California Regional Water Quality Control Board
San Francisco Bay Region

RESPONSE TO WRITTEN COMMENTS

On the Tentative Order for
Discharges of Treated Filter Backwash from Drinking Water Treatment Facilities
to Inland Surface Waters

The Regional Water Board received written comments from the City and County of San Francisco on a tentative order distributed for public comment. The comments are summarized below in *italics* (paraphrased for brevity) and followed by a staff response. For the full content and context of the comments, please refer to the comment letter. To request a copy of the comment letter, see the contact information provided in Fact Sheet section 8.7 of the Revised Tentative Order.

One staff-initiated revision is shown with underline <u>text</u> showing an addition. We also made minor editorial and formatting changes.

San Francisco Comment 1: *San Francisco requests deletion of the narrative permit terms in section 5 of the tentative order (receiving water limitations) and the rationale for these terms in Fact Sheet section 5. San Francisco states that this section contains "generic water quality-based effluent limitations, which were not prepared in a manner that is consistent with the applicable laws, regulations, and guidance documents" and are "unnecessary because the Tentative Order already contains facility-specific effluent limitations and a reopener provision." Specifically, San Francisco says this section:*

1. *Bypasses the NPDES permitting process in that it references applicable water quality standards, but does not translate them into water quality-based effluent limits (San Francisco cites* NRDC v. EPA *[4th Cir. 1993] 16 F.3d. 1395 and* Am. Paper Inst. v. EPA *[D.C. Cir. 1993]; 996 F.2d 346);*

2. *Improperly and unnecessarily resurrects "causation" as a fundamental element of the NPDES permitting framework (San Francisco cites* Friends of the Earth v. Gaston Copper Recycling Corp. *[4th Cir. 2000] 204 F.3d 149, 151, and* Piney Run Preservation Assn. v. County Comrs. of Carroll County *[4th Cir. 2001] 268 F.3d 255, 265.); and*

3. *Creates uncertainty for the Discharger rather than setting clear expectations as to whether it is in compliance with the permit.*

San Francisco adds that the tentative order provides no meaningful explanation of the nature or importance of a "receiving water limitation," how it differs from a water quality-based effluent limitation, or how a receiving water limitation fits into the Clean Water Act's legal framework. San Francisco asks for clarification regarding the distinction between "receiving water limitations" and "water quality-based effluent limitations," and the corresponding legal implications arising from that distinction. It also argues that the

receiving water limitations are too unclear and vague to give it fair notice of its legal obligations.

Response: Section 5 of the tentative order is supported by applicable law and available facts, and consistent with the Clean Water Act, NPDES regulations, State water quality standards, and State law.[1]

Fact Sheet section 5 describes the purpose of the receiving water limitations as follows: "The receiving water limitations in sections 5.1 and 5.2 of the Order are based on Basin Plan narrative and numeric water quality objectives. The receiving water limitation in section 5.3 of the Order requires compliance with federal and State water quality standards in accordance with the [Clean Water Act] and regulations adopted thereunder." Thus, the receiving water limitations are directly derived from applicable water quality standards.

San Francisco cites the federal NPDES regulations at 40 C.F.R. Parts 122 and 124 and the NPDES Permit Writers Manual to argue that the Board did not follow the "standards-to-permits process" in requiring the receiving water limitations. San Francisco made the same argument regarding its Oceanside permit (see footnote 1), which the U.S. EPA Environmental Appeals Board (EAB) recently rejected. The EAB held that the federal NPDES regulations do not prohibit a permitting authority from determining that a narrative prohibition against violating water quality standards in receiving waters is appropriate and that the federal regulations and guidance setting forth the standards-to-permit translation process are inapposite to narrative receiving water limits like the ones here.[2] It also held that "neither the [Clean Water Act] 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."[3]

The State Water Board, too, has affirmed, "Broad permit requirements implementing water quality standards, not stated as effluent limitations, may be included in permits and are enforceable."[4] The Clean Water Act defines "effluent limitation" as a "restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean,

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1 The Regional Water Board addressed a similar comment during the reissuance of San Francisco's NPDES permits for discharges from the Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project (Order No. R2-2019-0028) and Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater Collection System (Order No. R2-2013-0029), and the U.S. Department of Navy's NPDES permit for discharges from the Treasure Island Wastewater Treatment Plant and its Collection System (R2-2020-0020).

2 *In re City and County of San Francisco*, 18 E.A.D. 322, pp. 343-344 (EAB 2020).

3 *Id*. at p. 343.

4 State Water Board Order No. WQ 2002-0012, p. 24; see also State Water Board Order No. WQ 77-19, p. 3 (effluent limitation prohibiting foam in the discharge and visible foam in the receiving water was proper).

including schedules of compliance."[5] The difference between "effluent limitations" and "receiving water limitations," as those terms are used in the tentative order, is that compliance with effluent limitations is based on the quality of the effluent, whereas compliance with receiving water limitations is determined with respect to the discharge's effect on the receiving water.[6] Thus, as the State Water Board has said, "When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit…." This "direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet [permit] requirements."[7]

The receiving water limitations are necessary here to protect beneficial uses and to meet water quality standards when water quality-based effluent limitations alone are not sufficient, for example, due to unanticipated circumstances or changes to effluent quality. San Francisco nevertheless states the limitations are unnecessary because the reopener provision in the tentative order allows the Regional Water Board to "modify or reopen" the permit before expiration. As the EAB found, "Reopening and modifying a permit based on adverse impacts on water quality or beneficial uses that occur during a permit's term ... is different and serves a different purpose than a permit term that itself prohibits violating water quality standards in the first instance."[8]

Receiving water limitations are not "improper" or "unnecessary" simply because they cannot be enforced without establishing a causal link (i.e., causation) between the discharge and a problem in the receiving water. San Francisco incorrectly asserts that, because the NPDES permitting scheme emphasizes control of the constituents in a discharge, regulators may not prohibit discharges from causing harm to the receiving water.[9] While showing that a constituent in a discharge exceeds an effluent limitation may be easier than showing that the discharge causes an exceedance of a water quality standard in the receiving water, a permit may still impose requirements that protect receiving water quality directly.[10] The Clean Water Act requires NPDES permits to include conditions ensuring that discharges comply with its substantive provisions,

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5 See 33 U.S.C. § 1362(11).

6 See State Water Board Order No. WQ-2002-0012, p. 24; see also State Water Board Order No. WQ 2018-0002, pp. 10-11 (discussing role of receiving water limitations, as opposed to discharge monitoring, in achieving water quality objectives); State Water Board Resolution No. 2008-0025, p. 3 (Policy for Compliance Schedules in NPDES Permits), which categorizes effluent limitations and receiving water limitations as different types of "permit limitations."

7 See State Water Board Order No. 2015-0075-DWQ, pp. 8-9; see also State Water Board Order No. 2016-0039-DWQ, at p. 55 (numeric effluent limitations were not required to ensure that pesticide discharges met water quality standards, instead, implementation of BMPs and compliance with receiving water limitations would ensure compliance).

8 *In re City and County of San Francisco*, supra, 18 E.A.D. at p. 349.

9 See *Piney Run Preservation Assn. v. County Comrs. of Carroll County*, supra, 268 F.3d at p. 265-266 ("[D]espite the CWA's shift in focus of environmental regulation towards the discharge of pollutants, water quality standards still have an important role in the CWA regulatory scheme."); see also *Ohio Valley Environmental Coalition v. Fola Coal Co.* (4th Cir. 2017) 845 F.3d 133, 143 (states may incorporate water quality standards into NPDES permit terms).

10 See State Water Board Order No. 2015-0075-DWQ, supra, p. 8; State Water Board Order No. 2018-0002-DWQ, pp. 10-11.

including limitations "necessary to meet [state] water quality standards."[11] NPDES regulations require that permits include requirements necessary to achieve water quality standards established under Clean Water Act section 303; such requirements can be narrative and need not be in the form of effluent limitations.[12]

The tentative order does not create uncertainty; it sets clear expectations for compliance.[13] As explained in Fact Sheet section 3.3.1, applicable water quality standards are found in the Basin Plan and elsewhere. The Regional Water Board has discretion in translating water quality standards into permit limitations.[14] Thus, while San Francisco may prefer more specificity in the receiving water limitations, the tentative order establishes clear expectations for compliance and does not fail to translate applicable water quality standards into its terms.[15] Courts have upheld and found narrative water quality standards to be enforceable.[16]

Permit terms similar to those in section 5 of the tentative order are frequently used in NPDES permits issued by the Regional Water Board (e.g., City of St. Helena, Order No. R2-2021-0004; Town of Yountville, Order No. R2-2020-0026; and Union Sanitary District, Order No. R2-2020-0027). The various regional water boards have included

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[11] See 33 U.S.C. §§ 1311(b)(1)(C) and 1342(a)(2).

[12] See 40 C.F.R. §§ 122.44(d)(1) and 122.44(k); see also Id. § 122.4(d) (Permits must "ensure compliance with the applicable water quality requirements of all affected States.") and 54 Fed. Reg. 23868, 23875 (June 2, 1989) ("Narrative water quality criteria have the same force of law as other water quality criteria.").

[13] San Francisco alleges that the receiving water limitations are too unclear and vague to afford it fair notice of its legal obligation. The EAB has held otherwise, finding that there is nothing unclear about prohibitions against violating water quality standards similar to the tentative order. *In re City and County of San Francisco*, supra, 18 E.A.D. at p. 350.

[14] See *City of Taunton, Massachusetts v. EPA* (1st Cir. 2018) 895 F.3d 120, 126, 133; see also 40 C.F.R. § 122.44(k).

[15] San Francisco's reliance on *NRDC v. EPA*, supra, 16 F.3d. 1395, *Am. Paper Inst. v. EPA*, supra, 996 F.2d 346, and *Piney Run Preservation Assn. v. County Comrs. of Carroll County*, supra, 268 F.3d at p. 265 is not pertinent. See *Ohio Valley Environmental Coalition v. Fola Coal Co*., supra, 845 F.3d at p. 143 ("Nothing in Piney Run forbids a state from incorporating water quality standards into the terms of its NPDES permits.").

[16] See *Ohio Valley Environmental Coalition v. Fola Coal Co*., supra, 845 F.3d at pp. 142-143 (explaining that, in the Court's Piney Run decision, the Court "did not hold that numerical limitations on specific pollutant discharges constituted the only proper subject of regulation under the Clean Water Act. Rather, we noted that, despite the Clean Water Act's "shift in focus of environmental regulation towards the discharge of pollutants, water quality standards still have an important role in the [Clean Water Act's] regulatory scheme.") (emphasis in original). See also *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology* (1994) 511 U.S. 700, 716 ("The Act permits enforcement of broad, narrative criteria"); *NRDC v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205- 06 (enforcing California permit requirement prohibiting "discharges...that cause or contribute to the violation of the Water Quality Standards or water quality objectives"); *Northwest Environmental Advocates v. City of Portland* (9th Cir. 1995) 56 F.3d 979, 985-986 (enforcing Oregon permit condition that "no wastes shall be discharged and no activities shall be conducted which will violate water quality standards"). See also *Divers' Environmental Conservation Organization v. State Water Resources Control Bd*. (2006) 145 Cal.App.4th 246, 256-257; *County of Los Angeles v. State Water Resources Control Bd*. (2006) 143 Cal.App.4th 985, 992-993.

narrative receiving water limitations in NPDES permits since the early 1970s, and the State Water Board has consistently supported their inclusion.[17]

San Francisco Comment 2: *San Francisco requests to discontinue cyanide monitoring if annual monitoring demonstrates that the effluent concentration does not exceed the lowest applicable water quality criterion of 5.2 µg/L for three consecutive years. San Francisco explains that the sample preservation technique it previously used to analyze effluent and receiving water samples may contribute to false positive cyanide results (San Francisco cites a 2008 Bay Area Pollution Prevention Group Fact Sheet). San Francisco says it has not detected cyanide in any effluent or receiving water samples since it changed its sample preservation technique.*

Response: We disagree. San Francisco certified under penalty of law that it detected cyanide above the lowest applicable water quality criterion of 5.2 µg/L in one receiving water sample and one effluent sample in June 2020. During additional studies in December 2020, San Francisco detected cyanide above 5.2 µg/L in two effluent samples. Thus, there is reasonable potential for cyanide to cause or contribute to an excursion above state water quality standards (see Fact Sheet section 4.3.3). 40 C.F.R. section 122.44(i)(2) requires permittees to monitor for all parameters with effluent limitations at least once a year. We will reconsider the need for cyanide effluent limitations the next time we reissue the permit.

Staff-Initiated Revision: In accordance with 40 C.F.R. section 122.41(l)(9), we added section 5.10 to Attachment D, Standard Provisions, as follows:

> **5.10. Initial Recipient for Electronic Reporting Data.** The owner, operator, or duly authorized representative is required to electronically submit NPDES information specified in appendix A to 40 C.F.R. part 127 to the initial recipient defined in 40 C.F.R. section 127.2(b). U.S. EPA will identify and publish the list of initial recipients on its website and in the Federal Register, by state and by NPDES data group [see 40 C.F.R. § 127.2(c)]. U.S. EPA will update and maintain this list. (40 C.F.R. § 122.41(l)(9).)

[17] See State Water Board Order No. WQ 76-4, p. 2; see also Order No. WQ 75-11, pp. 2-3; WQ 99-05.