were preserved for review. *See* 40 C.F.R. § 124.19(a)(2); Att. 7; Att. 11; Att. 12.

3. San Francisco filed this petition within 30 days after the Regional Administrator served notice of issuance of the final permit. *See* 40 C.F.R. § 124.19(a)(3). San Francisco was served notice of the permit on December 10, 2019, and the deadline for filing this petition is January 13, 2020. *See* 40 C.F.R. § 124.20.

V. STANDARD OF REVIEW

The Board may grant review of a permit decision when the petitioner shows that the decision was based on either "a finding of fact or conclusion of law that is clearly erroneous," or "an exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review." *See* 40 C.F.R. § 124.19(a)(4)(A),(B).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment." *In re Steel Dynamics, Inc.* 8 E.A.D. 165, 191, 224–25 (EAB 2000); *In re Ash Grove Cement Co.,* 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusions and the significance of the crucial facts it relied on when reaching its conclusions. *In re Ash Grove,* 7 E.A.D. at 417. As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and followed an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D 323, 342 (EAB 2002).

In reviewing the exercise of discretion by the Region, the Board applies an abuse of discretion standard. *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 at n.7 (EAB 2011). The Region must include an explanation for its discretionary act in the record. *See In re Ash Grove,* 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified."); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner. . ."). When a

"permitting authority provides inconsistent or conflicting explanations for its actions, the Board frequently concludes that the Region's rationale is unclear and remands for further clarity." *In re Chukchansi Gold Resort*, 14 E.A.D. 260, 280 (EAB 2009).

VI. ARGUMENT

A. The Region Clearly Erred by Failing To Respond to San Francisco's Significant Comments.

The Region did not respond to at least six significant comments made by San Francisco, failing to meet the requirements in 40 C.F.R. § 124.17(a)(2) to "briefly describe and respond to all significant comments on the draft permit" that are "raised during the public comment period, or during any hearing:"

- San Francisco requested that the Region clarify the distinction between a water quality-based effluent limitation and a receiving water limitation, if any, and the corresponding legal implications for the distinction. Att. 7.B at 2. The Region failed to substantively address the comment. *See* Att. 10 at 11–12.
- San Francisco requested that the Region identify federal and state legal authority for each task and sub-task in Table 7. Att. 7.B at 9. In response, the Region provided a generic string of citations to the CSO Policy and EPA guidance. *See* Att. 10 at 16–17. The citations were not responsive nor did they provide an explanation for the legal authority supporting each task and sub-task in Table 7.
- San Francisco raised in its comments that the Region previously affirmed that the I.C.2 exemption in the CSO Policy applies to San Francisco because its program was substantially complete and exempt from the planning and construction requirements. Att. 7.B at 9–10. As such, San Francisco asked the Region to provide reasons for departing from this position and an explanation of the legal basis and implications of

applying Section I.C. of the CSO Policy to San Francisco via Table 7 of the 2019 Permit. *Id.* at 10. The Region did not respond. *See* Att. 10 at 17.

- San Francisco provided comments demonstrating that the current performance of the combined sewer system protects beneficial uses. Att. 7.B at 5–7. The Region did not respond or explain how operation of the system consistent with the San Francisco-specific water quality-based effluent limitations would fail to protect beneficial uses. *See* Att. 10 at 15–16.
- San Francisco objected to the unqualified assertion in Section VI.C.5.a that the Region has a legitimate "need" to collect information about isolated sewer overflows or that it has authority to collect such information. Att. 7.B at 4. The Region did not address or respond to San Francisco's comment. *See* Att. 10 at 28.
- San Francisco commented that permit terms failed to provide fair notice. Att. 7.B at 11-12. The Region failed to substantively respond, stating only that it "provided San Francisco fair notice of our expectations," without further response to the specific comments. *See* Att. 10 at 17. The Region conflated providing "notice," which is required as part of the NPDES permitting process under 40 C.F.R. § 124.10, with the requirement that regulatory agencies provide "fair notice," as mandated by the Due Process Clause of the U.S. Constitution. *See Cranston v. City of Richmond*, 40 Cal.3d 755, 763-64 (1985); *McMurty v. Bd. Of Med. Examiners*, 180 Cal. App. 2d 760, 766 (1960) ("This principle [due process] applies not only to statutes of a penal nature but also those prescribing a standard of conduct which is the subject of administrative regulation.").

The Region clearly erred by responding to some but not all of the comments; the Region "must address the issues raised in a meaningful fashion" and the response, "though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by the commenter." *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 566 (EAB 2004) (holding the Region "clearly erred by failing to respond, adequately or in some cases at all, to significant comments. . ."). Failing to comply with 40 C.F.R. § 124.17(a)(2) is clear error and the 2019 Permit must be remanded on this basis.

B. <u>The Region Clearly Erred by Including Generic WQBELs in Section V and Attachment G.I.I.1 that Are Based on Clearly Erroneous Conclusions of Law and Findings of Fact, and by Failing To Provide Fair Notice, and This Topic Involves a Matter of Policy that Warrants Review.</u>

The Permit at Section V and Attachment G, Provision G.I.I.1 includes generic, boilerplate WQBELs. Section V, in relevant part, states:

> Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16) for receiving waters adopted by the Regional Water Board, [State Water Board], or U.S. EPA as required by the CWA and regulations adopted thereunder.

Att. 1 at 8. Attachment G, Provision I.I.1 states:

> Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050.

Att. 1 at G-2; *see also* Cal. Water Code § 13050(1) (defining "pollution," to mean, in relevant part, "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses.").

The Region's decision to include generic, boilerplate WQBELs in the Permit is based on clearly erroneous findings of fact and conclusions of law. Separately, these generic WQBELs are so vague the Region failed to provide fair notice of what must be done to comply with the CWA. Additionally, the Region's use of generic WQBELs raises important policy

considerations appropriate for review by this Board. San Francisco requests that the Board remand the Permit for revisions consistent with the procedures required by the CWA, EPA's regulations, and EPA's guidance in developing facility-specific WQBELs.

1. The Region's Inclusion of Generic WQBELs Is Contrary to Law.

a. The Region's Failure To Follow the CWA, EPA's Regulations, and EPA Guidance Is Contrary to Law.

Section V and Attachment G.I.I.1 appear to be WQBELs despite inclusion in the "Receiving Water Limitations" section of the Permit. *See* Att. 7.B at 2. WQBELs are, by definition, "designed to protect water quality by ensuring that water quality standards are met in *the receiving water*." Att. 13, NPDES Permit Writers Manual at 6-1; *see also In re City of Moscow, Idaho*, 10 E.A.D. 135 (EAB 2001). The Permit already includes San Francisco-specific WQBELs that are designed to and, in fact, protect receiving water quality. *See* Att. 1 at 8 (Section IV.B: dry weather WQBELs), 18–20 (VI.C.5.c: wet weather narrative WQBELs), and F-25. The Region's adoption of Section V and Attachment G.I.I.1 is clearly erroneous because these permit terms are contrary to law, specifically the CWA, EPA's regulations, and EPA guidance. Att. 7.B at 1–3.

The Region failed to comply with the procedural and substantive CWA and NPDES permitting requirements for establishing WQBELs. *See* 33 U.S.C. § 1311(b)(1)(C), 40 C.F.R. Parts 122, 124. The CWA and EPA regulations require permit writers to follow a "standards-to-permits" process to assess the need for and develop WQBELs: (1) determine applicable water quality standards; (2) characterize effluent and receiving water; (3) determine the need for WQBELs; and (4) calculate WQBELs. Att. 13 at 6-1–6-2. There is no evidence in the record that the Region followed the standards-to-permit framework when it adopted Section V and Attachment G.I.I.1. For example:

- Determine if these terms are necessary, as required by 33 U.S.C. § 1311(b)(1)(C), when there are existing San Francisco-specific WQBELs.
- Identify the outfalls, characterize the effluent from the associated CSDs, or identify the receiving waters that were assessed.
- Explain how – if at all – it considered information from San Francisco's post-construction monitoring program, as required by the CSO Policy.
- Identify what pollutant(s) of concern form the basis for adoption of these WQBELs.

Att. 13 at 6-1, 6-12–6-23; *see, e.g.*, CSO Policy at II.C.9; Att. 7.B at 2. The adoption of these generic WQBELs is also inconsistent with the instruction to permitting authorities in the CSO Policy to adopt WQBELs for combined sewer systems that include "appropriate site-specific considerations." CSO Policy at III.B; Att. 13 at 9-20. There is no evidence the Region took into consideration San Francisco-specific considerations, the post-construction monitoring program, or the fact the Permit already includes San Francisco-specific WQBELs. *See* Section VI.B.2 below (San Francisco's system protects receiving water quality, including beneficial uses).

The Region's failure to comply with the CWA and permitting regulations is illustrated by inapposite and irrelevant statements in the Response to Comments. The Region states, "[t]he permitting authority has discretion in translating water quality standards into permit limitations." Att. 10 at 12. San Francisco agrees, but in the context of Section V and Attachment G.I.I.1, the Region did not ***translate*** anything consistent with the NPDES permitting regulations. Att. 13 at 6-32. The Region states, "[r]eceiving water limitations are directly derived from the applicable water quality standards." Att. 10 at 11. San Francisco agrees that WQBELs should be directly derived from applicable water quality standards, but Section V and Attachment G.I.I.1 are not ***derived*** from anything; they simply make an oblique reference to water quality standards. Att. 13 at 6-35. The Region states, "Nothing in [federal case law] forbids a state from incorporating water quality standards into the terms of its NPDES permits." Att. 10 at 12–13. San Francisco agrees, but this

response fails to address San Francisco's concern and there must be ***actual*** incorporation consistent with the standards-to-permit process. Att. 13 at 6-1–6-2. The Region points to a provision in the CSO Policy stating that Phase I NPDES permits should require compliance with applicable water quality standards "expressed in the form of narrative limitations." Att. 10 at 13. San Francisco agrees that narrative WQBELs are appropriate for NPDES permits, but the Region's response fails to acknowledge that San Francisco-specific WQBELs are already incorporated at Section VI.C.5.c (or, relatedly, that San Francisco's permit is a post-Phase II permit, not a Phase I permit).

The Region cites to case law that "[c]ourts have upheld and found narrative water quality standards to be enforceable." Att. 10 at 13. This response is misleading and the case law inapposite. As a matter of law, a permittee cannot "violate" water quality standards. *See, e.g., Am. Paper Inst. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits"); *NRDC v. U.S. EPA,* 16 F.3d 1395, 1399 (4th Cir. 1993) ("Water quality standards are a critical component of the CWA regulatory scheme because such standards serve as *a guideline for setting applicable limitations in individual discharge permits*.") (Emphasis added). The permits in the cases cited by the Region were not under review, but were enforcement cases, and the federal courts did not find a permitting authority could ignore the NPDES permitting regulations. The cases simply held that WQBELs – once included in the permit – may be enforced.

b. The Region's Justification for Ignoring the Requirements of the CWA, EPA Regulations and EPA Guidance Is Contrary to Law.

The Region attempts to sidestep the requirements of the CWA and EPA regulations by characterizing Section V and Attachment G.I.I.1 as "receiving water limitations." Att. 1 at 8. The

Region provides no meaningful explanation of how a "receiving water limitation" is different from a WQBEL, or how it fits into the CWA's legal framework. Att. 10 at 11–12. In its comments, San Francisco requested that the Region clarify the distinction between a WQBEL and a receiving water limitation, if any, and the corresponding legal implications arising from the distinction. Att. 7.B at 2, fn. 1. The Region's response included a discussion of receiving water limitations, but failed to address San Francisco's comment (*e.g.*, comparing receiving water limitations to "effluent limitations," but not water quality-based effluent limitations). Att. 10 at 11–12. The Region "must address the issues raised in a meaningful fashion" and the response, "though perhaps brief, must nonetheless be clear and thorough enough to adequately encompass the issues raised by the commenter." *See In re Wash. Aqueduct*, 11 E.A.D. 565 at 566.

WQBELs are, by definition, "designed to protect water quality by ensuring that water quality standards are met in *the receiving water*." Att. 13 at 6-1 (emphasis added); *see also In re City of Moscow, Idaho*, 10 E.A.D. 135 (EAB 2001). The Region itself effectively describes Section V and Attachment G.I.I.1 as WQBELs: "[c]ompliance with receiving water limitations is determined with respect to the discharge's effect on *the receiving water*." Att. 10 at 11. The Region did not cite any legal authority supporting the use of "receiving water limitations." *Id.* Instead, it relies on isolated statements made in unrelated contexts that merely use the phrase. *Id.* If anything, authorities cited by the Region suggest that properly developed narrative WQBELs look like the San Francisco-specific WQBELs at Section VI.C.5.c, not like those at Section V and Attachment G.I.I.1. *See, e.g., id.* at 11–12.

2. The Region's Inclusion of Generic WQBELs Is Based on Clearly Erroneous Findings of Fact and It Failed To Give Due Consideration to Contrary Information Submitted by San Francisco During the Comment Period.

a. The Region Failed To Identify Factual Information To Support Its Statement That Existing WQBELs Will Not Necessarily Protect Water Quality Standards.

The Region states that compliance with the San Francisco-specific WQBELs at Section VI.C.5.c "will not necessarily achieve water quality standards." Att. 10 at 15. "*For this reason"* it found Section V and Attachment G.I.I.1 are "required." *Id.* at 14-15 (emphasis added); *see also* Att. 1 at F-26 ("These limits are necessary to ensure compliance with applicable water quality standards. . .").

The Region failed to identify factual information supporting this statement. *See In re GSX Servs. of S.C., Inc*., 4 E.A.D. 451, 454 (EAB 1992) (remanding permit because record lacked facts to document Region's rationale for permit term and therefore did not reflect "considered judgment" necessary to support the Region's determination). The Region cited no monitoring or modeling data, included no analyses or other evidence to support the statement, and failed to identify what pollutant(s) or outfall(s) it believes "will not necessarily achieve water quality standards." *See In re Ash Grove,* 7 E.A.D. at 417 (explaining that the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the critical facts in reaching those conclusions). San Francisco commented there was no factual support for Section V and Attachment G.I.I.1. Att. 7.B at 5–7. The Region failed to respond to San Francisco's comment. Att. 10 at 15–16; *see also* 40 C.F.R. § 124.17(a)(2); *In re Wash. Aqueduct,* 11 E.A.D. 565 at 566 (The Region "must address the issues raised in a meaningful fashion").

The Region also failed to provide an explanation *why* the implementation of Section VI.C.5.c "will not necessarily achieve water quality standards." Att. 10 at 15; *See In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007) ("[R]ationale for [] conclusions must be adequately

explained and supported in the record."); *In re Gov't of D.C.*, 10 E.A.D at 342–43 ("Without an articulation by the permit writer of his analysis, [the Board] cannot properly perform any review whatsoever of that analysis and therefore, cannot conclude that it meets the requirements of rationality.").

b. The Region Failed To Give Due Consideration to Prior Findings That San Francisco-Specific WQBELs Protect Receiving Water Quality.

The Region failed to even attempt to reconcile this new response with decades of contrary Regional Board, State Board, and EPA findings cited by San Francisco in its comments that the WQBELs at Section VI.C.5.c protect receiving waters. Att. 7.B at 5–8; Att. 1 at F-25 (Section VI.C.5.c is based on San Francisco-specific information and those WQBELs are focused on the design and operation of the Westside Facilities). The Region fails to explain the factual basis, if any, for its departure from those findings. *In re Shell Offshore*, 13 E.A.D. at 386. For example, the 2009 Oceanside NPDES Permit stated that the design of the collection system reflected in Section VI.C.5.c "would not compromise beneficial uses" and the 2003 Oceanside Permit found the LTCP that is the basis of Section VI.C.5.c "would provide adequate overall protection of beneficial uses." *See* Att. 7.B. App.4 at F-34; Att. 7.B. App.5 at 10; *see also* Att. 7.B. App.8, Analysis of the Adequacy of San Francisco's CSO Control Efforts at 2-7, 2-9 (EPA initiated assessment concluded San Francisco "constructed a wastewater treatment system that protects both water quality and the beneficial uses of these receiving waters").

Additionally, the Regional Board developed (and EPA approved) a TMDL for bacteria in the receiving waters in San Francisco Bay and found San Francisco's CSDs were not a significant source of bacteria. Att. 7.B. App.20 at 20, 24, 27, 47, and 49. This finding is also reflected in the Basin Plan. Att. 8 at 7-57.

c. The Region Failed To Give Due Consideration to Contrary Information Submitted by San Francisco during the Comment Period.

In its comments, San Francisco explained, with supporting information, why the performance of the Westside Facilities and compliance with Section VI.C.5.c will achieve water quality standards. Att. 7.B at 3–5. San Francisco has an existing post-construction monitoring program that assesses the performance of the combined sewer system with applicable water quality standards. *Id*. at 10. The information associated with this program demonstrates the Westside Facilities and compliance with Section VI.C.5.c will protect beneficial uses. *Id.* at 5–9.

The Region did not respond to San Francisco's comments or supporting information. Att. 10 at 15–16. For example, there is no indication the Region considered the post-construction monitoring information and technical information, as described in San Francisco's Comments citing the Tech Memo. *See* Att. 2.B at 8–9; *In re Wash. Aqueduct*, 11 E.A.D. at 566 (The permit issuer's "response to comments must address the issues raised in a meaningful fashion . . . and adequately encompass the issues raised"). Without the benefit of the Region's response, San Francisco does not know if the Region disagrees with San Francisco's post-construction monitoring information, if the Region failed to consider it altogether, or if the Region has some other perspective for ignoring the information. *In re Gov't of D.C.,* 10 E.A.D at 342 (As a whole, the record must demonstrate the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record.").

d. The Region's Rationale for Section V and Attachment G.I.I.1 Is Inconsistent and Irreconcilable with the Other Explanations in the Permit.

During the adoption hearing, Section V and Attachment G.I.I.1 of the Permit were described "as backstops *in the event that the effluent limitations and other provisions in the Permit prove to be inadequate*." Att. 12 at 14:16–20 (emphasis added). This rationale for Section V and Attachment G.I.I.1 is inconsistent with other Permit provisions. The Permit already

contains San Francisco-specific WQBELs that protect designated uses. *See* Att. 1 at 8, 18–20, and F-25. Moreover, the Permit includes a broad "reopener" provision that allows the Region to modify or reopen the Permit before expiration if, in relevant part, "present or future investigations demonstrate that the discharges governed by this Order have or will have a reasonable potential to cause or contribute to . . . adverse impacts on water quality or beneficial uses of the receiving waters." *Id.* at 10, F-27. The reopener provision is specifically recommended in EPA guidance for combined sewer systems to manage any uncertainty associated with the protection of beneficial uses. Att. 13 at 9-19. San Francisco identified the purpose of the reopener provision in its comments. Att. 2.B at 3. The Region does not explain why this reopener provision does not adequately address its concern about the potential for future unknown concerns related to receiving waters. *See* Att. 10 at 11–14; *In re Wash. Aqueduct*, 11 E.A.D. 565 at 566.

The inclusion of generic terms at Section V and Attachment G, Provision I.I.1 is unnecessary, which adds weight to San Francisco's position that the Region clearly erred by including these Permit terms. The inconsistency between the Region's stated rationale with the other Permit terms is clearly erroneous and makes remand appropriate. *See In re Chukchansi*, 14 E.A.D. at 280.

3. The Region Failed To Provide Fair Notice to San Francisco of What Constitutes Compliance with the CWA.

The Board should remand the Permit because Sections V and G.I.I.1 are so vague and unclear that they fail to provide "fair notice" to San Francisco of its legal obligations under the CWA. Fair notice is grounded in "the government's obligation to promulgate clear and unambiguous standards." *U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995). A fundamental principle in our legal system "is that laws which regulate persons or entities must

give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). This principle has two components: first, "regulated parties should know what is required of them so they may act accordingly;" and second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id*; *see also* Att. 2 at 3-36–3-37 (encouraging ". . . the permit writer [to] include the specific narrative language in the permit to ensure that the permittee understands exactly what standards it must meet").

Section V declares the Westside Facilities "shall not cause or contribute to a violation of any applicable water quality standard." Att. 1 at 8. As explained above, San Francisco cannot "violate" a water quality standard, it can only violate a WQBEL in an NPDES permit. *See, infra,* Section 1.a and *Am. Paper Inst.*, 996 F.2d at 350. Likewise, Provision G.I.I.1 demands the Westside Facilities not "create pollution," where "pollution" means "an alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses." Att. 1 at G-2. Without identification of the pollutant(s) of concern, and no indication what receiving water or aspect of the applicable water quality standards is at risk, San Francisco has no reasonable certainty of what Sections V and G.I.I.1 require, and is unclear of what, if anything, it must do to comply with the CWA.

The Region tries to sidestep the lack of fair notice by simply citing to the Ocean Plan, Basin Plan, and Order WQ 79-16. Att. 10 at 13. This is inadequate, because water quality standards must be translated in order for permittees to understand, with "precision and guidance," what "conduct is forbidden or required." *Fox,* 567 U.S. at 253. The Region also cites Order WQ 79-16 for the proposition that San Francisco must take action to the "greatest extent practical." Att. 10 at 18. San Francisco cannot discern the actions that must be taken, if any, to

comply with Sections V and G.I.I.1, let alone how to achieve them to the "greatest extent practical." The resulting conundrum is illustrated by the fact the Permit already includes San Francisco-specific WQBELs that are – by definition – meant to ensure the protection of receiving water quality, specifically beneficial uses. Att. 1 at 8, 18–20, and F-25.

The tenuous situation San Francisco finds itself in is clearly demonstrated by the statement that Sections V and G.I.I.1 "serve as backstops in the event that the effluent limitations and other provisions in the Permit prove to be inadequate." Att. 12 at 14:16–20. Thus, the Region, at any time, without any of the safeguards built into the NPDES permitting process, may use these open-ended WQBELs as a basis to find the Westside Facilities do not protect beneficial uses or are otherwise is inconsistent with applicable water quality standards and bring a civil and criminal enforcement action. This runs afoul of the component of fair notice that protects against those enforcing the law from acting "in an arbitrary or discriminatory way." *Fox*, 567 U.S. at 253. The Region's failure to provide fair notice to San Francisco of what the generic WQBELs in Section V and Attachment G.I.I.1 require violates Constitutional Due Process and thus, is clearly erroneous. *See, e.g., In re City of Irving, Tex.*, 10 E.A.D. 111 (EAB 2001) (EAB authority for as applied Constitutional challenges to NPDES permit).

4. The Region's Inclusions of Generic WQBELs in a Post-Phase II Permit Raise Important Policy Considerations of the Proper Implementation of the CSO Policy.

San Francisco is a rare example of a combined sewer system that has fully built its collection system and holds a post-Phase II permit. Most other combined sewer systems are still implementing their LTCPs, typically pursuant to a consent decree.[4] The issue of how to properly

[4] *See* Status of Civil Judicial Consent Decrees Addressing Combined Sewer Systems (CSOs), available at, https://www.epa.gov/enforcement/status-civil-judicial-consent-decrees-addressing-combined-sewer-systems-csos (last visited, Jan. 12, 2020).

permit a combined sewer system via a post-Phase II permit based on the applicable provisions of the CSO Policy and to ensure the achievement of water quality standards will be critical. The Region's actions adopting this Permit illustrate uncertainty on the part of EPA with implementation of the CSO Policy for cities like San Francisco. For example, the Region relied on CSO Policy requirements that are for Phase I permits, Att. 10 at 13, and Phase II permits, Att. 10 at 16, to justify the contested permit terms, even though the Permit is a post-Phase II permit. The proper application of the CSO Policy and EPA's permitting regulations is critical for municipal permittees like San Francisco, and the Region's inappropriate actions associated with this Permit calls for the EAB, in its discretion, to grant San Francisco's petition and provide guidance on these "important policy consideration[s]." 40 C.F.R. § 124.19(a)(4)(B); *see also In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 530, 539–40 (EAB 2009) (concluding that permit issuer abused its discretion and remanding permit).

C. The Region Clearly Erred by Adopting Section VI.C.5.d Requiring San Francisco to "Update" Its Long Term Control Plan.

The Permit at Section VI.C.5.d establishes what the Region describes as an "LTCP Update," Att. 1 at 21, but, as a practical matter, this permit provision mandates a re-examination of the Westside Facilities. Section VI.C.5.d includes Table 7, which identifies a long, detailed list of tasks that San Francisco must complete over years in order to "update" its LTCP. *Id.* Section VI.C.5.d is clearly erroneous because it is contrary to law and not supported by relevant factual findings.

Section VI.C.5.d requires actions that the CSO Policy exempted municipalities like San Francisco from performing and that are inconsistent with the requirements for a post-Phase II permittee. Further, the Region identified no relevant factual findings supporting the permit requirements and failed to consider the substantial post-construction monitoring data submitted

by San Francisco in its comments. Att. 7.B at 9–12; Att. 10 at 16–17; *see In re Shell Offshore*, 13 E.A.D. at 386. San Francisco requests the Board remand the Permit for action consistent with the CSO Policy and other applicable law, after consideration of all relevant evidence related to the Westside Facilities and associated receiving waters.

1. The Region Clearly Erred by Including Section VI.C.5.d, Which Imposes CSO Policy Requirements That Are Not Applicable to San Francisco and Are Contrary to Law.

Section VI.C.5.d requires actions that the CSO Policy exempts San Francisco from performing. The CSO Policy recognizes that by 1994, some municipalities, like San Francisco, had already done extensive work to control CSOs. The CSO Policy states that any combined sewer system that as of 1994 has:

> . . . substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet [water quality standards] and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this Policy.

CSO Policy at I.C.2.

The construction of the Westside Facilities, as approved by both California and the Region, commenced in the early 1980s and was completed in 1997. Att. 8 at 2–6. The Region has affirmed that the CSO Policy I.C exemption applies to San Francisco. *See, e.g.*, Att. 7.B. App.7, 1997 Oceanside NPDES Permit at 6, finding 11 ("the City's program qualifies for the CSO Policy's classification under Section I.C. as being substantially complete and exempt from the planning and construction requirements."). Therefore, many of the elements of developing a LTCP in section II.C of the CSO Policy do not apply, as a matter of law, to San Francisco, for example, section II.C.1 (Characterization, Monitoring, and Modeling), section II.C.2 (Public Participation), and section II.C.4 (Evaluation of Alternatives).

In its comments, San Francisco objected to inclusion of the provisions in Section VI.C.5.d, in light of CSO Policy I.C exemption, and requested that the Region explain its reasoning:

> If the Regional Board and EPA disagree with this position, the SFPUC requests an explanation why, including their position on the practical implication of I.C as applied to the SFPUC. Relatedly, the SFPUC requests the Regional Board and EPA explain the demands in Table 7 in light of I.C and their prior findings that the SFPUC is exempt from most of the planning and construction requirements in the CSO Control Policy associated with the LTCP.

Att. 2.B at 10. The Region did not respond to San Francisco's specific comments on the applicability of the CSO Policy I.C exemption. *See* Att. 10 at 17–18; *See In re Wash. Aqueduct*, 11 E.A.D. 565 at 566.

The Region, in an attempt to justify Section VI.C.5.d, in its response cited to CSO Policy sections IV.B.2.b., IV.B.2.d., IV.B.2.e., and IV.B.2.f. *See id* at 17. However, as the Region itself explained, those cited provisions of the CSO Policy are "***Phase II*** Permits-Requirements for Implementation of a Long-Term CSO Control Plan." *Id.* (emphasis added). Under the terms of the CSO Policy, the 2019 Permit is not a Phase II permit; it is a post-Phase II permit. A Phase II permit is a permit issued during the initial implementation of an LTCP. San Francisco completed implementation of its LTCP for the Westside Facilities in 1997, and the Region has since issued two post-Phase II permits to San Francisco. *See* Att. 7.B. App.4 and App.5; *see also* Att. 4 at 15. The Region applied inapplicable and inapposite provisions of the CSO Policy to justify Section VI.C.5.d. Further, the Region failed to explain why applying Phase II permitting requirements to a post-Phase II permit is appropriate or consistent with law under the CSO Policy. *See, e.g., In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 580–90 (EAB 2010) (remand of permit for failure to articulate basis for the permit provision). The Permit must be remanded for the proper application of the CSO Policy.

2. The Region Clearly Erred by Not Supporting Section VI.C.5.d with Clear Factual Findings.

The Region included no clear factual findings to support the terms of Section VI.C.5.d. *See* Att. 1 at F-30–F-31, Att. 10 at 17; *see also In re Ash Grove,* 7 E.A.D. at 417. Nor does the record reflect consideration by the Region of the post-construction monitoring information submitted by San Francisco. Att. 10 at 16–17. In support of Section VI.C.5.d, the Region provided only post hoc rationales, unsupported by any evidence or law.

The Region states in support of Section VI.C.5.d, for example, "[s]ince decades have passed since San Francisco constructed most of its wet weather facilities, *we find it unlikely that no improvement can be made*." *See* Att. 10 at 18 (emphasis added). The Region provided no explanation of what – if any – factual finding supported this conclusion that "improvement[s] can be made," that improvements are necessary, or the objective of any improvement. *Id.* at 17–18. The Region also responded that it is a "*likely scenario* . . . that San Francisco will identify ways to minimize (e.g., reduce frequency or magnitude) combined sewer discharges and maximize pollutant removal during wet weather." *Id.* at 18 (emphasis added). Again, there is no explanation for why the Region found this is to be a "likely scenario" or any facts that support this justification for Section VI.C.5.d. *Id.*

The Region's response includes ". . . it is appropriate to assess ways to reduce the volume, frequency, and magnitude of the combined sewer discharges . . . to *better protect* beneficial uses. . ." *Id.* at 20 (emphasis added). The objective of any "improvement," if necessary, should be focused on protection of beneficial uses. *See* CSO Policy at II.C.3, II.C.9. However, the Region failed to identify any factual finding that beneficial uses are not currently protected. *See In re GSX Servs.,* 4 E.A.D. at 454 (Without facts to document Region's rationale for permit term, record does not reflect "considered judgment" necessary to support Region's

determination). As explained in Section VI.B.2, San Francisco provided evidence in its comments demonstrating the protection of beneficial uses based on the existing performance of the Westside Facilities through its post-construction monitoring activities. Att. 2.B at 5–7; *see also* Att. 7.B. App.10 at 2–3.

The Region made statements in its Response to Comments, but failed to explain their relevance, if any, to Section VI.C.5.d consistent with the CSO Policy. Att. 10 at 18–20. *See In re Gov't of D.C.*, 10 E.A.D at 342–43. The Region's statements and the cited documents are inapposite or irrelevant and do not support Section VI.C.5.d consistent with the CSO Policy. For example:

- The Region stated that "approximately 100 million gallons of combined wastewater and storm water were discharged from the combined sewer discharge outfalls between 2011 and 2014." Att. 10 at 20. The Region failed to explain that this volume is *only 1%* of combined flows received by San Francisco and is significantly less volume than expected under Order 79-16, when the State Board and the Region determined that the design, construction and operation of the Westside Facilities would protect beneficial uses. *See id.* at 20 (citing the 2014 Characterization of Westside Wet Weather Discharges at 1-4); *see also* Att. 7.B. App.1 at 10. The Region provides no explanation why the discharge of "100 million gallons" in 2011–2014 means that beneficial uses are not protected or how, if accurate, this fact justifies Section VI.C.5.d.
- The Region asserted that "20 percent of [recreational] users were in contact with receiving water" after "combined sewer discharges." *See* Att. 10 at 20. This is not correct; the report cited by the Region explicitly says that observed users were

engaged in "nonwater contact recreation," and its findings "cannot be extrapolated to estimate how many people were engaged in water contact recreation." Att. 7.B. App. 9 at 3-14. The Region failed to consider that the report also found inclement weather (*i.e.*, winter rain), the conditions where CSDs occur, "discourage water contact recreation and limit exposure." *Id.* at 3-14.

- The Region mischaracterized copper and zinc data provided in post-construction monitoring reporting. Att. 10 at 20 (citing 2014 *Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls*, *Appendix A*). First, the Region inappropriately compared monitoring data averages to maximum concentrations. Att. 7.B. App. 9 at 3-16 and Appendix A at 2. The Region also failed to consider that "the median and average concentrations" from the data in the report is "similar to those expected in storm water runoff" and "are mostly below the water quality objectives." *Id.* at 3-15, Table 3-4. The relevance of the Region's response is not clear, cogently explained, or supported in the record. Indeed, in issuing San Francisco's Bayside NPDES Permit, the Region determined that "given the relatively short duration of [CSDs] (*i.e.*, just a few hours each time), and accounting for the inevitable dilution within the receiving waters during wet weather, water quality standards appear to be maintained" notwithstanding similar levels of copper and zinc in CSDs from the Westside Facilities. Att. 14, Bayside NPDES Permit Order No. R2-2013-0029 at F-42.

The Region's failure to support section VI.C.5.d with any relevant factual findings is clear error. *See In re Shell Offshore*, 13 E.A.D. at 386–387 (remand where "Region provided no

record foundation for [its] determination other than a brief statement in the Response to Comments that is unsupported by facts or analysis in the record.").

3. The Region's Requirement To "Update" the LTCP Is Not Supported by Any Factual Finding or Law Regarding a Demonstrated Need To Further Protect Beneficial Uses.

The design and performance of the Westside Facilities may be reviewed and modified, if necessary to protect the beneficial uses of receiving waters. CSO Policy at II.C.3; *see also* Att. 2.B at 10. Any such review and modification in a post-Phase II permit must be consistent with the CSO Policy, including the sensitive area provisions (CSO Policy section II.C.3), and guided by the San Francisco-specific data provided by post-construction monitoring. Att. 2.B at 10; CSO Policy at section I.C.2. San Francisco clearly identified the correct legal framework for the Westside Facilities in its comments. *Id.*

Section VI.C.5.d is not consistent with the legal framework applicable to San Francisco. Section VI.C.5.d Table 7, Task 3 of the Permit, for example, requires a report "that evaluates, prioritizes, and proposes control alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of discharges to sensitive areas" and then San Francisco must "prioritize and propose for implementation alternatives to eliminate, relocate, or reduce the magnitude or frequency of discharges" and propose an "implementation schedule." Att. 1 at 22. Table 7 is inconsistent with the requirements in the CSO Policy and thus contrary to law. CSO Policy at II.C.3.b.ii. Table 7 requirements, for example, are not based on any determination of what is *necessary to protect beneficial uses*, as is required by the CSO Policy. *See* CSO Policy at II.C.3 (requiring that CSDs to a sensitive area that cannot be eliminated or relocated, be tied to the level of control "*deemed necessary* to meet [water quality standards] for full protection of existing and designated uses") (emphasis added); s*ee also In re Gov't of D.C.*, 10 E.A.D at 346 (remanding

where Region failed to explain departure from Agency guidance and how permit comports with regulatory requirements).

San Francisco commented that Section VI.C.5.d mandates a reduction of combined sewer discharges for the sake of reduction. Att. 2.B at 11. The Region's response that Section VI.C.5 does not "require San Francisco to minimize (*e.g.*, reduce frequency or magnitude) combined sewer discharges and maximize pollutant removal during wet weather simply for the sake of reduction, but rather to ensure protection of beneficial uses" is not supported by the plain language of the Permit. Att. 1 at 21, F-30—F-31. The plain language of Section VI.C.5.d is not limited by an assessment of what actions would be necessary to protect beneficial uses. *Id.* at 21. Perpetual reconstruction of combined sewer facilities is not required by the CSO Policy; rather, a well-reasoned and supported factual assessment of actual adverse impacts to beneficial uses is the fundamental prerequisite for expansion of system controls.

The Region's rationale for Section VI.C.5.d "must be adequately explained and supported in the record." *In re Shell Offshore,* 13 E.A.D. at 386. The record for the Permit contains no such analysis; thus, Section VI.C.5.d is clearly erroneous because it is supported neither by law nor by reasonable evidence. Under these circumstances, the Region cannot demonstrate that it "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C.,* 10 E.A.D. at 342.

4. The Region Clearly Erred by Mandating That San Francisco Update Its LTCP without Providing Fair Notice of What Is Necessary To Comply with Section VI.C.5.d.

The Permit at Section VI.C.5.d fails to provide fair notice to San Francisco of what level of control protects beneficial uses. Section VI.C.5.d of the Permit at Task 3 in Table 7, for example, fails to provide any guidance to San Francisco on ***why*** reduction is necessary or, critically, ***how much*** reduction is necessary to protect beneficial uses. The Region has taken the

position for decades that the current frequency and volume of CSDs protects beneficial uses. *See* Att. 2.B at 5–6; *see also* Att. 7.B. App. 2, Order 79-12 and App. 3, Westside Overflow Control Study (1978). If the Region's consistent findings on the level of control necessary to protect beneficial uses are no longer accurate, San Francisco does not know what level of control will provide "full protection of . . . uses." CSO Policy at II.C.3.b.ii. The Permit, including Section VI.C.5.d, does not provide an answer. The Region's failure to provide fair notice is contrary to law. Incumbent on the Region as the permit issuer is the obligation to provide clear and substantiated regulatory objectives. The Region's failure to do so is clearly erroneous.

San Francisco is entitled to "know what is required of [it] so [it] may act accordingly." *Fox*, 567 U.S. at 253. Without fair notice of the threshold constituting protection of beneficial uses, San Francisco lacks clarity about what is necessary to "minimize" CSDs, "maximize" pollutant removal, and "reduce the magnitude or frequency of discharges to sensitive areas" in order to comply with the terms of Section VI.C.5.d. Att. 10 at 17–18. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). San Francisco is *entitled by law* to "precision and guidance" in the Permit. *Fox*, 567 U.S. at 253. The Permit must be remanded because Section VI.C.5.d fails to provide San Francisco fair notice of its legal obligations under the CWA, in violation of the Due Process Clause. *See, e.g.*, *In re City of Irving, Tex.*, 10 E.A.D.111.

D. The Region Clearly Erred in Adopting Permit Requirements Regulating Isolated Sewer Overflows That Do Not Reach Surface Waters.

The Region, at Section VI.C.5.a.ii.b, requires the reporting, and potential regulation, of isolated sewer overflows that do not reach surface waters. The CWA does not confer authority to regulate overflows that never reach a Water of the United States. The Region has gone to

unreasonable lengths in its effort to craft a theory extending jurisdiction over isolated sewer overflows. The legal theories cobbled together by the Region misstate the authority conferred by the CWA, are contrary to the intent of the CSO Policy (e.g., allowing for the continued use of combined sewer systems by municipalities), and are inconsistent with EPA's NMC Guidance. Even if the Region had the authority to include this term, the Region has not provided substantial evidence adequately supporting collection of information on isolated sewer overflows. Having clearly erred as a matter of law and without any supporting findings of fact, the Permit must be remanded.

1. The Contested Permit Requirements relate to Isolated Sewer Overflows That Do Not Reach Surface Waters.

As is evident from the Permit requirements at Section VI.C.5.a.ii.b, the definitions accompanying the Permit, the Fact Sheet, and the Response to Comments, the Region is requiring the reporting, and potential regulation, of isolated sewer overflows that do not reach surface waters. The Permit at Section VI.C.5.a.ii.b.1 specifies, in relevant part: "The Discharger shall . . . enter information regarding *all sewer overflows from the combined sewer system* ["SOCSS"] into the CIWQS Online SSO database. . ." Att. 1 at 17 (emphasis added). Subsections (2) – (4) list various reporting requirements "[f]or sewer overflows from the combined sewer system," with the requirements differing based on the volume of the overflow. *Id.* Subsection (5) requires reporting for months "during which no sewer overflow from the combined sewer system occurs." *Id.*

The Fact Sheet states that Section "VI.C.5.a.ii.b requires the Discharger to notify and report sewer overflows from the combined sewer system using the State's CIWQS database." Att. 1 at F-30. The definitions in the Permit relevant to interpreting Section VI.C.5.a.ii.b include:

- "**Combined Sewer Overflow**:" "The [CSO Policy] defines a combined sewer overflow as the discharge from a combined sewer system at a point prior to the POTW's treatment plant."
- "**Sewer Overflow from the Combined Sewer System**:" "Release or diversion of untreated or partially treated wastewater or combined wastewater and stormwater from the combined sewer collection system. Sewer overflows from the combined sewer system can occur in public rights of way or on private property. Sewer overflows from the combined sewer system do not include releases due to failures in privately-owned sewer laterals or authorized combined sewer discharges. . . ."

Att. 1 at A-1 and A-5.

The Region was explicit in its intent to regulate all isolated sewer overflows in its Response to Comments. In comments on the definition of "Sewer Overflow from the Combined Sewer System," San Francisco requested that the Region "clarify that . . . SOCSS [(isolated sewer overflows)] do not reach surface waters." Att. 7.A at item A.28. The Region refused to make the requested clarification and explained that, "[l]imiting the definition to releases or diversions not reaching surface waters would circumvent the requirement in Provision VI.C.5.viii(b) [sic] of the [draft permit] to report such discharges via the CIWQS database." In sum, via Section VI.C.5.a.ii.b., the Region is imposing reporting on "all sewer overflows from the combined sewer system," which is intentionally defined to include isolated overflows that do not reach surface waters.

2. The Region Clearly Erred as a Matter of Law Because It Does Not Have Jurisdiction over Isolated Sewer Overflows That Do Not Reach Surface Waters.

The Permit is issued pursuant to the CWA as an NPDES permit for point source discharges from the Oceanside facility to surface waters. Att. 1 at F-9. The Region's jurisdiction

to regulate activity via the Permit is limited to discharges of pollutants from a point source to navigable waters of the United States. 33 U.S.C. § 1342; *see also SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 171-72 (2001) (Recognizing that in enacting the CWA, Congress extended jurisdiction "over waters that were or had been navigable" and not over "nonnavigable, isolated, intrastate waters").

Despite the constitutional limitations of the CWA's reach, the Region seeks to rely upon the CSO Policy's definition of "combined sewer overflows" as a basis to regulate isolated sewer overflows (i.e., arguing that such events fall within the definition of "combined sewer overflows") and, as a result, the CSO Policy contemplated reporting of such events. Att. 10 at item A.17. There is no basis for the Region's position that the CSO Policy's definition of "combined sewer overflows" extends to isolated overflows that do not reach a surface water. CSO Policy at 18689, 18695 (stating that (i) "CSOs are point sources subject to NPDES permit requirements …" and (ii) the objective of the CSO Policy is to "bring all wet weather CSO discharge points into compliance with technology-based and water quality-based requirements of the CWA.").

In fact, EPA has explicitly confirmed that the definition of a "combined sewer overflow," as used in the CSO Policy, does not extend to isolated events. For example, EPA provided the following definition in its 2004 Report to Congress:

> **What is a CSO?** A combined sewer system is a wastewater collection system, owned by a state or municipality, that is specifically designed to collect and convey sanitary wastewater (domestic sewage from homes as well as industrial and commercial wastewater) and storm water through a single pipe. During precipitation events (e.g. rainfall or snowmelt), the systems are designed to overflow when collection system capacity is exceeded, *resulting in combined sewer overflow (CSO) that discharges directly to surface waters*.

Att. 15, Report to Congress (2004) at Fact Sheet (emphasis added); s*ee also id*. at ES-2 ("Most [combined sewer systems] are designed to discharge flows that exceed conveyance capacity directly to surface waters ... Such events are called CSOs.").

In its comments, San Francisco raised the Region's lack of authority to regulate isolated overflows, stating that it "disagrees that EPA or the State has jurisdiction over discharges that do not reach surface waters, and which have no potential to do so." Att. 10 at item A.16. The Region responded, in relevant part, as follows:

> "Contrary to San Francisco's assertion, ***the State*** does have jurisdiction over discharges from the combined sewer that do not reach surface waters if those discharges reach or threaten to reach waters of the State. For example, groundwaters are waters of the State. This NPDES permit does not authorize any discharges to waters of the State that are not also waters of the United States."

Id. (emphasis added).[5] Nowhere in the response did the Region assert it had independent federal authority over isolated sewer overflows. Thus, the Region failed to articulate any basis whatsoever upon which ***EPA*** has jurisdiction over isolated sewer overflows. The Region's refusal to narrow the Permit requirements to match with the scope of its jurisdiction (or the lack thereof) constitutes clear error.

3. The Region's Regulation of Isolated Sewer Overflows Resulting from Design Capacity Exceedances Is an Abuse of Discretion.

San Francisco has particular concern with aspects of the Permit imposing reporting requirements for isolated sewer overflows occurring as a result of "storms exceeding the

[5] San Francisco disputes that California has independent jurisdiction over discharges that do not reach surface waters. For example, San Francisco disputes that California has authority to regulate discharges that do not reach surface waters as nuisances under California Water Code § 13050 because San Francisco is protected under a statutory shield from nuisance claims relating to isolated sewer overflows. San Francisco also has an affirmative defense of design immunity. The dispute over California's jurisdiction is currently subject to litigation. *City and County of San Francisco v. Regional Water Quality Control Board,* Alameda Superior Ct. Case No. RG19042575. However, because the extent of California's authority is not relevant to EPA's jurisdiction, arguments about the extent of California's authority are not argued herein.

system's level of service." Att. 7.C at 1. San Francisco explained its objection to the regulation of design capacity exceedances as follows:

> The definition of SOCSS ... must be revised to exclude SOCSS occurring as a result of storms exceeding the system's level of service. By definition, as a result of the inherent nature of a combined sewer system, SOCSS may occur when the design capacity of the system is exceeded by a storm event. There is no material benefit in collecting data on these occurrences because it is known in advance that they will occur.

Id.

Decisions related to the design capacity of a combined sewer system – just like decisions related to the design of a municipal stormwater system – must be left in the purview of accountable, local elected officials. *See, e.g., Tri-Chem, Inc. v. Los Angeles County Flood Control Dist.*, 60 Cal.App.3d 306, 315 (1976) (absent a showing that a flood control project results in *more* flooding, the level of control achieved by a municipality in designing flood control projects is at its discretion); *cf. United States v. Sponenbarger*, 308 U.S. 256, 265 (1939) ("In the very nature of things the degree of flood protection to be afforded must vary" and the government must use its discretion for designing a flood control system). Flood control is not an area where the Region has the expertise or legal authority to second-guess elected officials or to arbitrarily mandate a level of service.[6] *See, e.g., Hess v. Port Auth. TransHudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

The Region claims that reporting of isolated sewer overflows is necessary "because understanding the causes of overflows is vital to determining whether and what ***corrective actions*** might be appropriate." Att. 10 at 22 (emphasis added). There can only be one "corrective action" for isolated sewer overflows due to a design capacity exceedance: increase the capacity

[6] The Region failed to include any evidence in the record that San Francisco's level of service is inadequate.

of the combined system. Indeed, this is precisely the corrective action that the Region contemplates, as evidenced by the following: "Frequent sewer overflows from the combined sewer system of sufficient volume to backup into homes and business may be evidence that *capacity improvements* are needed." *Id.* at 24. Increasing the design capacity of the combined system would require re-engineering. Imposing such a requirement would be arbitrary and capricious and would require studies, major construction, cost billions of dollars, and likely take decades to implement at substantial citywide disruption. Most importantly, however, any such effort could not eliminate isolated sewer overflows because of the fundamental nature of a combined sewer system. EPA has identified no metric or other basis by which it has the authority (or expertise) to determine "the right amount" of isolated sewer overflows.

The Region cannot rely on the NMCs in the CSO Policy as a basis to impose future "corrective action." *See* Att. 16, CSO Guidance for NMC (1995) at 1-7 ("The NMC are controls that *can reduce CSOs and their effects on receiving water quality, do not require engineering studies or major construction, and can be implemented in a relatively short period (e.g., less than approximately two years"*) (emphasis added). Nor do any of the cases relied upon the Region as authority to impose "corrective action" actually confer such authority. *See, infra,* Section 4.b (discussing cases cited by the Region).

Although the Region does not try to mandate a level of service in this Permit, its stated basis for the reporting of isolated sewer overflows resulting from design capacity exceedances is to determine whether "corrective actions" is necessary. If the Region does not have authority to order a change in the design capacity of the system, it does not have a basis to require reporting of isolated sewer overflows resulting from design capacity exceedances. The Region's regulation of isolated sewer overflows resulting from design capacity exceedances is beyond the authority

conferred by the CWA and is an abuse of discretion. Further, as a matter of policy, this is a local issue properly left to elected officials.

4. The Region Did Not Exercise Considered Judgment in Its Imposition of Permit Requirements relating to Isolated Sewer Overflows That Do Not Reach Surface Waters.

The Region cites to two categories of authorities in support of the requirements relating to isolated sewer overflows in Section VI.C.5.a.ii.b: (a) EPA's 1995 *Combined Sewer Overflows Guidance for Nine Minimum Controls* ("NMC Guidance"); and (b) case law. Neither of these authorities supports the Region. Therefore, the Region failed to exercise considered judgment in its imposition of these Permit requirements.

a. The Region's Reliance on EPA's NMC Guidance To Justify a Reporting Requirement for Isolated Sewer Overflows That Do Not Reach Surface Waters Is Misplaced.

The Region relies heavily on EPA's NMC Guidance as a basis for imposing the requirements in Section VI.C.5.a.ii.b. Att. 10 at 22-23. The Region argues that "[o]verflow data are needed for many reasons" and presents a bulleted list of citations to EPA's NMC Guidance. *Id*. The Region's reliance on this Guidance is misplaced. The NMCs do not provide authority to regulate the design capacity of a combined sewer system unrelated to discharges to waters of the United States.

The Region provides a conclusory citation to sixteen pages of NMC Guidance without articulating, with reasonable clarity, how those pages dictate the need for, or otherwise authorize requiring reporting on, isolated sewer overflows. Att. 10 at 22-23 (citing to NMC Guidance at 2-3 to 2-4; 3-2 to 3-4; 5-2; 5-3; 6-2 to 6-3; 7-3, 7-8 to 7-10; 7-14; and 8-1 to 8-3); *see In re Shell Offshore*, 13 E.A.D. at 386 (explaining that the permit issuer must articulate with reasonable clarity the reasons supporting its conclusions).

It is clear, via the plain language of the NMCs, that they were not intended to, nor designed to, address isolated sewer overflows that do not reach a surface water. Att. 16 at 1-4, 1-7 (describing NMC as "controls that can reduce CSOs and their effects on receiving water quality"), 5-1 (explaining that the control relating to maximizing flow to the treatment works without causing sewer backups is narrow and limited to "simple modifications to the [combined sewer system] and treatment plant to enable as much wet weather flow as possible to reach the treatment plant. The objective of this minimum control *is to reduce the magnitude, frequency, and duration of CSOs that flow untreated into receiving waters*.") (emphasis added), 7-10 (discussion of consideration in removing floatables from the surface of the *receiving water body*) (emphasis added), and 8-1 ("The seventh minimum control, pollution prevention, is intended to keep contaminants from entering the CSS and *thus receiving waters via CSOs*.") (emphasis added).

The remainder of the provisions of the NMC Guidance cited by the Region: (i) have no relevance to identifying or reporting isolated sewer overflows that result from design capacity exceedances, or (ii) could be supported via implementation of a narrow reporting regime that is limited to isolated sewer overflows associated with operation and maintenance failures.[7] For example, the Region claims that isolated sewer overflow reporting is needed to determine: "whether San Francisco's operations and maintenance activities are adequate," "whether measures to maximize storage within the collection system are functioning properly," "whether dry weather overflows are being controlled,"[8] and whether appropriate action has been taken "to minimize floatables" and implement "pollution prevention activities" like the fats, oil, and grease

[7] As explained in San Francisco's comments: "[The City is] prepared to … develop a workable framework for the monitoring and reporting of SOCSS … associated with operation, maintenance, and other combined sewer system failures ..." Att. 2 C at 1.

[8] The Region has provided no evidence whatsoever indicating that dry weather overflows are not being controlled.

programs. Att. 10 at 23. Reporting on isolated sewer overflows resulting from design capacity exceedances have no relevance to any of these issues. Rather, the Region could entirely satisfy the need for information related to these issues via the collection of a narrower universe of information about overflows related to the operation and maintenance of the combined system. Therefore, citation to the NMC Guidance does not provide any basis for the reporting requirement imposed by EPA in the permit. *See In re Shell Offshore*, 13 E.A.D. at 386.

b. The Region's Other Authorities Uniformly Indicate that It Lacks CWA Jurisdiction over Isolated Sewer Overflows That Do Not Reach a Surface Water.

The Region cites four cases in support of its authority to require reporting of isolated sewer overflows. Att. 10 at 23. Rather than support the Region's position, the cases are clearly distinguishable and, if anything, demonstrate that the NPDES program does not extend jurisdiction over isolated sewer overflows:

- S*an Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F.Supp.2d 719 (N.D.Cal. 2011). The Court laid out the elements to "establish a violation of the [CWA]'s NPDES requirements" that is entirely contrary to the Region's position that it can regulate isolated sewer overflows. The Court identified the following elements that a plaintiff must prove: "(1) a person (2) discharged (3) a pollutant (4) *to navigable waters of the United States* (5) from a point source (6) without a permit." *Id.* at 754 (emphasis added). The Court declined to grant summary judgment where sanitary sewer overflows were identified, but were not shown to have discharged to a surface water. In other words, absent proof that an overflow discharged to a surface water, the Court found no basis to find a violation of NPDES requirements. *Id.* at 757. Similarly, the Court found no violation of the CWA where reports indicated: (i) "overflow was fully captured and returned to a sanitary sewer" before reaching a surface water; and

(ii) where overflows reached stormwater conveyances during dry weather but was successfully cleaned-up. *Id.* at 757, 761.

- *Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1*, 16 F.Supp.3d 294, 305 (S.D.N.Y 2014). Plaintiff sought "to hold Defendant liable for sewage spills discharged into the Saddle River ..." based on eyewitness accounts of overflows. *Id.* Although this is a sanitary sewer case – not a combined sewer – it reinforces the judiciary's interpretation that CWA jurisdiction requires a direct discharge to a surface water (here, the Saddle River).
- *Foti v. City of Jamestown Bd. of Pub. Utils.*, 2014 WL 3842376 (W.D.N.Y. 2014). This case is legally and factually irrelevant to support the Region's action.
- *United States v. Wayne County,* 369 F.3d 508 (6th Cir. 2004). This case provides no support for the legality of the disputed permit terms. The Region characterizes *Wayne County* as a case where the "major driver of system upgrades and repairs" was an enforcement action driven by concern over sewer backups into basements. This mischaracterizes the *Wayne County* decision. The opinion provides minimal information about the basis for the original enforcement action; to the extent the issue is addressed, the opinion indicates that isolated basement flooding was only discussed by the parties in the original action in the context of evaluating the potential consequences of closing bypasses that discharged directly to surface waters. *United States v. Wayne County*, 369 F.3d at 513-514 ("[T]he cause and effect between extreme weather and sewage discharges into the Detroit River was a significant reason, if not the primary reason, for the filing of the lawsuit by the United States and the State of Michigan."). The case does not address isolated sewer overflows resulting

from design capacity exceedances nor the legality of regulating such overflows under the CWA.

In imposing the requirements in Section VI.C.5.a.ii.b, the Region claims authority – via the CWA – over isolated sewer overflows. As the cases cited by the Region demonstrate, the CWA does not provide the Region with jurisdiction over isolated sewer overflows.

5. The Region's Position that It Is Necessary To Require Reporting of Isolated Sewer Overflows To Confirm Whether Such Events Reach Waters of the United States Is Based on a Clearly Erroneous Fact.

The Region argues that reporting of isolated sewer overflows via Section VI.C.5.a.ii.b is needed because the Region "cannot confirm whether overflows from the combined sewer system reach water of the United States *without this reporting*." Att. 10 at A.17 (emphasis added) and 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."). The Region similarly argues that "[p]reventing nuisance is integral to protecting the water contact recreation beneficial use and achieving the water quality objectives in the Ocean Plan and Basin Plan. Accordingly, the information about sewer overflows from the combined sewer system provides *an essential means* to evaluate compliance with these provisions." *Id.* at 28 (emphasis added). The Region's arguments are based on a clearly erroneous conclusion of fact because it does not need information about isolated sewer overflows in order to collect information meeting the needs articulated in its response.

The Permit includes a separate reporting mechanism for discharges from the combined sewer system reaching a surface water (including a Water of the United States) in Attachment G ("Standard Provisions – Reporting"). Att. 1 at F-30. Two provisions – "Two-Hour Notification" and "Five-Day Written Report" – require reporting unauthorized discharges to surface waters. *Id.* at G-12–G-13. Unauthorized discharges are defined as any "discharge, not regulated by waste

discharge requirements, of treated, partially-treated, or untreated wastewater resulting from the intentional or unintentional diversion of wastewater from a collection, treatment, or disposal system." *Id.* at G-12, n.1 (citing California Code of Regulations, Title 23, section 2250(b)). For "any unauthorized discharge that enters a drainage channel or surface water," San Francisco must notify the State and within five days, submit a report of the incident, including the location, cause, quantity, duration, and treatment-level of the discharge. *Id.* at p. G-12. All such reports must be copied to EPA. *Id.* at Section VI.A. Because Attachment G of the Permit includes a mechanism for reporting overflows to surface waters, the imposition of the reporting requirement at Section VI.C.5.a.ii.b is unnecessary and duplicative. *See In re GSX Servs.*, 4 E.A.D. at 454 (Remanding permit because record lacked facts to document Region's rationale for permit term and therefore did not reflect "considered judgment" necessary to support the Region's determination).

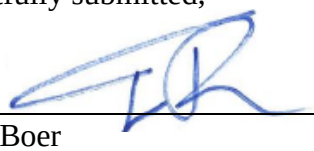
In fact, EPA has access to years of data on unauthorized discharges from the combined system that reach a surface water because the 2009 Oceanside Permit included almost identical "Two-Hour Notification" and "Five-Day Written Report" provisions. Att. 7.B. App. 4 at 19-21. Therefore, the Region has mandated reports about overflows from the combined sewer system that reach waters of the United States for a decade. Despite the reporting requirement in the 2009 Oceanside Permit, the Region failed to provide any substantial evidence indicating that isolated sewer overflows resulting from design capacity exceedances reach a surface water of any kind, much less impact water quality objectives, or that such discharges would not already be subject to the pre-existing reporting Requirements in Attachment G of the Permit. As a result, the Region clearly erred by failing to demonstrate why additional information collected by Section

VI.C.5.a.ii.b is necessary in light of reporting requirements in the 2009 Oceanside Permit and still required pursuant to Attachment G ("Standard Provisions – Reporting"). Att. 1 at F-30.

VII. CONCLUSION

For the foregoing reasons, the Region clearly erred or abused its discretion in the implementation of Section V and Attachment G.I.I.1, Section VI.C.5.d, and Section VI.c.5.a.ii.b and Petitioner respectfully requests that the Board remand NPDES Permit No. CA0037681.

Respectfully submitted,



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Date: January 13, 2020

REQUEST FOR ORAL ARGUMENT

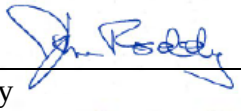
Petitioner, City and County of San Francisco, respectfully requests oral argument before the Environmental Appeals Board on its petition for review of NPDES Permit No. CA0037681 because it believes oral argument will be of assistance to the Board.

STATEMENT OF COMPLIANCE WITH THE WORD/PAGE LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) & (d)(3), I hereby certify that this Petition does not exceed 14,000 words. Not including the transmittal letter, caption, table of contents, table of authorities, figures, signature block, table of attachments, statement of compliance with the word limitation, and certification of service, this Petition contains 13,678 words.

J. Tom Boer

Samuel L. Brown



John Roddy

Estie Kus

TABLE OF ATTACHMENTS

Attachment #	Name of document
1	2019 Oceanside NPDES Permit No. CA0037681
2	Combined Sewer Overflows: Guidance for Permit Writers (EPA, 1995)
3	San Francisco Bay Basin Water Quality Control Plan (May 4, 2017), Chapter 4: Implementation Plans
4	San Francisco Wastewater Long Term Control Plan Synthesis (Mar. 30, 2018)
5	San Francisco Master Plan for Waste Water Management (Sept. 1971)
6	Environmental Impact Report and Statement, San Francisco Wastewater mast Plan (May 1974)
7	San Francisco Comments on Tentative Order for NPDES Permit No. CA0037681
	A. Summary Table of Comments
	B. Supplemental CSO Policy Comments Attachment B Appendix (cited in Petition by number): **1.** State Water Resources Control Board Order No. 79-16 **2.** San Francisco Bay Regional Water Quality Control Board, Order No. 79-12 **3.** Westside Wet Weather Facilities Revised Overflow Control Study, Abstract Report and Request for Revised Overflow Frequency (1978) **4.** 2009 Oceanside NPDES Permit **5.** 2003 Oceanside NPDES Permit **7.** 1997 Oceanside NPDES Permit **8.** Analysis of the Adequacy of San Francisco's Combined Sewer Overflow Control Efforts (Aug. 26, 1994) **9.** Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls (Jul. 30, 2014) **10.** Technical Memorandum on Current Performance of the Westside Collection System During Wet Weather (May 17, 2019) **13.** Staff Report, 2014 and 2016 California Integrated Report Clean Water Act Sections 303(d) and 305(b) (Oct. 3, 2017) **20.** Staff Report, Total Maximum Daily Load for Bacteria at San Francisco Bay Beaches (Apr. 13, 2016)
	C. Supplemental Sewer Overflows in the Combined Sewer System Comments
8	San Francisco Bay Basin Water Quality Control Plan (May 4, 2017), Chapter 7: Water Quality Attainment Strategies Including Total Maximum Daily Loads
9	Tentative Order NPDES Permit No. CA0037681
10	EPA Region 9 and San Francisco Bay Regional Water Quality Control Board - Response to Written Comments and Attachment 1

11	Staff Report Summary prepared for San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019
12	Transcript of San Francisco Bay Regional Water Quality Control Board Hearing on September 11, 2019
13	NPDES Permit Writers Manual (EPA, Sept. 2010)
14	Southeast, Bayside NPDES Permit Order No. R2-2013-0029
15	Report to Congress: Impacts and Control of Combined Sewer Overflows and Sanitary Sewer Overflows (EPA, Aug. 2004)
16	Combined Sewer Overflows: Guidance for Nine Minimum Controls (EPA, May 1995)

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2019 a copy of the foregoing Petition for Review was served on to the following persons, in the manner specified:

By electronic filing to:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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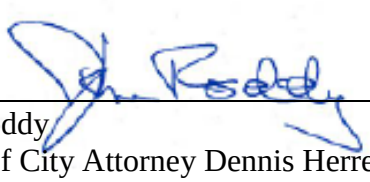

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