(Slip Opinion)

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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	)	NPDES Appeal No. 20-01

[Decided December 1, 2020]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

IN RE CITY AND COUNTY OF SAN FRANCISCO

NPDES Appeal No. 20-01

ORDER DENYING REVIEW

Decided December 1, 2020

Syllabus

The City and County of San Francisco ("San Francisco") petitioned the Environmental Appeals Board to review U.S. Environmental Protection Agency's ("EPA's") Region 9 ("Region") authorization to discharge under the National Pollutant Discharge Elimination System ("NPDES") permitting program of the Clean Water Act. The Region jointly issued its authorization with the California Regional Water Quality Control Board for the San Francisco Bay Region ("California RWQCB"), allowing San Francisco to discharge from its existing combined sewer system (which includes its wastewater treatment facility and waste collection system) into the Pacific Ocean.

San Francisco contests three of the permit's conditions: (1) a narrative prohibition against causing or contributing to a violation of any water quality standards (section V and attachment G.I.I.1); (2) a requirement to report on sewer overflows from the combined sewer system (section VI.C.5.a.ii.b); and (3) a requirement to update the long-term control plan ("LTCP") (section VI.C.5.d). Additionally, San Francisco challenges the Region's characterization of the joint authorization to discharge as two permits, rather than one.

Held: San Francisco has not demonstrated that review is warranted on any of the grounds presented. As such the Board denies the petition for review in all respects.

(1) The Board concludes that the respective permitting processes for the Region's authorization and that of the California RWQCB were consolidated under 40 C.F.R. § 124.4(c)(2). As a result, San Francisco received dual authorizations for the continued operation of its facility, regardless whether those authorizations are characterized as one permit or two. San Francisco fails to establish clear error as to either the consolidated NPDES permitting process or the differing characterizations of the dual authorizations.

(2) San Francisco fails to carry its burden with respect to its arguments that the Region lacks a legal or factual basis to include a narrative prohibition against violating water quality standards in the receiving waters or that the prohibition deprives San Francisco of fair notice. Under the Clean Water Act, permit issuers are required to include

in every NPDES permit conditions that ensure that water quality standards will be met. Although 40 C.F.R. § 122.44(d) sets forth a process for deriving pollutant-specific effluent limits, the regulations do not require that all permit conditions necessary to meet water quality standards be expressed in terms of specific pollutant-by-pollutant limitations. Given the Region's responsibility to determine what conditions are appropriate to include in the permit, its legal obligation to ensure that water quality standards are met, the legal authority to include a narrative prohibition against violating water quality standards, and its determination that the water quality-based effluent limitations elsewhere in the permit may not necessarily meet that obligation, the Board concludes that the contested narrative prohibitions were not clearly erroneous. Additionally, San Francisco has not identified any language in the narrative prohibitions, or the water quality standards that apply, that is vague or unclear so as to deprive San Francisco of fair notice.

(3) The Board concludes that San Francisco's argument concerning the requirement to report on isolated sewer overflows (for example, backups into basements or onto streets through manholes) misapprehends the function of the permit condition at issue and fails to carry San Francisco's burden to show that the Region's inclusion of the reporting requirement constituted clear error. The requirement to report on isolated sewer overflows is not to "regulate" them, as argued by San Francisco. Rather, the frequency, cause, and location of isolated sewer overflows can be indicative of whether the permitted combined sewer system is operating appropriately. As such, the reporting requirement is an appropriate mechanism, grounded in the Combined Sewer Overflow Control Policy and the Clean Water Act more generally, to determine whether the permitted combined sewer system is operating in compliance with the permit, including the requirement to maximize storage without increasing upstream flooding into basements and streets, which can negatively impact human health and the environment.

(4) The Board concludes that San Francisco has not demonstrated that the Region's decision to include permit terms requiring San Francisco to update its LTCP is clearly erroneous. The Region's decision to require San Francisco to update its LTCP—to ensure that up-to-date information is used to assess whether, among other things, water quality standards are being met and to ensure that wet weather discharges are not causing unreasonable degradation of the marine environment—is entirely consistent with the aims of the Clean Water Act and its incorporation of the Combined Sewer Overflow Control Policy. Permitting authorities are required to issue permits that comply with the Clean Water Act, which in the case of combined sewer systems reasonably can include updates to long-term control plans, particularly where such plans are decades old. Additionally, the Board concludes that the Region's decision to require an LTCP update was well supported by the facts given that San Francisco's LTCP consists of a compilation of documents developed over the course of two decades (the most recent document being a 1990 revision of a 1988 document), making it difficult to discern the relationship between the documents. Information related to the existing sewer system, potential technology and water-quality based requirements that are intended to shape the system, and collection system improvement opportunities is clearly relevant to San Francisco's long-term plans

to control combined sewer overflows. Such information is also relevant to the Region's determination as to whether San Francisco's long-term plans will ensure compliance with the Clean Water Act, including the Combined Sewer Overflow Control Policy. The Board also concludes that the permit clearly describes, defines, and articulates the tasks required, giving San Francisco fair notice of what is required to comply with the Permit.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Avila:

I. *INTRODUCTION*

The U.S. Environmental Protection Agency ("EPA") Region 9 ("Region") and the California Regional Water Quality Control Board for the San Francisco Bay Region ("California RWQCB") jointly authorized the City and County of San Francisco ("San Francisco") to discharge from San Francisco's existing Oceanside combined sewer system (which includes its wastewater treatment facility and its wastewater collection system) ("Oceanside CSS") under the National Pollutant Discharge Elimination System ("NPDES") permitting program of the Clean Water Act.[1] The two permitting agencies processed their respective permit authorizations together because San Francisco's facility discharges into the Pacific Ocean, and those discharges are regulated by both EPA (for discharges more than three miles offshore) and the State (for discharges inside of three miles offshore).

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[1] San Francisco owns and operates the Oceanside Water Pollution Control Plant and its waste collection system. Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, Fact Sheet for NPDES Permit No. CA0037681*, at F-3 (Dec. 10, 2019) (A.R. 17f) ("Fact Sheet") (appended to NPDES Permit No. CA0037681 as attach. F). This system was last permitted in 2009. *See* Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *NPDES Permit for City and County of San Francisco Oceanside Water Pollution Control Plant and Collection System, including the Westside Wet Weather Facilities, NPDES No. CA0037681, Order R2-2009-0062* (Aug. 12, 2009) (A.R. 81) ("2009 Permit"); *see also* Fact Sheet at F-4. During the term of the permit at issue here, San Francisco plans to construct, own, and operate the Westside Recycled Water Project. Fact Sheet at F-3. Collectively, the Oceanside Water Pollution Control Plant, its waste collection system, and the Westside Recycled Water Project (or any portion thereof) are referred to in this decision as the "Oceanside CSS."

In January 2020, San Francisco petitioned the Environmental Appeals Board ("Board") to review the Region's permit decision, contesting three of the permit's conditions: (1) a narrative prohibition against causing or contributing to a violation of any water quality standards (section V and attachment G at G.I.I.1); (2) a requirement to report on sewer overflows from the combined sewer system (section VI.C.5.a.ii.b); and (3) a requirement to update the long-term control plan (section VI.C.5.d). *See* San Francisco Petition for Review of Oceanside Wastewater Treatment Plant's NPDES Permit 2 (Jan. 13, 2020) ("Petition"). Additionally, in response to the Region's notice regarding the stay of permit conditions pending appeal, San Francisco challenges the Region's characterization of the joint authorization to discharge as two permits, rather than one. Final briefing for this appeal was completed in September 2020. Oral argument was held in October 2020. For the reasons stated below, the Board denies the Petition for Review in its entirety.

II. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of an NPDES permit. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). "[A] petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." *Id.* § 124.19(a)(4)(i).

In considering whether to grant or deny a petition for review, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board's power to grant review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). The Board will ordinarily deny a petition for review and thus not remand the permit unless the underlying permit decision is based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a)(4)(i).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised "considered judgment." *E.g.*, *In re Steel Dynamics, Inc.*, 9 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 conclusion and the significance of the crucial facts it relied on when reaching its conclusion. *E.g.*, *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 ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Sep. Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *pet. for review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, again, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, L.L.C*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006); *see also, e.g.*, *In re Russell City Energy Ctr., L.L.C*, 15 E.A.D. 1, 12, 39-42, 66 (EAB 2010), *pet. for review denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012); *NE Hub Partners*, 7 E.A.D. at 570, 571.

III. *RELEVANT CLEAN WATER ACT PROVISIONS AND IMPLEMENTING REGULATIONS*

In 1972, Congress enacted the Clean Water Act ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* CWA §§ 101(a), 33 U.S.C. §§ 1251(a). To achieve this objective, the CWA prohibits the discharge of pollutants into the waters of the United States, unless authorized by an NPDES permit or other specified CWA provision. *See* CWA §§ 301(a), 402, 502(7), 33 U.S.C. §§ 1311(a), 1342, 1362(7).

A. *National Pollutant Discharge Elimination System Permits Generally*

NPDES permits rely on two statutory mechanisms to protect water quality: (1) water quality standards, and (2) effluent limitations. *See generally* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131. Water quality standards are promulgated by states and approved by EPA. *See* CWA § 303(a), (c), 33 U.S.C. § 1313(a), (c); 40 C.F.R. §§ 131.10-.12. Water quality standards include three components: (1) the "designated uses" of a waterbody, such as public drinking supply, recreation, or wildlife habitat; (2) "water quality criteria," expressed in numeric or narrative form, specifying the amount of various pollutants that may be present in the waterbody without impairing the waterbody's designated uses; and (3) an "antidegradation" provision that protects existing uses and high quality waters. 40 C.F.R. §§ 131.10-.12; s*ee also* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). The CWA and its implementing regulations require permitting authorities to ensure that any permit

issued complies with the CWA and the water quality standards of all states affected by the discharge. *See* CWA §§ 301(b)(1)(C), 401(a)(1)-(2), 33 U.S.C. §§ 1311(b)(1)(C), 1341(a)(1)-(2); 40 C.F.R. §§ 122.4(d), .44(d)(1).

Generally speaking, effluent limits are either technology based (typically established by the permitting authority on an industry-specific basis) or water quality based (developed in the context of individual permit decisions). *See* CWA §§ 301(b), 302, 303(c), (d), 33 U.S.C. §§ 1311, 1312, 1313(c), (d); 40 C.F.R §§ 122.44, 125.3(a). Water quality-based effluent limits ("WQBELs") control pollutant discharges by restricting the types and amounts of particular pollutants a permitted entity may lawfully discharge. *See* 40 C.F.R. § 122.44(d).

NPDES permits can be issued either by EPA or by states with authorized programs. *See generally* CWA § 402, 33 U.S.C. § 1342. Where EPA has approved a state's submitted program under CWA section 402(b), the state administers its approved NPDES permit program and EPA suspends its issuance of NPDES permits as to discharges into navigable waters *within the state's own boundaries*. *See id.* § 1342(b), (c); 40 C.F.R. § 123.1(d)(1). EPA has approved the State of California's program to implement the NPDES program through the State Water Resources Control Board and its nine Regional Water Quality Control Boards. *See* Approval of California's Revisions to the State National Pollutant Discharge Elimination System Program, 54 Fed. Reg. 40,664, 40,664-65 (Oct. 3, 1989); Discharges of Pollutants to Navigable Waters: Approval of State Programs, 39 Fed. Reg. 26,061, 26,061 (July 16, 1974). Nearshore waters, i.e., waters in the Pacific Ocean within three miles from shore, are considered within the boundary of California (they are also referred to as the "territorial waters" of the state) and are therefore subject to California's approved program. *See* Fact Sheet at F-6. Discharges into the Pacific Ocean that are beyond three miles from shore are not within the boundary of California and therefore are *not* subject to California's approved program. Thus, as relevant here, the California RWQCB administers the NPDES program for San Francisco's nearshore discharges, and EPA administers the NPDES program for San Francisco's discharges that are beyond three miles from shore.[2] *See id.* at F-6, F-11.

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[2] This distinction between the state-authorized and the EPA-authorized discharges does not alter the fact that *all* of the authorized discharges from the Oceanside CSS are into the Pacific Ocean, which is considered "navigable waters" and falls under the scope of NPDES regulation for purposes of the CWA. *See* CWA § 502(7), (8), 33 U.S.C. § 1362(7), (8). The parties use the term "state waters" to refer to the "navigable waters" that are

B. *Combined Sewer Overflows*

San Francisco's challenge to this permit involves provisions that relate to combined sewer overflows ("CSOs") within the San Francisco wastewater collection system. Combined sewer systems convey sanitary wastewater (domestic, commercial, and industrial wastewaters) and stormwater through a single pipe system to a wastewater treatment facility. *See* Combined Sewer Overflow (CSO) Control Policy § I.A, 59 Fed. Reg. 18,688, 18,689 (Apr. 19, 1994) (A.R. 96) ("CSO Control Policy"). A CSO is a discharge from a combined sewer system at a point prior to the treatment facility that occurs as a result of a wet weather event. *Id.* Dry weather CSOs are prohibited by the CWA. *Id.* § I.B, at 18,689. Combined sewer systems anticipate significant stormwater events and are designed to overflow directly from CSO outfalls to surface water bodies such as the Pacific Ocean. In addition, when the storage capacity of the entire system is exceeded, isolated sewer overflows ("ISOs"), or spills, can occur from various points of exit other than the permitted CSO outfalls (backups into basements or onto streets through manholes, for example). *See* Office of Water, U.S. EPA, *CSO Guidance for Permit Writers*, at 4-6 (1995) (A.R. 95c) ("CSO Guidance for Permit Writers"); Office of Water, U.S. EPA, *Combined Sewer Overflows Guidance for Nine Minimum Controls*, at 3-3 (1995) (A.R. 95a) ("NMC Guidance").

Discharge from a CSO event consists of mixtures of domestic sewage, industrial and commercial wastewaters, and stormwater runoff. CSO Control Policy § I.A, 59 Fed. Reg. at 18,689. As such, CSOs often contain high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. *Id.* CSOs can cause exceedances of water quality standards. Such exceedances may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the nation's waterways. *Id*. Discharges from CSOs are not subject to the secondary treatment requirements applicable to wastewater treatment facilities; they are, however, point source discharges subject to the CWA, including its NPDES permit requirements. *Id.*

EPA issued the CSO Control Policy in 1994 to implement a "comprehensive national strategy" for CSO control to "meet appropriate health and environmental objectives." CSO Control Policy, 59 Fed. Reg. at 18,688. In 2000,

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subject to California's approved NPDES program and "federal waters" to refer to the "navigable waters" that are not part of California's approved program and are instead under EPA's NPDES authority.

Congress subsequently codified the CSO Control Policy at section 402(q) of the CWA, 33 U.S.C. § 1342(q), thus making the provisions of the CSO Control Policy part of NPDES permitting law. The CSO Control Policy is intended to facilitate and coordinate the planning, selection, design, and implementation of CSO management practices and controls to meet the requirements of the CWA and to involve the public fully during the decisionmaking process. *Id*. § I.A, 59 Fed. Reg. at 18,689. The policy seeks to review and revise, as appropriate, the implementation of water quality standards when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs. *Id.* The policy applies to all combined sewer systems that overflow as a result of stormwater flow, including those systems that were completed prior to issuance of the policy. *Id.* §§ I.B, .C, 59 Fed. Reg. at 18,689-90 (referencing NPDES permit requirements identified in section IV.B of the CSO Control Policy, which includes requirements for nine minimum controls and the long-term control plan, and providing that, "[for] any ongoing or substantially completed CSO control effort, the NPDES permit * * * should be revised to include all appropriate permit requirements" of the CSO Control Policy).

The CSO Control Policy requires municipalities operating combined sewer systems to "immediately" and "accurately" characterize their sewer systems and demonstrate the implementation of the nine minimum controls ("NMC") as the minimum technology-based requirements to be imposed on combined sewer systems during wet weather. *Id.* § II.A., B, 59 Fed. Reg. at 18,691 (incorporating CWA § 301(b) requirement to impose best practicable control technology); *see* 40 C.F.R. § 125.3; Fact Sheet at F-29; CSO Guidance for Permit Writers at 3-1, 3-3. Municipalities must also develop and then implement a "Long-Term CSO Control Plan" ("LTCP"). CSO Control Policy § II.A, C, 59 Fed. Reg. at 18,691. The CSO Control Policy allows a phased approach for implementation of CSO controls. *See* CSO Guidance for Permit Writers at 3-1, 4-1. "Phase I permits" require permittees to implement the NMC and develop an LTCP. *Id.* at 3-1; *see also* CSO Control Policy § IV.B.1, 59 Fed. Reg. at 18,696. "Phase II permits" require permittees to implement the LTCP developed in Phase I. CSO Control Policy § IV.B.2, 59 Fed. Reg. at 18,696; CSO Guidance for Permit Writers at 4-1. A permit writer's responsibilities continue after the issuance of a first Phase II permit; multiple Phase II permits may be required through numerous permit cycles, and a permit writer's obligation to address CSO controls continues even after implementation of the LTCP in subsequent (or "post-Phase II") permits to ensure proper operation and maintenance of the CSO controls and appropriate implementation of post-construction compliance monitoring. CSO Guidance for Permit Writers at 5-1 to 5-4.

In recognition that some municipalities were already in the process of managing their CSOs at the time the CSO Control Policy was issued, in certain circumstances permitting authorities could determine on a case-by-case basis that portions of the CSO Control Policy did not apply. CSO Control Policy § I.C., 59 Fed. Reg. at 18,690. The policy also provides that "such programs * * * should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of [the] Policy." *Id.*

IV. *PROCEDURAL POSTURE AND RELEVANT FACTS*

San Francisco's Oceanside CSS includes 250 miles of pipe to collect and transport wastewater from approximately 250,000 residents across western San Francisco to its water pollution control plant for treatment. *See* Fact Sheet at F-4. During dry weather, the water pollution control plant provides secondary treatment, and the system's maximum secondary treatment capacity is 43 million gallons per day.[3] *Id.* at F-5. During wet weather, the system can provide primary treatment for an additional 22 million gallons per day (which is then combined with the secondary-treated effluent before being discharged for a total of 65 million gallons per day), and the system's storage/transport structures and collection system piping have a combined storage capacity of about 73 million gallons. *Id.* When the volume of stormwater exceeds the system's capacity, the system discharges the combined effluent through seven nearshore (within California's boundary) combined sewer discharge structures (or "CSD Outfalls")[4] into the Pacific Ocean and through one deepwater ocean outfall that terminates approximately 3.9 nautical miles offshore (outside of California's boundary and therefore beyond the State's authority to regulate through its approved NPDES program). *Id.* at F-6. The combined sewer system was designed to achieve a long-term average of eight combined sewer discharges per year. *Id.* at F-7.[5]

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[3] As mentioned above, San Francisco seeks authorization to add a recycled water project to its system, as part of its current permit renewal. Fact Sheet at F-3.

[4] The current configuration of the facility is different from prior descriptions of the facility, which described the system as having eight rather than seven CSD Outfalls. *See* Memorandum from Becky Mitschele, NPDES Permit Writer, NPDES Permits Section, to Admin. Record for NPDES Permit No. CA0037681, at 6 n.9 (Apr. 15, 2019) (A.R. 91) ("Memo to File").

[5] In 1976, the San Francisco facility existing at that time was required to reduce discharges from an average of 114 overflow events per year to an average of 1 overflow

San Francisco began developing a "Master Plan for Wastewater Management" in the 1970s, part of which included studies to balance system storage, reduce wet weather discharges, and develop control alternatives. *See* Pet. at 4-5; *San Francisco Master Plan for Waste Water Management*, at i, II-1 to II-9 (Sept. 1971) (A.R. 77). Construction began on the Oceanside CSS in the early 1980s and the system was substantially complete by 1993. *See* Pet. at 6. Thus, when the CSO Control Policy was developed in 1994, San Francisco was well into the process of reducing wet weather discharges from its combined sewer system. As a result, the Region and the California RWQCB determined that San Francisco did not need to comply with the initial planning and construction requirements of the CSO Control Policy when they issued its NPDES permit in 1997. Region 9, U.S. EPA & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *NPDES Permit for City and County of San Francisco's Oceanside Water Pollution Control Plant and the Westside Wet Weather Combined Sewer System, NPDES No. CA0037681, Order 97-044*, at 6 (1997) ("1997 Permit") (A.R. 9, App. 7); *see also* CSO Policy § I.C.1, 59 Fed. Reg. at 18,690.

In subsequent permit renewals, the Region and the California RWQCB determined that San Francisco's LTCP was consistent with the CSO Control Policy and, thus, did not require San Francisco to conduct the planning and construction tasks required by the CSO Control Policy. Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *NPDES Permit for San Francisco Oceanside Treatment Plant, Sw. Ocean Outfall, and Westside Wet Weather Facilities, NPDES No. CA0037681, Order R2-2003-0073*, at 10, 17 (Aug. 20, 2003) ("2003 Permit") (A.R. 9, App. 5) (citing CSO Control Policy § I.C.1); Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *NPDES Permit for San Francisco Oceanside Water Pollution Control Plant & Collection System, including the Westside Wet Weather Facilities, NPDES No. CA0037681, Order R2-2009-0062*, at 10 (Aug. 12, 2009) (A.R. 81) ("2009 Permit") (determining San Francisco's implementation of its LTCP is "consistent with" CSO Control Policy). In 2011, San Francisco began a Sewer System Improvement Program ("SSIP") as

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per year and to conduct a study to better understand the costs and benefits associated with various overflow frequencies. Cal. State Water Resources Control Bd., Order No. WQ 79-16: In the Matter of the Request for an Exception to the 1978 Water Quality Control Plan for Ocean Waters of Cal., at 1 (1979) (A.R. 102) ("State Water Board Order No. WQ 79-16") (referencing Cal. Regional Water Quality Control Board, S.F. Bay Region, Order No. 76-23). In 1979, the Regional Water Board amended Order No. 76-23 to allow an average of 8 overflows per year, which was adopted in State Water Board Order No. 79-16. *Id.* at 2, 18.

a twenty-year, citywide investment to enhance the reliability and performance of its wastewater system. Memorandum from Becky Mitschele, NPDES Permit Writer, NPDES Permits Section, to Admin. Record for NPDES Permit No. CA0037681, at 5 (Apr. 15, 2019) (A.R. 91) ("Memo to File"). The SSIP contains information about how the combined sewer system, the sewershed, and the system's management approach have changed since 1997, including various studies that analyze collection system improvements and that identify collection system opportunities within the drainage basin. *See id.* at 5, 10-11.

In 2014, the Region shared an early draft NPDES permit with San Francisco and received comments from San Francisco in January 2015. San Francisco, Comments on Admin. Draft NPDES Permit (Jan. 8, 2015) (A.R. 24). The permit reissuance process was put on hold when the Region and the California RWQCB sought additional information. In 2016, the Region sent an information request after receiving reports of "raw sewage mixed with stormwater * * * overflowing from the City and County of San Francisco's [CSS] into streets, sidewalks, residences and businesses." Letter from Kathleen H. Johnson, Dir., Enforcement Div., Region 9 U.S. EPA, to Harlan Kelly, Gen. Manager, S.F. Pub. Utils. Comm'n, Request for Information under Clean Water Act Section 308(a) (Feb. 16, 2016) (A.R. 146a). In 2017, California RWQCB sent San Francisco a request for additional monitoring data to better understand the quality of the wet weather discharges. Letter from Bruce H. Wolfe, Exec. Officer, California RWQCB, S.F. Bay Region, to Brian Henderson, Acting Assistant Gen. Manager, Wastewater Enterprise, Clarification of Monitoring Requirements and Requirement for Information (Nov. 29, 2017) (A.R. 145).

In March 2018, San Francisco submitted a Long Term Control Plan Synthesis to the California RWQCB in the context of its Bayside permit requirements.[6] S.F. Pub. Utils. Comm'n, *San Francisco Wastewater Long Term Control Plan Synthesis for the Bayside Permit (NPDES No. CA0037664) & the*

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[6] San Francisco's "Bayside" combined sewer system discharges to the San Francisco Bay and includes the Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and related wastewater collection system. These discharges are authorized under a separate NPDES permit issued solely by the California RWQCB. *See* Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *San Francisco Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater Collection System, NPDES No. CA0037664, Order R2-2013-0029*, attach B (Facility Map) at B-1, attach. F (Fact Sheet) at F-3 to F-4, (Aug. 19, 2013) (A.R. 79a) ("Bayside Permit").

Oceanside Permit (NPDES No. CA0037681) (Mar. 30, 2018) (A.R. 88b) ("Synthesis").[7] The stated objective of the Synthesis is "to describe the historical planning efforts undertaken" by San Francisco "to minimize and control wet weather discharges from the combined sewer system." *Id.* at 4. Among other things, the Synthesis identifies various documents that San Francisco maintains "comprise" the LTCP for its combined sewer system. *Id.*

In response to the submittal, California informed San Francisco that the Synthesis "[did] not adequately address the minimum required elements" of the Bayside Permit requirement to update its LTCP. Letter from Bill Johnson, Chief, NPDES Wastewater & Enforcement Div., Cal. RWQCB, S.F. Bay Region, to Amy Chastain, Regulatory Program Manager, S.F. Pub. Utils. Comm'n, regarding Comments on Synthesis, at 1 (Sept. 7, 2018) (A.R. 85). For example, California explained that appendix A of the Synthesis "summarizes documents that comprise [San Francisco's] Long-Term Control Plan through March 1994, but this does not reflect current circumstances." *Id.* San Francisco gave a written response to California's comments, but San Francisco did not, and has not, submitted a revised Synthesis. Letter from Amy Chastain, Regulatory Manager, S.F. Pub. Utils. Comm'n, to Bill Johnson, Cal. RWQCB, regarding Comments on Synthesis & Update (Sept. 21, 2018) (A.R. 88a) ("S.F. Resp. to RWQCB Cmts. on Synthesis"); *see also* Oral Argument Transcript at 26-27 (Oct. 8, 2020) ("Oral Arg. Tr.") (Counsel for San Francisco stating that he is unaware of an updated plan or synthesis document having been sent to either permitting authority or whether either permitting authority agreed with San Francisco's September 21, 2018 letter addressing the deficiencies identified by the California RWQCB). The Region determined that, notwithstanding the prior CSO exemption, it was both appropriate and necessary to include a requirement in the Permit at issue here that San Francisco update its LTCP. *See* Fact Sheet at F-30 to F-31 (explaining bases for requirement to update LTCP); Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Response to Comments, at 16-17 (Aug. 30, 2019) (A.R. 10) ("Resp. to Cmts."). The permitting authorities also added a reporting requirement to the permit for isolated sewer overflows and a narrative prohibition against causing or contributing to a violation of any water quality standards in the receiving

[7] San Francisco submitted the *Synthesis* to the California RWQCB pursuant to section VI.C.5.c.v. of the Bayside Permit, which required it to "synthesize and update its Long-Term Control Plan into one document that reflects current circumstance." Bayside Permit at 25. In the Fact Sheet for the Permit that is currently before the Board, the permitting authorities described the *Synthesis* as "summariz[ing] the various documents that comprise [San Francisco's] historical planning process and LTCP." Fact Sheet at F-30.

waters. Fact Sheet at F-26, F-30 to F-31; Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, NPDES Permit No. CA0037681*, §§ V, VI.C.5.a.ii.b at 9, 17 (issued Dec. 10, 2019) (A.R. 17) (signed by Region) ("Permit").

In April 2019, the Region and the California RWQCB issued a public notice and opportunity to comment on the draft permit within 30 days. Resp. to Cmts. at 26. In September 2019, the Region and the RWQCB held a hearing on the permit. Transcript of S.F. Bay Reg'l Water Quality Control Bd. Hearing (Sept. 11, 2019). In addition to San Francisco's voluminous comments on the permit, the Region and the California RWQCB also received comments from numerous members of the public asking the permitting authorities to stop allowing San Francisco to discharge sewage into people's homes and businesses. Resp. to Cmts. at 1-9. The permit was signed by the California RWQCB on September 12, 2019, and became effective as to discharges to state waters on November 1, 2019. Region 9, U.S. EPA, & Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, *Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, NPDES Permit No. CA0037681*, at 2 (Sept. 11, 2019) (A.R. 15). The Region signed the Oceanside Permit, NPDES No. CA0037681, on December 10, 2019, with an effective date of February 1, 2019. *See* Permit at 2-3. San Francisco petitioned the Board for review of the Region's permit decision in January 2020.[8]

V. *ANALYSIS*

San Francisco's petition challenges three permit provisions: (1) the generic water quality based effluent limitations at section V and attachment G.I.I.1; (2) the reporting of isolated sewer overflows at section VI.C.5.a.ii.b; and (3) the long-term control plan update at section VI.C.5.d. Pet. at 2. After San Francisco filed its Petition for Review, and pursuant to 40 C.F.R. § 124.16, the Region issued a Notice of Stay, identifying which provisions of the permit were stayed pending appeal. U.S. EPA Region 9 Notice of Stay of Contested Conditions for NPDES Permit No. CA0037681 (Feb. 7, 2020) ("Notice of Stay"). In that notice, the Region characterized the NPDES authorizations for the Oceanside CSS as two permits—a

[8] After San Francisco filed its petition with the Board and the Region issued its notice of stayed permit conditions, substantial motions practice and supplemental briefing ensued.

state permit and a federal permit—rather than as a single, jointly issued permit.[9] As a result, in its Supplement to the Petition, San Francisco seeks either a determination that the Permit is a single, jointly issued permit, or a remand of the Permit with directions to the Region to develop a record that supports the issuance of a standalone federal permit. San Francisco's Supplement to Petition for Review 33 (Jun. 30, 2020) ("Supp. to Pet."). The Board addresses San Francisco's argument in its Supplement to the Petition first.

A. *One Permit Versus Two*

In issuing their separate authorizations to San Francisco to discharge from the City's existing Oceanside CSS into the Pacific Ocean, the Region and the California RWQCB consolidated their respective permit processing, as is allowed by 40 C.F.R. § 124.4(c)(2), for efficiency and coordination purposes. Combining that process resulted in a consolidated fact sheet, draft permit, public comment period, response to comments document, and a final consolidated NPDES permit signed by each of two permitting authorities (one federal, one state) albeit on two different dates (three months apart). *See* Permit at 2-3 (including unnumbered EPA signature page); Fact Sheet at F-3, F-34 to F-35; Resp. to Cmts. at 1.

Under regulations governing permit processing, EPA and an approved state "may agree to consolidate draft permits whenever a facility or activity requires permits from both [permit issuers]." 40 C.F.R. § 124.4(c)(2). Although San Francisco argues that the California and EPA permit processes could not have been consolidated under section 124.4(c)(2) because the Region "fail[ed] to follow any of the procedures required for permit consolidation," San Francisco also acknowledges that the regulations do not specify required procedures for consolidation. Supp. to Pet. at 25-26; *see also*, Order Denying San Francisco's Motion to Stay 5 n.4 (May 11, 2020) (Docket No. 14) ("Order Denying Motion to Stay"). The regulations also do not require any particular documentation of the agreement or intent to consolidate. *See* Order Denying Motion to Stay at 5 n.4. We also note that a joint permit was issued to San Francisco for all three prior NPDES permits authorizing the operation of the Oceanside CSS. *See,* e.g., 1997 Permit, 2003 Permit, and 2009 Permit. San Francisco identifies no other regulatory process for combining the permit processes. As such, we conclude that the permitting

[9] Additional history and background on this issue is available in the Order Denying San Francisco's Motion to Stay (May 11, 2020) (Docket No. 14) ("Order Denying Motion to Stay"), and the related filings in the appeal docket for this case.

process for these two authorizations was consolidated under 40 C.F.R. § 124.4(c)(2).

After San Francisco appealed to the Board, the Region issued the Notice of Stay of the contested permit conditions, as it is required to do under 40 C.F.R. section 124.16. In that notice, the Region for the first time described the dual authorization as two permits—a state permit and a federal permit. San Francisco objects to this characterization.[10]

As we explained in our order denying San Francisco's motion to stay the Permit pending appeal, consolidation of the permitting process (including the consequent issuance of one consolidated permit document) does not alter the fact that there are two permit issuers, each with its own legal authority. Order Denying Motion to Stay at 9-11. The purpose of consolidation is to make the permitting process more efficient but, once the permitting process is complete and the consolidated permit is issued, the authorizations are distinct for the purposes of appeal,[11] stay, and enforcement as a matter of law. *See id.* (explaining that the Permit itself, whether consolidated or not, does not alter the individual legal authority of either permitting authority to stay or enforce the permit). In other words, the permit authorizations in this case involve one document derived from one consolidated permitting process resulting in dual authorizations by EPA and

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[10] This issue was fully briefed after the Board granted San Francisco's motion to supplement its petition on this issue. *See* Supp. to Pet.; U.S. EPA Region 9 Response to San Francisco's Supplement to Petition for Review (Jul. 23, 2020) (Docket No. 23); San Francisco's Reply in Support of Supplement to Petition for Review (Sept. 11, 2020) (Docket No. 30).

[11] Just as the Region's authorization must be appealed through the Board using the administrative process outlined in 40 C.F.R. § 124.19 before proceeding to the federal judicial process, the California RWQCB authorization must be challenged through the State's administrative and judicial processes. *See* Fact Sheet at F-35; 40 C.F.R. § 123.30; Letter from Michael Montgomery, Exec. Officer, Cal. RWQCB, S.F. Bay Region, to Michael Carlin, S.F. Pub. Utils. Comm'n, 2-3 (Oct. 29, 2019) (A.R. 134) (citing Cal. Water Code §§ 13320, 13321, 13330). In fact, San Francisco is separately challenging the Oceanside CSS Permit in the California state court system. Pet. at 2, n.1 (referring to *City and Cty. of San Francisco v. RWQCB,* Case RG19042575 (Alameda Superior Court)).

the California RWQCB for the continued operation of the facility, regardless whether the authorizations are characterized as one permit or two.[12]

In addition, the outcome of the issues raised in this appeal would be no different whether the NPDES authorizations for the Oceanside CSS are characterized as one permit versus two. The Region does not rely on its consolidation of the permitting process for its authority to include a narrative prohibition against causing or contributing to a violation of any water quality standards, to require reporting on isolated sewer overflows, or to require San Francisco to update its long-term control plan. To the extent that San Francisco preferred that the permitting processes not be combined and that each permitting authority proceed with its own permitting process and issue its own separate permit, San Francisco could have recommended (and may recommend in the future) that the process not be consolidated. *See* 40 C.F.R. § 124.4(c)(3).[13]

In sum, San Francisco fails to establish that either the consolidated NPDES permitting process, resulting in two authorizations (one by the Region and the other by the California RWQCB), or the differing characterizations of the dual authorizations as either one or two permits constitutes clear error.

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[12] We are not unsympathetic to the complexity of this permitting process, particularly given the Region's notice of stay of the contested permit conditions. As we described in our order denying San Francisco's motion to stay, both permitting authorities have referred to the permit in this matter in both singular and plural terms. *See* Order Denying Motion to Stay at 11 n.10. Adding to the confusion in this matter is the fact that the California RWQCB signed the authorization three months before the Region, resulting in different effective dates but identical expiration dates. As we stated before, the apparent confusion in this case suggests that it may behoove all involved if each permitting authority provides greater clarity for permittees in future permitting decisions. *Id.*

[13] The rule allowing for consolidation of the permitting process, 40 C.F.R. § 124.4, also allows the permittee to recommend whether or not the processing of their applications should be consolidated, *id.* § 124.4(c)(3). San Francisco did not contest the consolidation of the permit process either for this permit term or in prior permit issuances. The rule also provides for the deconsolidation of the permits if joint processing will result in unreasonable delay in the issuance of one or more permits. *Id.* § 124.4(a)(2). Presumably, this would be appropriate in situations where one authority is prepared to issue a permit, but the other has not reached the same conclusion. Again, this issue arose only after the Region characterized the permits in this matter as two permits, after the authorizations were issued and the appeal was docketed.

B. *Narrative Prohibition Against Violating Water Quality Standards*

Section V of the Permit, entitled "Receiving Water Limitations," prohibits discharges from "caus[ing] or contribut[ing] to a violation of any applicable water quality standard * * * for receiving waters."[14] Permit § V, at 9. San Francisco argues that the Region's inclusion of that prohibition is based on "clearly erroneous conclusions of law and findings of fact and [the provision fails] to provide fair notice" of what is required to comply. Pet. at 12.[15]

As a preliminary matter, we note two things. First, San Francisco characterizes the contested provision in section V of the Permit as a water quality-based effluent limitation or "WQBEL." Pet. at 12-23. The Region also uses the term "WQBEL" to describe the provision in its response brief. U.S. EPA Region 9 Response to San Francisco's Petition for Review 15-26 (Feb. 28, 2020) (Docket No. 6) ("Resp. Br."). Notwithstanding the parties' characterization, we refer to the contested provision as a *prohibition* against exceeding (or violating) water quality standards of the receiving waters. We do so to distinguish this limitation from other facility-specific water quality based effluent limits set forth

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[14] The prohibition against violating any applicable water quality standard also incorporates the exception set forth in State Water Board No. WQ 79-16 granting San Francisco an exemption from the California ocean quality control plan (which prohibits discharges of wastewater to the Ocean that do not conform to its standards) to allow an average of eight wet weather overflows per year. Permit § V, at 9; *see* State Water Board Order No. WQ 79-16 at 18; Cal. State Water Resources Control Bd., *Water Quality Control Plan – Ocean Waters of California*, at 4, 13-33 (2019) (A.R. 101) ("Ocean Plan").

[15] Section G.I.I.1 of attachment G to the Permit provides that "[n]either the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." Permit attach. G at G-2. This provision is part of California's Regional Standard Provisions and Monitoring and Reporting Requirements that have been incorporated into nearly all California NPDES permits since 1993. Resp. to Cmts. at 13. For example, an identical provision was included in San Francisco's 2009 permit. *See* 2009 Permit attach. G (supp. to attach. D) at 3. San Francisco challenges both the narrative prohibition at G.I.I.1 in attachment G in addition to the narrative prohibition in section V of the permit. Pet. at 12-23. San Francisco presents identical arguments with respect to both provisions, characterizing them as imposing "generic, boilerplate [water quality-based effluent limitations]." *E.g.*, Pet. at 12. The Board's decision with respect to these provisions does not differ and, for ease of discussion, we will address the language in section V specifically. However, our disposition of this issue applies to both the language in Section V and the language in Attachment G.I.I.1.

elsewhere in the Permit that are not contested in this appeal. This distinction between the receiving water limitation and other end-of-pipe water quality based effluent limits is also consistent with the permit record. *See* Permit §§ IV.B, V, VI.C.5, at 8, 9, 15; Fact Sheet at F-17 to F-18, F-26.[16]

Second, the City of Lowell, Massachusetts, challenged a nearly identical NPDES permit provision in an appeal before the Board and raised arguments similar to those that San Francisco makes here. *See In re City of Lowell*, 18 E.A.D. 115, 175-88 (EAB 2020) (determining that region did not clearly err in including provision that stated facility's discharge "shall not cause a violation of the water quality standards of the receiving water"). In *Lowell*, the Board upheld the provision after determining that the petitioner failed to demonstrate that the region lacked legal authority, that the prohibition was unnecessary, or that the prohibition infringed upon fair notice requirements.

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[16] San Francisco argues that the Region provided no meaningful distinction between a "receiving water limitation" and a water quality-based effluent limitation. Pet. at 10, 15-16. To the contrary, in its response to comments document, the Region described a receiving water limitation as "directly derived from the applicable water quality standards," Resp. to Cmts. at 11, and a water quality-based effluent limitation as a "restriction * * * on quantities, rates, and concentrations of chemical, physical, biological and other constituents [that] are discharged from point sources," *id.* (quoting CWA § 502(11), 33 U.S.C. § 1362(11)). The Region explained that "[c]ompliance with receiving water limitations is determined with respect to the discharger's effect on the receiving water, whereas compliance with effluent limitations is based on the quality of the effluent." *Id.* In other words, water quality-based effluent limits (or WQBELs) might be thought of as specific "end-of-pipe" limits on what is being discharged, whereas the narrative receiving water limitations might be thought of as a check on the effect that the discharge has on the quality of the receiving water. *See* U.S. EPA, Combined Sewer Overflows: Guidance for Long-Term Control Plan, at 1-22, 1-23 (1995) (A.R. 95b) (distinguishing end-of-pipe measures of success from receiving water measures of success); *see also* U.S. EPA, CSO Post Construction Compliance Monitoring Guidance, at 45 (May 2012) (A.R. 94) (distinguishing monitoring for achieving end-of-pipe-goals from quality of receiving water). In sum, the Region's response to San Francisco's comments on this issue was more than enough to meet the requirements of 40 C.F.R. § 124.17(a)(2). *See In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, 674-76 (EAB 2010) (discussing the permitting authority's obligation to respond to comments under 40 C.F.R. § 124.17(a)(2)).

1. *The Narrative Prohibition is Not Contrary to Law*

We address first the Region's legal authority to impose a narrative prohibition against violating water quality standards (that is, a prohibition based on the effect that a discharge will have on receiving waters), in addition to the Permit's specific water quality based effluent limits (that is, limits based on the end-of-pipe quality of the effluent). *See* Pet. at 13-16 (arguing that both the narrative "receiving water limitation" and the specific WQBELs are designed to protect water quality standards, but the receiving water limitations were not properly developed according to the standards to permit process set forth for WQBELs). For the reasons set forth below, in *Lowell*, and in the response to comments document for this Permit, San Francisco fails to demonstrate that the Region's inclusion of a narrative prohibition against violating water quality standards in the Permit is based on a clearly erroneous conclusion of law. *See City of Lowell*, 18 E.A.D. at 175-80; Resp. to Cmts. at 11-14.

Clean Water Act section 402 requires permit issuers to include—in every NPDES permit—conditions that ensure that the discharge will meet the requirements of Clean Water Act section 301, *including* those necessary to meet water quality standards. *See City of Lowell*, 18 E.A.D. at 175; CWA §§ 402, 301(b)(1)(C), 33 U.S.C. §§ 1342, 1311(b)(1)(C); Resp. to Cmts. at 12. NPDES regulations implementing the CWA also require that permits include "any" limitation necessary to achieve water quality standards. 40 C.F.R. § 122.44(d); *see* Resp. to Cmts. at 12. Although 40 C.F.R. § 122.44(d) sets forth a process for deriving pollutant-specific effluent limits when the permitting authority determines that a particular pollutant has the reasonable potential to cause or contribute to an exceedance of water quality standards, the regulations do not require all permit conditions necessary to meet water quality standards to be expressed in terms of specific pollutant-by-pollutant limitations. *See* 40 C.F.R. § 122.44(d); Resp. to Cmts. at 12.

Additionally, CSOs must meet the requirements of the CWA, including compliance with water quality standards and the protection of designated uses. CSO Control Policy, 59 Fed. Reg. at 18,688-89; *id.* § IV.B, 59 Fed. Reg. at 18,695-96; Resp. to Cmts. at 12. The CSO Control Policy specifically recognizes that Phase I permits need to require compliance "expressed in the form of a narrative limitation." CSO Control Policy § IV.B, 59 Fed. Reg. at 18,696; *see* Resp. to Cmts. at 12. Similarly, the guidance document for CSO permit writers provides that permit writers should include in Phase II permits narrative permit language providing for the attainment of applicable water quality standards, in addition to

facility-specific performance standards.[17] CSO Guidance for Permit Writers at 4-27; *see* Resp. to Cmts. at 12.

Provisions generally prohibiting discharges from violating water quality standards are frequently included in NPDES permits in addition to more specific "end of pipe" effluent limits. *See, e.g., City of Lowell*, 18 E.A.D. at 176; *see also, e.g., Ohio Valley Envtl. Coal. v. Fola Coal Co.*, 845 F.3d 133, 136, 141-142 & n.5 (4th Cir. 2017) (recognizing that EPA often includes such provisions in NPDES permits). As the Region explained in its response to comments document, provisions prohibiting discharges that result in violations of water quality standards incorporate enforceable assurances that water quality standards will be met. Resp. to Cmts. at 11-12. In effect, they serve as "backstops" in the event that more specific limits or provisions prove inadequate. *See* Transcript of S.F. Bay Reg'l Water Quality Control Bd. Hearing at 14:16-20 (Sept. 11, 2019) (A.R. 14); Oral Arg. Tr. at 70, 71-72, 74. Such provisions also provide a mechanism for addressing "water quality violations that a permittee causes due to unanticipated circumstances or changes to effluent quality." *City of Lowell,* 18 E.A.D. at 176.

As we stated in *Lowell*, federal courts have recognized the authority of permit issuers to include narrative prohibitions against violations of water quality standards that are similar to the one at issue here. *City of Lowell*, 18 E.A.D. at 176-77 (citing *Nw. Envtl. Advocates v. City. of Portland*, 56 F.3d 979, 989-90 (9th Cir. 1995); *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology,* 511 U.S. 700, 716-18 (1994)); Resp. to Cmts. at 13; *see also Fola Coal*, 845 F.3d at 139-143 (determining that permit condition prohibiting permittee from causing violation of applicable water quality standards was enforceable permit term, recognizing EPA's consistent use of such permit conditions, and noting acceptance by courts of EPA's view when interpreting similar provisions); *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles,* 725 F.3d 1194, 1199, 1201, 1205 (9th Cir. 2013) (addressing enforcement of permit that included provision prohibiting "discharges from [the facility] that cause or contribute to the violation of the Water Quality Standards or water quality objectives"), *cert. denied*, 572 U.S. 1100 (2014)). In upholding the enforcement of a similar narrative provision, the U.S. Court of Appeals for the Ninth Circuit in *Northwest Environmental Advocates v. City of Portland* explained that "the Supreme Court recognized that the numerical criteria components of state

[17] The CSO guidance document for permit writers provides that "[*i*]*n addition to"* performance standards designed to meet water quality standards, "the permit writer should include narrative permit language providing for the attainment of applicable [water quality standards]." CSO Guidance for Permit Writers at 4-27 (emphasis added).

water quality standards cannot reasonably be expected to address all the water quality issues arising from every activity which can affect the State's hundreds' of individual water bodies," and "requiring the States to enforce only the numerical criteria component of their water quality standards 'would in essence require the states to study to a level of great specificity each individual surface water to ensure that the criteria * * * fully protect the water's designated uses.'" 56 F.3d at 989-990 (quoting *PUD No. 1 of Jefferson County,* 511 U.S. at 717-18).

San Francisco contends, as did the petitioner in *Lowell*, that the cases on which the Region relies in support of its authority to include a narrative prohibition are enforcement cases and, as such, are inapposite. Pet. at 15. In *Lowell* we explained that, notwithstanding the enforcement posture of these cases, the conclusions regarding a permitting authority's basis for including narrative prohibitions against violating water quality standards are instructive and strongly support the proposition that permitting authorities are authorized to include such provisions. *See City of Lowell*, 18 E.A.D. at 177-178 (analyzing *Nw. Envtl. Advocates*, 56 F.3d at 989-90, and *Fola Coal*, 845 F.3d at 145-47). San Francisco also suggests that the authorities cited by the Region are a reference to narrative WQBELs like the ones set forth in this Permit at section VI.C.5.c,[18] rather than the narrative prohibition expressed in section V. Pet. at 16. We disagree. The enforcement cases cited involved the application of permit language almost identical to the language at issue here. *See Nw. Envtl. Advocates*, 56 F.3d at 985 ("no wastes shall be discharged and no activities shall be conducted [that] will violate Water Quality Standards"); *Fola Coal*, 845 F.3d at 136 ("discharges * * * are to be of such quality so as not to cause violation of applicable water quality standards").

San Francisco also cites *American Paper Institute v. EPA* for the proposition that water quality standards are not a limit that can be violated because water quality standards themselves "'have no effect on pollution,'" rather they are "'used as the basis for specific effluent limitations in NPDES Permits.'" Pet. at 15 (quoting *Am.*

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[18] Section VI.C.5.c of the Permit contains narrative WQBELs applicable to wet weather discharges from CSO outfalls and the deepwater ocean outfall. Fact Sheet at F-25. As such, it satisfies the CSO Control Policy's requirement to implement San Francisco's LTCP by incorporating it into the Permit to satisfy water quality-based requirements during wet weather. *See* Fact Sheet at F-30. The narrative controls include requirements such as "optimize system operations to minimize combined sewer discharges and maximize pollutant removal during wet weather," "use all facilities * * * to store or treat wet weather flows to the maximum extent practicable." Permit § VI.C.5.c., at 20.

Paper Inst. v. EPA, 996 F.2d 346, 350 (D.C. Cir. 1993)). *American Paper,* however, involved a challenge to an EPA rule requiring permit writers to use one of three methods to interpret state water quality standards when establishing pollutant-specific effluent limitations in permits. 996 F.2d. at 348, 350 (upholding the rule codified at 40 C.F.R. § 122.44(d)(1)(vi)). *American Paper* is thus inapposite to whether, in addition to pollutant-specific water quality-based effluent limitations, a permit writer may *also* include a narrative prohibition against violating water quality standards. The same is true for *Natural Resources Defense Council Inc. v. EPA*, which San Francisco cites for the proposition that water quality standards are a critical component for setting applicable limitations in individual permits. Pet. at 15 (citing *Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993)). Again, that proposition does not speak to whether a permit writer may include a narrative prohibition against violating water quality standards in addition to specific water quality-based effluent limitations. *See Nat. Res. Def. Council*, 16 F.3d at 1400, 1405, 1406 (noting that states can establish narrative criteria to supplement numerical criteria and rejecting a challenge to EPA's approval of specific state water quality standards). In sum, neither the CWA nor the caselaw supports San Francisco's argument that a broad narrative prohibition against violating or exceeding water quality standards, in addition to more specific water quality-based effluent limitations, is based on a clearly erroneous conclusion of law.

San Francisco also contends that the narrative prohibition is illegal because the Region failed to follow the standards-to-permit framework set forth in the permit writers manual, which serves as guidance in implementing CWA requirements and regulations. Pet. at 13-15 (*citing* Office of Wastewater Mgmt., U.S. EPA, *NPDES Permit Writers' Manual* at 6-1 to 6-2, 6-12 to 6-23 (2010) ("Permit Writers' Manual")); *see also* Pet. at 21 (arguing that a discharger cannot "violate*"* a water quality standard because that standard must first be "translated*"* into a permit limit). In its reply, San Francisco specifically points to the provisions for determining pollutant-specific effluent limits in 40 C.F.R. § 122.44(d)(1). Reply Br. at 4-5. The framework in the permit writer's manual to which San Francisco refers is designed to determine specific water quality-based effluent limitations and not the type of general narrative prohibition that is at issue here. Additionally, as stated above and described by the Region in its response to comments document, although 40 C.F.R. § 122.44(d) provides a process for establishing pollutant-specific effluent limits, the regulations do not require that all permit conditions necessary to meet water quality standards be expressed in terms of specific pollutant-by-pollutant numeric limitations. *See* 40 C.F.R. § 122.44(d); Resp. to Cmts. at 12. Nor do the regulations prohibit the permitting authority from determining that a narrative prohibition against violating water quality standards in

the receiving waters is appropriate. *See Nw. Envtl. Advocates*, 56 F.3d at 986 (rejecting argument that "only those water quality standards that are translated into effluent limitations" may be enforced). As such, the regulations and guidance setting forth the standards-to-permit process are inapposite to the narrative prohibition at issue here.

In sum, San Francisco has not met its burden to demonstrate that the Region lacked legal authority to impose the prohibition against violating water quality standards in the receiving waters.

2. *The Region's Factual Basis for the Provision*

San Francisco also argues that the Region's inclusion of the prohibition against violating water quality standards in the Permit is based on clearly erroneous findings of fact. Pet. at 17-19. The Region explained that it included the prohibition as a backstop "to ensure compliance with applicable water quality standards in accordance with the CWA and [its implementing regulations]." Fact Sheet at F-26; *see also* Resp. to Cmts. at 11; Oral Arg. Tr. at 70, 71-72. In its comments on the draft permit, San Francisco asserted that compliance with applicable WQBELs in the Permit's long-term control plan provision (section VI.C.5.c.) will result in attainment of applicable water quality standards and thus the narrative general prohibition is unnecessary. *See* Letter from Greg Norby, Assistant Gen. Manager, Wastewater Enter., to Jessica Watkins, Cal. RWQCB, S.F. Bay Region, attach. B at 3-5 (May 20, 2019) (attaching comments) (A.R. 9) ("San Francisco Comments"); Pet. at 18, 19-20. In its response to comments, based on the design of the Oceanside CSS and other factors related to historical assumptions, exceptions, and current conditions, the Region explained that the effluent limits in section VI.C.5.c. and elsewhere in the Permit may not "necessarily achieve water quality standards," and therefore the narrative prohibition against violating water quality standards in the receiving water is "necessary to ensure compliance with applicable water quality standards." Resp. to Cmts. at 11, 15; *see also generally* Resp. to Cmts. at 14-16.

Contrary to San Francisco's argument that the Region provided no support for the determination that WQBELs in section VI.C.5.c. may not, alone, achieve water quality standards, Pet. at 17, the record in fact supports the Region's conclusion. As discussed in the Fact Sheet, in 1972, the California State Water Resources Control Board adopted water quality standards for the Pacific Ocean to protect beneficial uses. *See* Fact Sheet at F-10 to F-11 (describing Cal. State Water Res. Control Bd., *Water Quality Control Plan – Ocean Waters of Cal., Cal. Ocean Plan* (1972, rev. 2019) (A.R. 101) ("Ocean Plan")). The Ocean Plan is applicable to discharges both within and outside of the territorial waters of the state "to assure no violation of [the water quality standards in] the Ocean Plan will occur in ocean

waters." Ocean Plan at 67. Notwithstanding the water quality standards set forth in the Ocean Plan, in 1979, the California State Water Quality Control Board ("State Water Board") granted San Francisco a limited exception to the requirements of the Ocean Plan, by allowing San Francisco to discharge an average of eight overflows per year from its outfalls during wet weather. Fact Sheet at F-11 to F-12. The Oceanside CSS was thus *designed and constructed* not to contain all stormwater runoff (contrary to the goal of the CWA to eliminate all CSOs), but instead to allow CSOs, namely a long-term average of eight combined sewer discharges annually. *See* Fact Sheet at F-7.[19]

Notwithstanding the exception granted to San Francisco, the State Water Board Order also provided that San Francisco was to comply with the Ocean Plan "to the greatest extent practical," and also provided that EPA or the California RWQCB "may require construction of additional facilities or modification of existing Facility operations if it finds (1) changes in the location, intensity, or importance of affected beneficial uses, or (2) demonstrated unacceptable adverse impacts result from Facility operations as currently constructed." Fact Sheet at F-12; *see also* Cal. State Water Resources Control Bd., Order No. WQ 79-16: In the Matter of the Request for an Exception to the 1978 Water Quality Control Plan for Ocean Waters of California 19 (1979) (A.R. 102) ("State Water Board Order No. WQ 79-16"). Additionally, although the exception was presupposed to be contingent upon protecting beneficial uses of ocean waters, the State Water Board also acknowledged that "to some degree," the exception itself would *require* an exception to the regulatory mechanisms meant to protect beneficial uses. State Water Board Order No. WQ 79-16 at 7-8. Thus, the design and construction of the Oceanside CSS and the exception contained in State Water Board Order WQ 79-16 provide support to the Region's determination that the facilities' discharges may not achieve water quality standards.

The aim of the CWA, by virtue of the CSO Control Policy, is to bring combined sewer discharges into compliance with the CWA, "including compliance with water quality standards *and* protection of designated uses." CSO Control Policy, 59 Fed. Reg. at 18,688 (emphasis added). As the Region explained, the

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[19] *See also* 2009 Permit, attach. F (Fact Sheet) at F-5 ("[the facility was] designed to achieve a long term average of eight discrete CSOD events per year."); 2003 Permit at 10 ("The system was designed and built based upon historical rainfall data to not exceed the overflow frequencies specified in Order No. 79-16."); 1997 Permit at 4 ("The long-term average of 8 overflows per year was established as the Westside design goal by the Board after an evaluation of costs and benefits.").

CSO Control Policy contemplates that water quality standards might not be attained and requires the permittee to submit a revised control plan in the event that they are not. *Id.*; *see also* CSO Control Policy §§ I.C., IV.B.2.g, 59 Fed. Reg. at 18,690, 18,696. The Permit "requires post-construction compliance monitoring to verify compliance with water quality standards and protection of designated uses as well as [to] ascertain the effectiveness of CSO controls." Resp. to Cmts. at 15 (citing CSO Control Policy, 59 Fed. Reg. at 18,688, 18,694). In other words, the CSO Control Policy also supports the Region's determination to address the possibility that specific WQBELs may not be sufficient to ensure that water quality standards would be met. *Id.*

In further support of the need to protect beneficial uses of the receiving waters, the Region noted that the combined sewer discharges occur at Ocean Beach, China Beach, and Baker Beach, each of which is a popular recreational area used by the community and tourists throughout the year. *Id.* at 19-20. Between 2011 and 2014, approximately 100 million gallons of combined wastewater and stormwater were discharged from the combined sewer discharge outfalls. *Id*. at 20 (citing S.F. Pub. Utils. Comm'n, *Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls*, at 1-3 to 1-4 (Jul. 30, 2014) (A.R. 63) ("2014 Report on Efficacy of CSD Controls")). From 2008 to 2014, recreational surveys after combined sewer discharges document that 20% of users were in contact with receiving water, and data from that timeframe show that pollutant concentrations in combined sewer discharges exceeded water quality objectives.[20] *Id.* (citing 2014 Report on Efficacy of CSD Controls at 3-14 tbl.3-3 & app. A). Additionally, discharges that occur in the early Fall or Spring have the potential to impact more users since "recreational use increases when days are longer and the duration of storm events is typically shorter, which contributes to good surf conditions." Resp. Br. at 22 (citing S.F. Pub. Utils. Comm'n, *Southwest Ocean Outfall Regional Monitoring Program, Sixteen-Year Summary Report 1997-2012*, at ii (Apr. 2014) (A.R. 62) ("Sixteen Year Summary Report")).

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[20] San Francisco incorrectly asserts that the Region erred in stating that 20% of users were in contact with receiving water after combined sewer discharges. *See* Pet. at 27-28 (citing Resp. to Cmts. at 20). The report on which the Region relies states that 80% of users observed during or shortly after a combined sewer discharge were engaged in "non-water contact recreation." 2014 Report on Efficacy of CSD Controls at 3-14 (cited in Resp. to Cmts. at 20). The report also illustrates that 15% of total recreational users observed were identified as "full contact" and 5% as "partial contact," which amounts to 20% of recreational users in contact with the receiving water, during or after combined sewer discharges. *Id.* at 3-14 tbl.3-3; *see also* Resp. Br. at 22 n.12.

Monitoring data for one year (July 2012 – July 2013) showed that "56 of the 468 samples collected at the ten shoreline receiving water monitoring locations exceeded a single-sample maximum water quality objective for at least one bacteria indicator (i.e., *E. coli*, total coliform or *Enterococcus*)." Resp. to Cmts. at 20 (citing Sixteen Year Summary Report at 3-7, 3-13). Of the elevated samples, 70% were associated with a combined sewer discharge event and resulted in the posting of warning or no swimming signs at beaches for seventeen days. *Id.* Given these facts, it was not unreasonable for the Region to conclude it was appropriate to "assess ways to reduce the volume, frequency, and magnitude of the combined sewer discharges" to these sensitive recreational areas to better protect beneficial uses.[21] *See id.*

San Francisco argues that prior findings established that San Francisco's specific WQBELs were protective of water quality standards and that the Region failed to justify departing from those findings when the Region concluded that the prohibition against violating water quality standards in the receiving water was needed. Pet. at 18 (citing San Francisco's comments, which include citation to State Water Board Order No. WQ 79-16 as well as "decades of contrary Regional Board, State Board and EPA findings"); *see also* San Francisco Comments, attach. B at 5 (citing State Water Board Order No. WQ 79-16); Resp. to Cmts. at 15 (citing State Water Board Order No. WQ 79-16). The Region disagrees that State Water Board Order No. WQ 79-16 contained a determination that beneficial uses would be protected. Resp. to Cmts. at 15-16.

Although the order provides that exceptions to the Ocean Plan can be made *only* if the State Water Board determines that the exception will not compromise protection of ocean waters for beneficial uses, as we stated above, the State Water Board also recognized that "[t]o some degree," allowing wet weather bypasses requires an exception to the regulatory mechanisms in the Ocean Plan that are meant to protect beneficial uses. State Water Board Order No. WQ 79-16 at 8. Additionally, the wet weather exception, granted in the State Water Board Order,

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[21] San Francisco asserts, "[t]he Region did not respond or explain how the operation of the [CSS] consistent with San Francisco-specific water quality-based effluent limitations would fail to protect beneficial uses." Pet. at 11. The Region's response to comments document provides a more than adequate explanation for why a narrative prohibition against violating water quality standards is needed in addition to San Francisco-specific WQBELs in order to protect beneficial uses. *See Circle T Feedlot*, 14 E.A.D. at 674-76 (discussing the permitting authority's obligation to respond to comments under 40 C.F.R. § 124.17(a)(2)).

allowed an average of eight overflows per year, based on then-current circumstances and then-current average rainfall records. *Id.* at 10-13, 18. The State Water Board Order also specifically provided that, notwithstanding the wet weather exception granted in the order, "if the Regional Board finds that changes in location, intensity or importance of affected beneficial uses or demonstrated unacceptable adverse impacts * * * have occurred, it may require [changes to the structure or operation of the facilities]." *Id.* at 19. Based on the language of the order we agree with the Region that State Water Board Order No. WQ 79-16 does not provide a determination that operation of the Oceanside CSS would be protective of beneficial uses in perpetuity. Nor does it render the Region's inclusion of the prohibition against violating water quality standards in the Permit clearly erroneous.

San Francisco also points to a more than ten-year old determination in the 2009 Oceanside permitting record that the design of the system "would not compromise beneficial uses" in arguing that the Region has departed from prior findings that compliance with the LTCP would equate to compliance with water quality standards. Pet. at 18 (citing, among other things, 2009 Permit attach. F (Fact Sheet) at F-34). Determinations as to whether a permittee is in compliance with the terms of a permit, however, are not made in the context of issuing a permit. *See* Resp. to Cmts. at 15. Additionally, as discussed above and in Part V.D., below, the Region reviewed current data and determined that it was not appropriate to include a statement indicating that solely complying with the requirements of the LTCP would result in compliance with water quality standards (which include protecting beneficial uses). Resp. to Cmts. at 14-15; *see* Memo to File at 6-8. In any event, San Francisco does not explain how a determination that water quality standards were met in the past prevents the Region from being able to determine a future requirement is appropriate, particularly when the system is decades old and was modified from its original design with additional changes planned.[22] We therefore

[22] For example, the service life of the sewers exceeds 100 years (making the rate of failure more imminent), average rainfall totals have changed from when the exception to the Ocean Plan was implemented, the sewer system has undergone upgrades and operational changes over the years, and this Permit authorizes San Francisco to construct, own, and operate the Westside Recycled Water Project. *See* Fact Sheet at F-3; Memo to File at 6-8; *see also* Part V.D, below (discussing the need for an update to the long-term control plan, including modifications to the San Francisco CSS since built and future changes planned).

conclude that the 2009 determination on which San Francisco relies, or other prior determinations cited, does not render the Region's decision clearly erroneous.

San Francisco then invokes its post-construction monitoring as evidence that the applicable water quality standards under previous permits have been met (thus, the narrative prohibition is not needed) and argues that the Region failed to consider that information. Pet. at 19. As explained above, and in the response to comments document, the Region based its decision to include the narrative prohibition not on the monitoring data alone, but on its determination that solely complying with the end-of-pipe provisions in the LTCP may not necessarily result in compliance with the water quality standards, including beneficial uses. Resp. to Cmts. at 15. That latter determination was based on the fact that the CSO Control Policy contemplates that water quality standards may not be met by complying with the LTCP alone, the exception to the Ocean Plan that allows San Francisco to discharge from the outfalls for an annual average of up to eight times per year, as well as its consideration of the post-monitoring information in the administrative record supporting the Region's decision here. *See* Resp. to Cmts. at 14-16, 19-20 (citing 2014 Report on Efficacy of CSD Controls at 1-4, 3-14, & tbl.3-3, and the Sixteen Year Summary Report at 3-7, 3-13); Resp. Br. at 21-22 (citing Memo to File at 6-8; Sixteen Year Summary Report at ii, 3-13; Ocean Plan at 9 tbl.3; California Integrated Water Quality Systems Project, Monitoring data from 2012-2019 for CSOs from the CSD structures for the Oceanside Permit (A.R. 67b)); *see also* 40 C.F.R. § 124.18 (requiring Region to base its permitting decision on contents of administrative record). San Francisco has not established that the Region's consideration of post-monitoring data in determining whether beneficial uses were being met was clearly erroneous.

Finally, San Francisco argues that the prohibition at issue is not necessary because the standard reopener provision required to be included in NPDES permits addresses any uncertainty or future unknowns. Pet. at 20. In so arguing, San Francisco relies on the description of the reopener clause in the Permit Writer's Manual as allowing the permitting authority to reopen and modify the Permit based on adverse impacts on water quality or beneficial uses. *Id.* (citing Permit Writers Manual at 9-19). San Francisco does not, however, explain or support how the requirement to include a reopener clause in the Permit prohibits the Region from also including a narrative prohibition against violating water quality standards in a reissued permit as well. Reopening and modifying a permit based on adverse impacts on water quality or beneficial uses that occur during a permit's term (the reopener provision) is different and serves a different purpose than a permit term that itself prohibits violating water quality standards in the first instance.

Given the Region's responsibility to determine what conditions are appropriate to include in the Permit, its legal obligation to ensure that water quality standards are met, the legal authority to include a narrative prohibition against violating water quality standards, and its determination that the WQBELs elsewhere in the Permit may not necessarily meet that obligation, we cannot conclude that the Region's decision here was based on clear error of fact.

3. *Fair Notice*

San Francisco's final argument on the prohibition against violating water quality standards is that the provision is so "vague" and "unclear" that the Permit condition fails to provide "fair notice" to San Francisco of its legal obligations. Pet. at 20. In *Lowell*, we explained that, to evaluate a claim of unfair notice, the Board examines the contested permit provisions to determine if they are "confusing," ambiguous," or "unclear." 18 E.A.D. at 175, 182 (*citing In re Puna Geothermal Venture*, 9 E.A.D. 243, 262-63 (EAB 2000) (evaluating similarly-worded prohibition against discharges that will "cause a violation of the water quality standards of the receiving water")).

As in *Lowell*, nothing in the language of the narrative prohibition against violating water quality standards in the Permit is itself unclear. *See id.* at 182. Nor is it unclear which water quality standards apply under the permit. *See id.* To the extent that San Francisco is suggesting that the language in any particular water quality standard is vague or insufficiently clear, San Francisco has not identified any such water quality standard.

In addition, the San Francisco-specific limits in section VI.C.5.c of the Permit contain narrative language such as "to minimize combined sewer discharges and maximize pollutant removal" and "to the maximum extent practicable." Permit § VI.C.5.c, at 20. San Francisco's argument that the narrative prohibition fails to provide fair notice is belied by San Francisco's argument that the latter permit limits (in section VI.C.5.c) are sufficiently protective of water quality standards so as to render the narrative prohibition unnecessary. *See* Part V.B.1, above; Pet. at 19-20, 22 (citing Permit at 8, 18-20; Fact Sheet at F-25). If San Francisco maintains that the narrative limits in section VI.C.5.c. are sufficiently protective of water quality standards, *see* Pet. at 19-20, then San Francisco must also have sufficient notice of how to comply with them. *Accord City of Lowell*, 18 E.A.D. at 183-84. If those narrative limits are sufficiently clear and not vague, the same is true for the narrative prohibition that San Francisco challenges.

C. *The Requirement to Report Isolated Sewer Overflows*

San Francisco's next challenge to the Permit involves the requirement to report on sewer overflows from the combined sewer system. Pet. at 31-44 (challenging Permit section VI.C.5.a.ii(b)). Combined sewer systems anticipate significant stormwater events and are designed to overflow directly from CSO outfalls to surface water bodies such as the Pacific Ocean. *See* Fact Sheet at F-3 to F-4. In addition to the anticipated CSO events from outfalls, as described in Part III.B., above, when the storage capacity of the entire system is exceeded, isolated sewer overflows ("ISOs") can occur from various points of exit other than the permitted CSO outfalls (backups into basements or onto streets through manholes, for example). CSO Guidance for Permit Writers at 4-6; NMC Guidance at 3-3. As also discussed in Part III.B, above, overflows of wastewater can be a major source of water pollution that the CSO Control Policy is designed to address. The reporting provision at issue in this petition requires San Francisco to notify and report on all sewer overflows from the combined sewer system (including those from CSO outfalls and from isolated sewer overflows). Permit § VI.C.5.a.ii(b), at 17; Fact Sheet at F-30.[23]

San Francisco contests this reporting requirement only as it applies to isolated sewer overflows and not as it applies to sewer overflows from outfalls. Pet. at 31. San Francisco essentially makes two arguments as to why it was clearly erroneous for the Region to include that reporting requirement: (1) that the Region cannot *regulate* ISOs that do not reach waters of the United States (because the Region has no Clean Water Act authority over such overflows), *id.* at 32-35, 38-44; and (2) that the Region cannot require reporting of ISOs where that reporting is premised on the need to determine whether there are capacity issues because the capacity of the system is not within the purview of EPA, *id.* at 35-38. Both of San Francisco's arguments misapprehend the function of the Permit condition at issue

[23] Section VI.C.5.a.ii(b) also sets forth various time frames within which overflows must be reported, based on the volume of the overflow. Permit at 17. For example, for sewer overflows with volumes of 1000 gallons or greater, San Francisco must submit draft reports within three business days of becoming aware of the overflow. *Id.* Additionally, for sewer overflows with volumes of 50,000 gallons or greater that reach surface waters, San Francisco must submit a technical report that explains the causes and circumstances, including the method and data used to calculate the volume, and the response actions completed and planned. *Id.*

and fail to carry San Francisco's burden to show that the Region's inclusion of the reporting requirements constituted clear error.

As to San Francisco's first argument, it is undisputed that the Region's authority to regulate here is derived from San Francisco's discharge through an outfall into the Pacific Ocean three miles offshore. *See* Part III.A, above. As an NPDES permitting authority, the Region must include permit terms that meet the requirements of the CWA, as well as the monitoring and reporting necessary to ensure compliance. The requirement to report on ISOs is not to "regulate" ISOs. Rather, the reporting requirements notify the permitting authorities of such occurrences because sewer overflows serve as an indicator of whether the CSO controls are working and the permitted system is operating as it should. Resp. Br. at 34; Resp. to Cmts. at 22-23. Even San Francisco acknowledges the usefulness of this reporting requirement, having stated during the permitting process that the frequency, cause, and location of sewer overflows from the combined sewer system may serve as "a metric to evaluate the effectiveness of operation and maintenance of the collection system to the extent that they are indicative of blockages that may reduce storage capacity." *See* Resp. to Cmts. attach. 1 at 5, 11; *see also* Pet. at 39 n.7 (citing San Francisco Comments attach. C, at 1) (stating that San Francisco was "prepared to * * * develop a workable framework for the monitoring and reporting of [sewer overflows from the combined sewer system]"); *see also* Resp. to Cmts. at 22.

The Region's authority to require such reporting derives, in part, from the CSO Control Policy, which, as noted previously, was incorporated into CWA section 402(q). 33 U.S.C. § 1342(q). As described above, the CSO Control Policy establishes "Nine Minimum Controls" as the minimum technology-based requirements to be imposed on combined sewer systems. *See* CSO Control Policy § II.B, 59 Fed. Reg. at 18,691; 40 C.F.R. § 125.3; Fact Sheet at F-29. Among other things, those minimum controls require "[p]roper operation and regular maintenance programs" for the sewer system and "[m]aximization of flow to the [plant] for treatment." CSO Control Policy § II.B, 59 Fed. Reg. at 18,691. One of the Nine Minimum Controls requires dischargers to "[m]aximize use of the collection system for storage." *Id.* This latter requirement refers to "making relatively simple modifications to the [combined sewer system] to enable the system itself to store wet weather flows until downstream sewers and treatment facilities can handle them." NMC Guidance at 3-1.

The Region included the requirement to maximize storage in San Francisco's Permit at section VI.C.5.a.ii. Permit at 16-17; *see* Fact Sheet at F-29;

Resp. to Cmts. at 22-23 (citing the NMC Guidance).[24] EPA guidance on implementing that requirement provides that "[t]he first step in maximizing storage in a system is to identify possible locations where minor modifications can be made to the CSS to increase in-system storage." NMC Guidance at 3-1. The guidance further provides that "more complex modifications [to the combined sewer system] (e.g., those requiring extensive construction)" are meant to be evaluated as part of the system's long-term control plan. *Id.* The guidance recognizes that the "[r]isk of upstream (street, basement) flooding goes up with increased use of the collection system for [wet weather] storage," and warns that modifications to maximize storage should be analyzed to ensure that the modifications will not cause other problems, such as street or basement flooding. *Id.* at 3-1, 3-3; *see also* CSO Guidance for Permit Writers at 4-6. Any modifications undertaken are to be documented for the permitting authority. NMC Guidance at 3-1.

The guidance document also provides that municipalities should record, summarize, and report information on incidents relating to the impacts of the combined sewer overflow system, including street and basement flooding. *Id.* at 10-4; see also *id.* at 10-2 to 10-4 (describing monitoring requirements to characterize CSO impacts and the efficacy of CSO controls, including overflow occurrences). The expectation is that the reporting will provide useful information on the general performance of the combined sewer system and the effect of control measures implemented, as well as assist in characterizing the nature and relative severity of receiving water impacts from combined sewer overflows. *Id.* at 10-4; *see also generally id.* at 10-2, 10-5 (stating that the data is expected to "provide a perspective on existing conditions and a basis for identifying progress that has been achieved"). Importantly, monitoring and reporting existing conditions allow the permitting authority to assess the performance of the minimum control measures, as the permitting authority is required to do. *See id.* at 10-5.

The Region's authority for the reporting requirement is also rooted in the general permitting regulations implementing the permitting provisions of the CWA. For example, permittees are required to, at all times, operate and maintain facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit. *See* 40 C.F.R. § 122.41(e). CWA sections 308 and 402 and their

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[24] While the NMC Guidance by itself does not mandate the reporting requirements, it does provide guidance to the Agency for implementing the CSO Control Policy according to the CWA, which authorizes the reporting requirements. NMC Guidance at 1-4, 1-6; CWA §§ 308, 402, 33 U.S.C. §§ 1318, 1342.

implementing regulations authorize the permitting authority to collect information deemed necessary to ensure compliance with all applicable requirements of the CWA, including the CSO Control Policy. 33 U.S.C. §§ 1318, 1342; 40 C.F.R. § 122.43(a); *see also* Resp. to Cmts. at 27 (citing the reporting requirement as necessary to detect violations of CWA section 301 and to evaluate compliance with the nine minimum controls). Permitting authorities rely on permittees to furnish "any information" that the permitting authority may request "to determine compliance with the permit." 40 C.F.R. § 122.41(h).[25]

In issuing the draft permit, the Region explained that reporting on releases of untreated or partially treated wastewater is necessary, among other reasons, "to evaluate combined sewer system performance, and operations and maintenance practices," and "to determine whether any diversions of untreated or partially treated wastewater result in a discharge to surface waters." Fact Sheet at F-30. The Region also explained that the requirement implements public notification requirements of the CSO Control Policy and is necessary to determine possible impacts to public health. *Id.* at F-29 to F-30; *see also* Resp. to Cmts. attach. 1 at 12; CSO Control Policy § I.A, 59 Fed. Reg. at 18,689 (stating that among the objectives of the CSO Control Policy is the goal of "minimiz[ing] water quality, aquatic biota, and human health impacts"); *Id.* § II.B, 59 Fed. Reg. at 18,691 (identifying "[p]ublic notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts" as one of the Nine Minimum Controls).[26]

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[25] In its reply brief, San Francisco maintains that the Region identified only two bases for its authority to require reporting of isolated overflows—40 C.F.R. § 122.41(h) and the CSO Control Policy. Reply Br. at 15. From there, San Francisco argues that other bases for the Region's authority (i.e., CWA §§ 308, 402) were "*post hoc"* and therefore the Region cannot rely on those provisions. *Id.* (asserting, without citation or legal support, that reliance on these statutory provisions was impermissible, presumably based on the *post hoc* rationalization doctrine). The Region's reliance on those CWA provisions in its response brief was not impermissible inasmuch as the Permit was issued pursuant to CWA § 402, the CSO Control Policy was incorporated into CWA § 402(q), and 40 C.F.R. § 22.41 sets forth conditions applicable to all NPDES permits issued under the CWA, including the sections on which the Region relies. In any case, San Francisco has not been deprived of an opportunity to confront the Region's rationale.

[26] The Permit also provides that the collection, treatment, storage, and disposal systems shall be operated in a manner that precludes public contact with wastewater. *See* Permit attach. G § G.I.I.2, at G-3.

In response to San Francisco's arguments, the Region explained that complete reporting on sewer overflows—i.e., "whenever sewage or sewage mixed with stormwater exits the system, whether in streets, business[es], residences, or discharges to surface waters"—provides important information about the proper operation and maintenance of the CSS. Resp. Br. at 34 (citing Permit at 17). The Region explained in its response to comments document that monitoring and reporting sewer overflows from the combined sewer system provide the Region with a means to evaluate implementation of the Nine Minimum Controls and determine "whether San Francisco's operations and maintenance activities are adequate," "whether measures to maximize storage within the collection system are functioning properly," "whether flows to the treatment works have been maximized without causing sewer backups," "whether dry weather overflows are being controlled," "whether actions to minimize floatables are not causing backups," and "whether pollution prevention activities * * * are effective." Resp. to Cmts. at 23 (citing NMC Guidance). As the Region explained, "understanding the causes of overflows is vital to determining whether and what corrective actions might be appropriate." *Id.* at 22.[27] In other words, monitoring and reporting ISOs provide the Region with a means to evaluate and ensure permit compliance, which the Region is required to do under the CWA. *Id.*; *see also* CWA §§ 308, 402(a)(2), 33 U.S.C. §§ 1318, 1342(a)(2) (mandating permit issuer to require reporting necessary to establish compliance with CWA and applicable regulations); 40 C.F.R. § 122.43(a).

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[27] San Francisco also argues that reporting on isolated sewer overflows that occur as a result of wet weather events is not appropriate because the system anticipates and is designed for such events and, thus, overflows due to wet weather events would not demonstrate improper operation or maintenance. Pet. at 35-36 (citing San Francisco Comments attach. C, at 1); *see also* Resp. to Cmts. at 24; Reply Br. at 15, 19-20. San Francisco also argues that 44 C.F.R. § 122.41(e), which requires permittees to properly operate and maintain the permitted facility, is inapplicable to overflows caused by extreme storm events where the system operates as designed. Reply Br. at 19. These arguments ignore the purpose of the CSO Control Policy, which as we have stated is to ensure that controls are implemented at combined sewer systems to ensure that overflows that occur as a result of wet weather events meet the objectives and requirements of the CWA. 59 Fed. Reg. at 18,688. The arguments are also inconsistent with San Francisco's acknowledgment that overflows can be indicative of blockages that reduce storage capacity and can be a useful metric to evaluate the effectiveness and operation of the collection system. *See* Pet. at 39 n.7 (citing San Francisco's Comments attach. C, at 1); *see also* Resp. to Cmts. at 22.

San Francisco's second argument—that the Region cannot base its reporting requirement on system capacity issues, because capacity is beyond the purview of the Region—again misapprehends the reporting requirement. *See* Reply Br. at 19 (arguing that "[e]valuation of system's design capacity *is not* a component of 'ensuring adequate operation and maintenance' of a combined system" (citing Resp. Br. at 34); Pet. at 37 (arguing that, if 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 [ISOs] resulting from design capacity exceedances"). The Region is not requiring reporting of ISOs to assert authority over the capacity of the overall system. Rather, the Region is requiring reporting to determine the effect of the controls implemented and to confirm proper maintenance and operation of the system. The location, frequency, significance, and circumstances of sewer overflows may reflect an exceedance of the capacity of the system to contain sewage and stormwater, and that capacity issue may be due to conditions that are within the purview of the permitting authority, indicating that changes to permitted activities are necessary. For example, as discussed, the Permit (as contemplated by the CSO Policy and the Nine Minimum Controls) requires San Francisco to maximize the use of its system for storage capacity. But if in the course of "maximizing the storage capacity of the system," San Francisco were to implement modifications that result in sewer overflows into basements or onto streets, that would be an indicator to which the Region should be alerted. NMC Guidance at 3-1, 3-3, 10-4. This is not so that the Region can require design changes or increased capacity, but so that the Region can evaluate the system's operation pursuant to its permit, as is appropriate. *See* Resp. Br. at 34.

If the Region were to exclude either some or all ISOs from reporting requirements, the risk of under-reporting CSO capacity problems would increase, and the need for rehabilitation of the sewer system would be masked. *See* Resp. to Cmts. at 23. Additionally, the Region explained that "without such monitoring and reporting, determining whether a particular sewer overflow from the combined sewer system arises solely from capacity constraints would be difficult, if not impossible, particularly when dealing with a collection system as old and complex as San Francisco's collection system." *Id.* at 22. The Region further explained that the monitoring and reporting of storm events provides the permitting authority with information on the frequency and severity of such events, which is essential to evaluating the accuracy of models used to predict the frequency and severity of future events. *See id.* at 24. For example, as the Region explained, "[f]requent sewer overflows from the combined sewer system of sufficient volume to backup into homes and businesses may be evidence that capacity improvements are needed," which could lead to the need for a revised long-term control plan or

changes in the steps taken to maximize the use of the combined sewer system for storage capacity.[28] *Id.*

Based on the record before us, the Region's conclusion that the frequency, cause, and location of isolated sewer overflows can be indicative of whether the permitted combined sewer system is operating appropriately is not clearly erroneous. Even more, the frequency, cause, and location of ISOs can be indicative of whether storage is being maximized without causing inappropriate upstream impacts. The requirement to report isolated sewer overflows is not an attempt by the Region to "regulate" those overflows, nor is it an attempt to assert authority over waters not otherwise covered by the Clean Water Act. Rather, the requirement to report isolated overflows is an appropriate mechanism, grounded in the CSO Policy and the Clean Water Act more generally, to determine whether the permitted combined sewer system is operating in compliance with the permit, including the requirement to maximize storage without increasing upstream flooding into basements and streets, which can negatively impact human health and the environment. San Francisco fails to demonstrate that the Region clearly erred in requiring San Francisco to report isolated sewer overflows. Accordingly, the Board denies review on this issue.

D. *The Requirement to Update the Long-Term Control Plan*

San Francisco's final challenge relates again to the CSO Control Policy that is incorporated into the CWA at section 402(q), 33 U.S.C. § 1342. The CSO Control Policy requires municipalities operating combined sewer systems to develop and implement a "Long-Term Control Plan" as part of the NPDES permitting process. CSO Control Policy § II.C, 59 Fed. Reg. at 18,691. When the CSO Control Policy was issued in 1994, San Francisco was already well into constructing its facilities. Resp. to Cmts. at 17. As such, the permitting authorities determined that San Francisco's "program qualifies for the CSO Control Policy's classification under Section I.C. as being substantially complete" and was "exempt" from the "planning and construction requirements" pursuant to section I.C of the Policy. 1997 Permit at 6 (Finding No. 11). Although San Francisco's existing plan

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[28] Notwithstanding the Region's articulation of both its authority and need to require reporting of ISOs, San Francisco asserts that the Region failed to adequately respond to its comments on the issue. Pet. at 11. We disagree; the record reflects that the Region adequately responded. *See* Resp. to Cmts. at 22-24, 27; *Circle T Feedlot*, 14 E.A.D. at 674-76 (discussing the permitting authority's obligation to respond to comments under 40 C.F.R. § 124.17(a)(2)).

was deemed to satisfy the requirements of the CSO Control Policy in subsequent permits, in this Permit, San Francisco is required to update its "Long-Term Control Plan" or "LTCP" by implementing specified tasks based on the CSO Control Policy. *See* Permit § VI.C.5.d, at 21-23 tbl.7.

To comply with the provision, San Francisco must complete a specific list of tasks that is based on the CSO Control Policy and then report to the California RWQCB and the Region as specified. *Id.* The tasks include: (1) submitting a "System Characterization Report" that includes "a comprehensive characterization of the combined sewer system developed through records review, monitoring, modeling, and other means as appropriate"; (2) involving the affected public in the decision-making process; (3) submitting a "Consideration of Sensitive Areas Report" that "evaluates, prioritizes, and proposes control alternatives needed to eliminate, relocate, or reduce the magnitude of or frequency of discharges to sensitive areas";[29] (4) submitting a "Wet Weather Operations Report" that "proposes a set of operational parameters to be used as performance measures to ensure that wet weather operations maximize pollutant removal and minimize the frequency, volume, and duration of combined sewer discharges and sewer overflows from the combined sewer system"; and (5) developing a "Post-Construction Compliance Monitoring Program" that proposes modifications, as appropriate, to the monitoring plan for the next permit term. *Id.* Each task is then further defined and articulated in the Permit. *See id*. Notably, the tasks are focused on obtaining and providing accurate information to the permitting authorities, as well as to San Francisco itself, on the current system and operation; they are not construction or redesign requirements.

San Francisco objects to the LTCP provision (and the tasks that it requires), arguing that the requirements are "contrary to law," and "not supported by relevant factual findings." Pet. at 23. San Francisco also argues that the requirement to update its LTCP does not provide it with fair notice of what is necessary to comply with the provision. *Id.* at 30-31. We address each of these arguments, in turn, below.

1. *The Long-Term Control Plan Provision Is Not Contrary to Law*

San Francisco argues that the requirement to update the LTCP plan is contrary to law because the Region (and the California RWQCB) determined in the

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[29] San Francisco discharges to sensitive areas at six out of its seven discharge points. Permit § VI.C.5.d, at 22 tbl.7.

1997 permit that San Francisco was not covered by the initial planning and construction requirements of the CSO Control Policy based on the status of the San Francisco's facility at the time the Policy was issued. *See* 1997 Permit at 6, 8 (Finding Nos. 11 & 15) (relying on CSO Control Policy § I.C.1, 59 Fed. Reg. at 18,690). As a result, San Francisco argues, many of the elements of developing an LTCP required by the CSO Control Policy do not apply to San Francisco's CSS as a matter of law. Pet. at 24.

The Region acknowledges that based on certain provisions in the CSO Control Policy, it previously allowed San Francisco to avoid the initial planning and construction requirements applicable to other CSOs based on the status of San Francisco's system at the time. Resp. Br. at 26; *see* Resp. to Cmts. at 17. The Region disagrees, however, that its determination in 1997 applies to San Francisco's CSS in perpetuity and prevents a permitting authority from requiring an update to a previously completed LTCP. Resp. to Cmts. at 17; *see also* Resp. Br. at 26. According to the Region, an update to the LTCP is necessary to meet San Francisco's obligations under the CWA, including the CSO Control Policy.[30] Resp. to Cmts. at 16-17 (citing the CWA, including the CSO Control Policy, as well as 40 C.F.R. § 122.44(d); State Water Board Order No. WQ 79-16; and Office of Water, U.S. EPA, *Combined Sewer Overflows: Guidance for Long-Term Control Plan* (Sept. 1995) (A.R. 95b) ("LTCP Guidance")).

As discussed above, CSOs often cause exceedances of water quality standards during wet weather events.[31] *See* CSO Control Policy § I.A, 59 Fed. Reg.

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[30] We find no merit to San Francisco's assertion that the Region failed to explain its departure from its prior determinations that San Francisco was excepted from certain requirements under section I.C. of the permit. *See* Pet. at 10-11; Resp. to Cmts. at 16-17. The Region's rationale for requiring an LTCP update, notwithstanding its prior determination, satisfied the Region's obligation under 40 C.F.R. § 124.17(a)(2) to "[b]riefly describe and respond to all significant comments." *See Circle T Feedlot*, 14 E.A.D. at 674-76.

[31] As described in Part III.B, above, "CSOs consist of mixtures of domestic sewage, industrial and commercial wastewaters, and storm water runoff. CSOs often contain high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants." CSO Control Policy § I.A, 59 Fed. Reg. at 18,689. As such, they not only cause exceedances of water quality standards, but they also "may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways." *Id.*

at 18,689. Recognizing this, and the water quality problems that ensue, EPA developed—and Congress later incorporated into law—the CSO Control Policy to bring combined sewer systems into compliance with the CWA. *Id.* at 18,688-89; CWA § 402(q), 33 U.S.C. 1342(q); *see also* Part III.B, above. As such the CWA, via the CSO Policy, requires permitting authorities to include in every NPDES permit all appropriate requirements in section IV.B of the policy, including the requirement to develop and implement an LTCP to ensure that CSSs that overflow as a result of wet weather events include controls that meet the objectives and requirements of the CWA. *See* CWA §§ 402(a), (q), 33 U.S.C. § 1342(a), (q) (establishing the NPDES permit program and requiring that no permit be issued unless the discharge will meet the requirements of the Clean Water Act, including water quality standards and the requirements of CSO Control Policy); CSO Control Policy §§ I.C, II.C, IV.A-B, 59 Fed. Reg. at 18,690, 18,691, 18,695-96; *see also* CWA § 301, 33 U.S.C. § 1311 (prohibiting the discharge of pollutants except in compliance with the CWA); CWA § 303, 33 U.S.C. § 1313 (establishing water quality standards and implementation plans).

As described in Part III.B, above, the CSO Control Policy sets out a phased approach for implementing the LTCP requirement. CSO Control Policy § IV, 59 Fed. Reg at 18,695-96. Under this approach, a "Phase I" permit will require that the permittee "develop and submit" an LTCP and a "Phase II" permit will "insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan." *Id.* § IV.B.1, .2, 59 Fed. Reg. at 18,696; *see also Lowell*, 18 EAD at 169. That said, when it issued the CSO Control Policy in 1994, EPA recognized that "extensive work [had already] been done by many Regions, States, and municipalities to abate CSOs." CSO Control Policy § I.C, 59 Fed. Reg. at 18,690. As such, the Agency recognized that portions of the Policy may not apply, "as determined by the permitting authority on a case-by-case basis" under specified circumstances.[32] *Id.* But even then, the CSO

[32] In its brief and at oral argument, San Francisco asserted that it was exempt from certain requirements of the CSO Control Policy pursuant to section I.C.2, rather than I.C.1. Pet. at 24; Oral Arg. Tr. at 14. The first exception applies to permittees that had "completed or substantially completed construction of CSO control facilities" on the date the CSO Control Policy was published. CSO Control Policy § I.C.1, at 18,690. The second exception applies to permittees that had "substantially developed or [were] implementing a CSO control program" on the date the CSO Control Policy was published. CSO Control Policy § I.C.2, at 18,690. According to the 1997 Permit, San Francisco was excepted from "initial planning and construction" provisions pursuant to section I.C.1 of the CSO Control Policy. 1997 Permit at 6; *see also* 2003 Permit at 17. The exception would not change

Control Policy specifies that "[i]n the case of any ongoing or substantially completed CSO control effort, the NPDES permit or other enforceable mechanism, as appropriate, should be revised to include all appropriate permit requirements consistent with Section IV.B of [the CSO Control Policy]." *Id.* The CSO Control Policy also indicates that its phased approach should not be construed to mean that each function occurs separately, "[r]ather, the entire process * * * must be coordinated to control CSOs effectively." *Id.* § I.F, at 18,690.

As the Region explained in its response to San Francisco's comments on the draft permit, the CSO Control Policy also anticipates changed circumstances and the need to re-evaluate CSO control programs. Resp. to Cmts. at 16-17; Resp. Br. at 26-28. For example, the CSO Control Policy provides that, where monitoring demonstrates water quality standards are not being met, permittees "should be required to submit a revised CSO control plan that, once implemented, will attain [water quality standards]." CSO Control Policy § I.C.1, 59 Fed. Reg. at 18,690. The Policy also states that programs that are excused from planning requirements under section I.C.2, "should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions" of the CSO Control Policy. *Id.* § I.C.2, 59 Fed. Reg. at 18,690. With respect to sensitive areas where elimination or relocation of CSOs is determined to be economically or physically impossible, the Policy provides that permitting authorities "should require for each subsequent permit term a reassessment" of discharges to sensitive areas "based on new or improved techniques" or "changed circumstances that influence economic achievability." *Id.* § II.C.3.c, 59 Fed. Reg. at 18,692. Additionally, permits issued for CSOs should include permit reopener clauses that allow for permitting authorities to reopen and modify a permit if CSO controls fail to meet water quality standards or to protect designated uses. *Id.* § IV.B.2(g), at 18,696. Nothing in the CSO Policy suggests that long-term control plans (whether developed before the CSO Control Policy was issued or developed consistent with the provisions of the CSO Control Policy) were meant to forever remain static after a facility was beyond "Phase II." The Agency guidance designed for use by permitting authorities in developing LTCPs also contemplates re-evaluation and updates of LTCPs after Phase II. LTCP Guidance at 4-16 (explaining in a section entitled "Re-Evaluation and Update" that post-construction

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based on further progress by a permittee because the exception is based on the date of publication of the CSO Control Policy. Notwithstanding San Francisco's position with respect to which exception applies, the basis for the exception makes no difference to the outcome of this issue on appeal.

monitoring is intended to verify compliance with water quality standards and protection of designated uses as well as to ascertain the effectiveness of the CSO controls; adding that, if the implemented controls do not achieve these results, a municipality should evaluate the current system's operating practices, strategies, and control measures as necessary).

San Francisco acknowledges its obligation under the CSO Control Policy to "focus on" sensitive areas and to perform post-construction compliance monitoring according to its plan. Reply Br. at 11-12. But San Francisco argues that the permitting authority is required to demonstrate that water quality standards are not being met, or that beneficial uses are not being protected, before the permitting authority can require an LTCP update. Pet. at 29 (citing CSO Control Policy § II.C.3, 59 Fed. Reg. at 18,692). Contrary to San Francisco's argument, the CSO Control Policy and LTCPs are not singularly focused on achieving water quality standards; the CSO Control Policy makes clear that its objective is compliance with the CWA generally and not compliance with water quality standards *exclusively*. *See, e.g.*, CSO Control Policy, 59 Fed. Reg. at 18,688 (explaining that major provisions of CSO Control Policy include "compliance with the CWA, *including* compliance with water quality standards and protection of designated uses" (emphasis added)). Additionally, in the provision requiring LTCPs to include the re-assessment of discharges to sensitive areas, the CSO Control Policy does not require a demonstration of water quality exceedances. *See* CSO Control Policy § II.C.3.c, 59 Fed. Reg. at 18,692 (providing that "[w]here elimination or relocation [of overflows] has been proven not to be physically possible and economically achievable, permitting authorities should require for each subsequent permit term, a reassessment based on new or improved techniques to eliminate or relocate or on changed circumstances that influence economic achievability"). In other words, the Permit's requirement to "propose[] control alternatives needed to eliminate, relocate, or reduce the magnitude or frequency of [overflow] discharges to sensitive areas" is consistent with the CSO Control Policy, irrespective of whether water quality standards or beneficial uses are being met. *See id*.; Permit § VI.C.5.d tbl.7 (No. 3) at 22. Thus, San Francisco's argument that CSO Control Policy section II.C.3 requires a demonstration of water quality exceedances is mistaken.

San Francisco cites to nothing in the CWA, its regulations, or the policies implementing those requirements that prohibits permitting authorities from requiring a municipality to update its long-term control plan post-Phase II. *See* Pet. at 23-26. Nor does San Francisco cite to anything that supports the notion that a determination that a permittee is excused from having to conduct initial planning or construction requirements under the CSO Control Policy remains in perpetuity.

See id. Rather, the CSO Control Policy states that "Agency decisions in any particular case will be made by applying the law and regulations on the basis of specific facts when permits are issued." CSO Control Policy § I.A, 59 Fed. Reg. at 18,689.

Also, as discussed above, the CSO Control Policy anticipates that the satisfaction of certain requirements may be revisited, including that a facility may need to update its long-term control plan due to changed circumstances. *Id.* §§ II.C, II.C.3, IV.B, 59 Fed. Reg. at 18,690, 18,692, and 18,695-96. Additionally, while a demonstration that water quality standards are not being met (or beneficial uses are not being protected) may be needed for a permit to be reopened mid-term, the reopener provision does not speak to a permitting authority's ability to re-evaluate the need to update an LTCP at the time of permit renewal. *See generally id.* § IV.B.2.g, at 18,696; CSO Guidance for Permit Writers at 4-38 (providing that permit writers should consider waiting for permit term to end, if it is late in the five-year permit cycle, to address changes in the context of normal permit reissuance process). Moreover, the Region's stated objectives—including to ensure that up-to-date information is used to assess whether water quality standards are being met and to ensure that wet weather discharges are not causing unreasonable degradation of the marine environment—is entirely consistent with the aims of the CWA and the CWA's incorporation of the CSO Control Policy. *See generally* CWA § 101(a), 33 U.S.C. § 1251(a) (providing that one objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); CSO Control Policy, 59 Fed. Reg. at 18,688 ("The CSO Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities, and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives."). Permitting authorities are required to issue permits that comply with the CWA, which includes ensuring that water quality standards will be met. To that end, permitting authorities may impose conditions in a permit for a combined sewer system that will achieve that objective, which under some circumstances reasonably can include updating a long-term control plan, particularly where such plan is decades old. In sum, San Francisco has failed to carry its burden to establish that the Region's decision to include permit terms requiring San Francisco to update its LTCP rests on a clearly erroneous conclusion of law.

2. *The Region's Decision to Require San Francisco to Update its Long-Term Control Plan Is Factually Supported in the Record*

San Francisco next argues that the Region's decision to require an LTCP update is not supported in fact. Pet. at 23, 26. The Region's stated objectives for requiring the LTCP update include: (1) ensuring that water quality objectives during wet weather are met to the greatest extent practicable; (2) ensuring that receiving water designated uses are protected; (3) reducing risks to human health and the environment associated with discharges from combined sewer discharge points; (4) evaluating a range of control alternatives that further reduce discharges to sensitive areas; and (5) providing for adaptive management of the combined sewer system. Memo to File at 1-2; *see also* Fact Sheet at F-30 to F-31; Resp. to Cmts. at 18-19. Ultimately, the Region determined that an LTCP update is needed to ensure that San Francisco's LTCP is based on the most current information so that the Region can accurately "assess whether water quality standards are being met" and assure that "wet weather discharges are not causing unreasonable degradation of the marine environment." Fact Sheet at F-30 to F-31; *see also* Resp. to Cmts. at 17-19; Memo to File at 1-2, 5-8.

In addition to its objectives, the Region articulated multiple bases for requiring San Francisco to update its LTCP in the fact sheet issued with the draft permit as well as in subsequent documents. *See* Fact Sheet at F-30 to F-31; Memo to File at 5-8; Resp. to Cmts. at 16-17. The Region observed that San Francisco has provided many documents over the years relating to the planning and operations of its sewer system and that identifying the contents of San Francisco's current LTCP—that is, which documents the LTCP comprises and which documents are outdated or no longer applicable—is difficult. Resp. to Cmts. at 17. The Region describes San Francisco's LTCP as a compilation of documents "developed over the course of two decades, dating from 1971" rather than "a single document, as is the case with most combined sewer systems," making it difficult to discern the relationship between the documents. Memo to File at 5. In addition, beginning in 2011 (after the last permit was issued for the Oceanside CSS), San Francisco commenced a twenty-year effort to improve the city's wastewater system; the program (discussed earlier and referred to as the SSIP) identifies information related to the existing system and potential technology and water-quality based requirements that are intended to shape the sewer system (including long-term capital plans and projects to provide cost-effective controls that affect system performance and protect water quality). *Id.* (citing the SSIP and the studies conducted as part of that program). In support of the SSIP, San Francisco also issued a technical memorandum in 2015 identifying "collection system improvement opportunities." *See* S.F. Pub. Utils. Comm'n, *Westside Drainage*

Basin Urban Watershed Opportunities Technical Memorandum (Final Draft), at xi (Feb. 2015) (A.R. 69) ("2015 Westside Drainage Memorandum"); *see also* Memo to File at 10-11. Such information is clearly relevant to San Francisco's LTCP. For example, its plan to control CSOs, as well as the Region's determination as to whether San Francisco's long-term plans will ensure compliance with the CWA, including the CSO Control Policy, are significant.

San Francisco points to the San Francisco Wastewater Long Term Control Plan Synthesis ("Synthesis") which (as discussed above in Part IV) it submitted to the California RWQCB pursuant to a 2013 permit proceeding for a separate facility, as sufficient to summarize the various documents that constitute San Francisco's historical planning process and LTCP. Pet. at 4 (citing Synthesis). According to the Region, however, this document does not adequately solve the problem as it incorporates earlier documents from the 1970s and 1980s (the most recent document in the Synthesis is a 1990 revision of a 1988 document). Resp. Br. at 29-30. Among other shortcomings, the Synthesis does not include the studies, findings, or plans associated with the SSIP.[33] Thus, as the Region concluded, the Synthesis does not provide a basis for the Region to analyze San Francisco's current long-term control plan for wastewater and to assess whether that plan is adequate to ensure that San Francisco's CSOs are meeting water quality standards, not causing unreasonable degradation to the marine environment, and achieving other objectives of the CSO Control Policy.[34] *See generally* CSO Control Policy § II.C,

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[33] Notwithstanding the relevance to San Francisco's LTCP, San Francisco maintains that the SSIP is not properly part of its LTCP because it did not exist at the time the LTCP was implemented. *See* S.F. Resp. to RWQCB Cmts. on Synthesis, attach. cmt. 1; Oral Arg. Tr. at 26. San Francisco's position rests on its erroneous assumption that the LTCP remains static unless and until it is demonstrated that water quality standards are being exceeded.

[34] In its reply brief, San Francisco argues that the Region erroneously states that San Francisco has not addressed deficiencies that the California RWQCB identified in the Synthesis. Reply Br. at 12, n.6 (citing Resp. Br. at 30 n.16) (indicating that it had responded to the California RWQCB's comments on the Synthesis). San Francisco's response to comments on the Synthesis, however, does not establish that either the Region or the California RWQCB determined that the Synthesis is adequate for purposes of this Permit. It is the permitting authorities that must be satisfied that the LTCP is sufficient, and San Francisco's view that the plan is sufficient does not necessarily make it so. In any event, San Francisco's response to the California RWQCB does not appear to address the issues with the *S*ynthesis identified by the Region above. *See* S.F. Resp. to RWQCB Cmts. on Synthesis, attach. cmt. 1 (stating that the compilation of documents in the Synthesis

59 Fed. Reg. at 18,691 (describing requirements for long-term control plans); *see also* Resp. Br. at 30 n.16 (noting that the California RWQCB also found the Synthesis to be inadequate, in part because it did not reflect current circumstances when it was submitted pursuant to the 2013 Bayside NPDES Permit); Fact Sheet at F-30 to F-31.

The Region also noted changed circumstances as a basis for the Permit's LTCP update requirement. The Region explained that the combined sewer system, the sewershed, and San Francisco's management approach have changed since construction was completed in 1997, and additional changes are underway and planned for the near future. Resp. to Cmts. at 17. For example, the facility discharges from seven CSD Outfalls rather than the eight originally planned. Resp. to Cmts. at 17 n.3; *see also* Memo to File at 6, n.9. Many of the planning documents developed since the issuance of the 2009 Permit—which contain information related to the programs and plans intended to shape the sewer system, including cost-effective controls that affect system performance and water quality protection—were developed by different departments within the San Francisco Public Utilities Commission and were not submitted to EPA as part of the LTCP. Memo to File at 5. These changes further complicate the fact that the Synthesis provided by San Francisco is an amalgam of historic LTCP documents, the most recent of which is a 1990 revision of a 1988 document, and therefore predates now-completed and ongoing changes to the system, the sewershed, and the management approach. The Region's goal is that an updated LTCP will coordinate and integrate the ongoing planning efforts and take into account changes that have occurred "since the original LTCP was first developed in the 1970's and implemented in 1997."[35] *Id.* That goal is consistent with the strategy of the CSO Control Policy to require permittees to "accurately characterize" sewer systems and to submit "appropriate documentation." CSO Control Policy § II, 59 Fed. Reg. at 18,691.

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constitutes the LTCP as constructed through the 1990s and stating San Francisco Public Utilities Commission's conclusion that documents reflecting current conditions and current operating and monitoring of the existing system are not appropriately part of its LTCP).

[35] When asked at oral argument how San Francisco could determine the source, cause, or volume of an isolated sewer overflow, Counsel for San Francisco explained that it would rely on its characterization and modeling of the system. Oral Arg. Tr. at 38-40. That response underscores the Region's need to have an accurate and current characterization of the system.

Moreover, updating an LTCP is not unprecedented. As the Region noted, a number of other cities have updated their LTCPs for reasons that include the "need to achieve specific water quality standards, update control commitments, update system requirements based on capital improvements, includ[ing] additional green infrastructure controls, minimize impacts associated with combined sewer discharges, and clarify technology-based and water-quality based permit requirements." Memo to File at 13-14 (providing links to information on updated LTCPs for thirteen cities between the years of 2005-2018); *see also* Resp. to Cmts. at 17 (noting that EPA has required LTCP updates for other combined sewer systems).

San Francisco maintains that the Region failed to establish that beneficial uses are not currently being protected. Pet. at 26; *see* Reply Br. at 12. The assumption underlying San Francisco's argument is that a permitting authority can require a permittee to update its LTCP only if it is shown that beneficial uses of the receiving water are not being adequately protected. *See* Pet. at 26; *see* Reply Br. at 12. As discussed in Part V.D.1, above, however, San Francisco points to nothing in the CWA or its implementing regulations that requires such a demonstration prior to requiring an update of the LTCP in a permit.

San Francisco also argues that it "clearly identified the correct legal framework" for updating the LTCP in its comments on the draft permit. Pet. at 29 (citing San Francisco Comments, attach. B at 10). The "legal framework" to which San Francisco refers is the subsection of the CSO Control Policy that addresses the objectives for permittees in considering sensitive areas in the development and review of long-term CSO control plans. *Id*.; San Francisco Comments, attach. B at 10 (citing CSO Control Policy § II.C.3). The provision of the subsection cited that addresses reconsideration of sensitive areas describes how permitting authorities should require permittees to review and reassess discharges to sensitive areas in subsequent permit terms, considering new or improved techniques to eliminate or relocate discharges to sensitive areas, as well as changed circumstances that influence economic achievability. CSO Control Policy II.C.3.c, 59 Fed. Reg. at 18,692. The one-sentence provision on reassessing discharges to sensitive areas does not, however, set forth a legal framework for weighing whether and how the permitting agency should factually support the need to review and revise an LTCP that is decades old and not readily ascertainable from existing documents for a combined sewer system and sewershed that has undergone many changes since the LTCP was formulated, with additional changes underway and planned for the near future.

With respect to the specific terms of the LTCP update requirement, the Region relied on various elements of the CSO Control Policy section pertaining to the LTCP requirements for Phase II permits. *Compare* Fact Sheet at F-31 *with* CSO Control Policy §§ II.C., IV.B, 59 Fed. Reg. at 18,691-94, 18,695-96. Those elements are:

- "[N]arrative requirements to ensure that selected controls are implemented, operated, and maintained as described in the * * * LTCP" (*see* CSO Control Policy § IV.B.2.b);

- [A] requirement to monitor and collect sufficient information to demonstrate compliance with water quality standards and protect designated uses, as well as to determine the effectiveness of combined sewer system controls" (*see id.* § IV.B.2.d);

- "[A] requirement to reassess combined sewer discharges to sensitive areas in those cases where elimination or relocation was previously found to be not physically possible and economically achievable" (*see id.* § IV.B.2.e); and

- "Requirements for maximizing the treatment of wet weather flows at the treatment plant, as appropriate" (*see id.* § IV.B.2.f).

Fact Sheet at F-31. The Region points to the above elements of the CSO Control Policy in support of requiring San Francisco to include these elements in its updated LTCP. *Id*. at 30-31.[36]

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[36] San Francisco asserts that the Region failed to respond to its request to identify the legal authority for the tasks in table 7 of the Permit. Pet. at 10. In its response to comments document, however, the Region stated that it relied on the CSO Control Policy's Phase II permit requirements for implementation of a long-term control plan, as well LTCP Guidance. Resp. to Cmts. at 16-17. Additionally, the requirements in table 7 of the Permit track the requirements in both the CSO Control Policy and the LTCP Guidance. *Compare* Permit at 21-23 tbl.7, *with* CSO Control Policy § II.C, 18,691-94; *see also generally* LTCP Guidance. The Region's response to San Francisco on the rationale for the tasks described in table 7 satisfies the Region's obligations under 40 C.F.R. § 124.17(a)(2). *See Circle T Feedlot,* 14 E.A.D. at 674-76 (discussing the permitting authority's obligation to respond to comments under 40 C.F.R. § 124.17(a)(2)).

The Region also points to State Water Board Order No. WQ 79-16, which, among other things, requires San Francisco to design and construct and operate facilities to the greatest extent practical to conform to the standards set forth in chapters II and III of the 1978 Ocean Plan. *Id.* Ultimately, the Region determined that an updated LTCP that takes into account all the changes to the combined sewer system, the sewershed, and the management approach is necessary. Fact Sheet at F-31. Further, the Region determined that compiling the LTCP in one document that contains the basic elements set forth in the CSO Control Policy, is necessary so that the Region can ensure that San Francisco's LTCP is "based on the most current information" and so that the Region can, among other things, properly "assess whether water quality standards are being met" and whether "wet weather discharges are not causing unreasonable degradation of the marine environment." *Id.* (citing 40 C.F.R. § 125.122); *see also* Memo to File at 5-8.

San Francisco suggests that the requirement to update the LTCP mandates an unduly onerous "re-examination" of its facilities that will take years to complete. Pet. at 23. The tasks required in table 7 of the Permit, as described above, are clearly laid out.[37] Permit § VI.C.5.d, at 21-23. The task list also provides a timeline for completing these tasks that allows up to forty-eight months for many of the tasks. *Id.* Recognizing that San Francisco's CSO facilities are already substantially completed, the Region also allows San Francisco to "use previously completed studies to the extent that they accurately provide the required information." *Id.* § VI.C.5.d, at 21; *see also* Resp. to Cmts. at 17.[38] San Francisco does not identify

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[37] In its reply brief, San Francisco also argues that the Region "mischaracterizes the nature of the obligations" in section VI.C.5.d of the Permit (requiring the LTCP update and describing what that entails). Reply Br. at 12. As San Francisco notes, however, the Permit terms speak for themselves. *Id.* As we state above, the tasks are clearly set forth in the Permit with timelines for completion and permission to use previously completed studies as appropriate. San Francisco has not established any basis for concluding the Region mischaracterized the tasks outlined in the Permit or that the tasks will be unduly onerous or take more time to complete than set forth in the Permit.

[38] Although San Francisco asserts that the Region's rationale in its response to comments was "post hoc," Pet. at 26, the response to comments document is an appropriate vehicle for the Region to provide its rationale for a final permitting decision. *See City of Taunton Dept. of Pub. Works*, 17 E.A.D. 105, 125, 186 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir 2018), *cert. denied* 139 S. Ct. 1240 (Feb. 19, 2019). Indeed, that is precisely the purpose of the response to comments document. *See id.*; 40 C.F.R. § 124.17(a) (requiring the permitting authority to provide its rationale for any changes made from the draft and to briefly respond to all significant comments on the draft permit).

any specific enumerated task that it contends is unreasonable; nor does San Francisco carry its burden of demonstrating that the Region clearly erred in requiring in the Permit that these tasks be completed.

3. *The Permit Requirement to Update its Long-Term Control Plan Provides San Francisco With Fair Notice of What is Required*

Finally, San Francisco maintains that the LTCP update provision fails to provide San Francisco with "fair notice" of what San Francisco is required to do to comply. Pet. at 30-31. San Francisco suggests that because the LTCP Update provision does not provide any guidance on "*why* reduction is necessary or * * * *how much* reduction is necessary to protect beneficial uses," and the Region has for decades concluded that the limits for prior discharges were protective of beneficial uses, San Francisco cannot know what is required of its facilities. *Id*. By focusing on what specific levels of pollutants are required to protect beneficial uses, San Francisco fails to engage the Region's rationale for the provision—the LTCP needs to be updated so that the Region can adequately assess the CSS to determine whether beneficial uses are being adequately protected. Resp. Br. at 28. Instead, San Francisco is essentially arguing that the Region must rely on inadequate characterization, outdated management approaches, and old inadequate data to prove that beneficial uses are not being protected before it can require an update to the LTCP.

As stated in Part V.D.2, above, the Permit clearly describes, defines, and articulates the tasks that San Francisco is required to complete. Permit § VI.C.5.d tbl.7, at 21-23. While San Francisco describes the tasks as vague references to beneficial use requirements, they are, in fact, detailed and specific, while still allowing San Francisco the opportunity to propose how best to address any issues it identifies. *See generally id.* (setting forth the tasks required to update the LTCP, which include "identify[ing]" alternatives, "evaluat[ing]" feasibility and costs, and "consider[ing]" costs relative to benefits for water quality and other public benefits).[39] Pet. at 30-31. Current information on the system will allow the

[39] San Francisco argues that the Region failed to respond to its comment with respect to fair notice. Pet. at 11. In its comments on the draft permit, San Francisco asserted that the terms in table 7 of the Permit were "vague" and failed to provide "fair notice" of what is "specifically required." Resp. to Cmts. at 16. We find the argument that the Region failed to respond to be without merit. *See* Resp. to Cmts. at 16-21 (responding to San Francisco's comments regarding the LTCP update requirement); *see also Circle T*

permitting authorities to better assess whether water quality standards are being met, whether wet weather discharges are causing unreasonable degradation to the environment, and whether discharges to sensitive areas are being reduced to the maximum extent practicable. Fact Sheet at F-31; Resp. to Cmts. at 16-17, 18-19, 20; Memo to File at 1-2, 5-8.

In sum, San Francisco has failed to carry its burden to show that the Region clearly erred in requiring San Francisco to update its LTCP.

VI. *CONCLUSION*

For the reasons stated above, the Petition for Review is denied.

So ordered.

Feedlot, 14 E.A.D. at 674-76 (discussing the permitting authority's obligation to respond to comments under 40 C.F.R. § 124.17(a)(2)).

CERTIFICATE OF SERVICE

I certify that copies of the *Order Denying Review* in the matter of City and County of San Francisco, NPDES Appeal No. 20-01, were sent to the following persons by email:

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Dated: ***Dec 01 2020***

Eurika Durr
Clerk of the Board