CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESPONSE TO WRITTEN COMMENTS

on Tentative Order for
City and County of San Francisco and North Bayside System Unit, San Francisco International Airport Mel Leong Wastewater Treatment Plant
and Wastewater Collection Systems
San Mateo County

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 staff responses. For the full content and context of the comments, refer to the comment letter. To request a copy of the letter, see the contact information provided in Fact Sheet section 8.7 of the Revised Tentative Order.

Revisions are shown with strikethrough ~~text~~ for deletions and underline <u>text</u> for additions.

Comments 1 and 2: *San Francisco objects to the narrative permit requirements in Attachment G section 1.9.1 and section 5.3 of the tentative order. San Francisco asserts that these generic prohibitions make permitholders responsible for the overall quality of receiving waters, rather than imposing requirements that restrict discharges at their point sources.*

*San Francisco asserts that the generic prohibitions were not prepared in a manner that is consistent with applicable laws, regulations, and guidance documents. Specifically, San Francisco asserts that the Clean Water Act does not authorize the Regional Water Board to condition a permitholder's compliance based on the quality of receiving waters. To regulate point source discharges, San Francisco asserts that Clean Water Action section 301(b)(1)(C) requires the Regional Water Board to include effluent limits, which precludes the Regional Water Board from imposing permit requirements that condition compliance on receiving water quality. San Francisco further asserts that the general narrative prohibitions undermine the "permit shield" under 33 U.S.C. § 1342(k). San Francisco asserts that the Regional Water Board does not have authority under the California Water Code, including sections 13263 and 13377, to include the prohibitions either. San Francisco also incorporates all objections to the provision stated in response to NPDES Permit CA0037681 (Order R2-2019-0028) issued to the City for the Oceanside Water Pollution Control Plant and in the filing by San Francisco in the pending state court lawsuit (*City and Cnty. of S.F. v. San Francisco Bay Regional Water Quality Control Board, Alameda Superior Court, Case No. RG19042675*) and in the federal court lawsuit (*City and Cnty. of S.F. v. EPA, Case No. 21-70282; City and Cnty. of S.F. v. EPA, S. Ct. Case No. 23-753*).*

San Francisco asks the Regional Water Board to (1) exempt San Francisco from any obligation to comply with Attachment G, section 1.9.1and (2) delete the narrative receiving water limitation in section 5.3 and the rationale for the provision in Fact Sheet section 5.

If the Regional Water Board refuses to exempt San Francisco from Attachment G section 1.9.1 or to delete the receiving water limitations and corresponding rationale, then San Francisco requests that the Regional Water Board describe the rationale behind its conclusion and identify all factual and legal support upon which it is relying on to justify it.

Response: We did not make changes to the Tentative Order in response to these comments. The general narrative prohibitions in Attachment G section 1.9.1 and in section 5.3 of the Tentative Order are supported by applicable law and available facts, and are consistent with the Clean Water Act, NPDES regulations, State water quality standards, and State law.

The Regional Water Board addressed similar comments from San Francisco 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 R2-2019-0028) (Oceanside permit) and Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater Collection System (Order R2-2013-0029) (Bayside permit). San Francisco went on to contest the general narrative prohibitions in the Oceanside permit in federal and state court. U.S. EPA's Environmental Appeals Board and the Ninth Circuit Court of Appeals upheld the provisions in the Oceanside permit.[1] The U.S. Supreme Court granted San Francisco's petition for writ of certiorari to review the Ninth Circuit's decision and heard oral arguments on October 16, 2024. We expect the Supreme Court to issue its decision sometime this year.

In its decision on the Oceanside permit, the Ninth Circuit held that the plain text of the Clean Water Act and its regulations provide permitting agencies with broad authority to impose limitations necessary to ensure a discharger's compliance with water quality standards.[2] The Ninth Circuit Court of Appeals rejected San Francisco's argument that the narrative prohibitions, including the receiving water limits, failed to provide San Francisco with sufficiently clear direction as to how to ensure that its discharges comply with water quality standards.[3] The court pointed out that other permit provisions provided San Francisco with substantial guidance on how to meet water quality standards and that the narrative prohibitions operated as a backstop if specific effluent limitations failed to achieve compliance.[4] The general narrative prohibitions in the Tentative Order are necessary to achieve water quality standards. The provisions serve

[1] See *In re: City and County of San Francisco* (EAB 2020) 18 E.A.D. 322, 338–44;,*City and County of San Francisco v. U.S. Environmental Protection Agency* (9th Cir. 2023) 75 F.4th 1074.
[2] *City and County of San Francisco v. U.S. EPA* (9th Cir. 2023) 75 F.4th 1074, 1089–1090.
[3] *Id.* at p. 1091.
[4] *Ibid.*

as backstops if the effluent limitations and other provisions in the Tentative Order prove to be inadequate due to unanticipated circumstances or changes.[5]

The general narrative prohibitions in the Tentative Order do not create uncertainty or undermine the Clean Water Act's permit shield. San Francisco knows the applicable water quality standards that apply to its discharge. As explained in Fact Sheet section 3.3, applicable water quality standards are found in the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE), the National Toxics Rule (NTR), and the California Toxics Rule (CTR). The Basin Plan and the ISWEBE identify beneficial uses and the water quality objectives that are protective of those uses, and the NTR and CTR establish water quality objectives for toxic pollutants that are protective of human health and the environment. The Regional Water Board has discretion in translating water quality standards into permit limitations.[6] 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.[7]

The Tentative Order, if adopted, will also serve as waste discharge requirements under Water Code section 13263. The Regional Water Board has authority under Water Code section 13263 to prescribe requirements for any proposed or existing discharge "with relation to the conditions existing in the ... receiving waters ... into which, the discharge is made or proposed." The inclusion of the general narrative prohibitions falls within this authority.

The Regional Water Board fully incorporates its responses to San Francisco's comments objecting to similar general narrative prohibitions in the Bayside permit and Oceanside permit into this response. The Board also fully incorporates U.S. EPA's briefs filed in *City and County of San Francisco v. U.S. EPA* (9th Cir. Case No. 21-70282) and *City and County of San Francisco v. U.S. EPA* (S. Ct. Case No. 23-753) as well as the Board's amicus brief in the Ninth Circuit case and the amicus briefs filed by State of California and the State of Washington et al. in the Supreme Court case here.

Comment 3: *San Francisco requests that Provision 6.3.5.3 of the tentative order refer to Water Code section 13385(j)(1)(D) as did the previous order (Order R2-2018-0045).*

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[5] See *In re City of Lowell* (EAB 2020) 18 E.A.D. 115, 176, 181.

[6] 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).

[7] 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.").

Response: We agree and added the following language at the end of Provision 6.3.5.3:

> To avail itself of the penalty exemption for new wastewater treatment plant units under Water Code section 13385(j)(1)(D), the Discharger may, at least 30 days in advance of operating the upgraded treatment plant, submit a startup operations plan. The plan must include the following: (1) a description of the actions the Discharger will take during a defined period of adjusting and testing new treatment plant units, including steps to prevent violations of this Order; and (2) identification of the shortest reasonable time required for the defined period of adjusting and testing, which is not to exceed 90 days for biological treatment units and 30 days for any other treatment unit.

Comment 4: *San Francisco requests that we add language to clarify the monitoring location description in Attachment E, Table E-1, for Monitoring Location EFF-001-Ind.*

Response: We agree and revised Table E-1 as follows:

Table E-1. Monitoring Locations

Monitoring Location Type	Monitoring Location	Monitoring Location Description
⋮	⋮	⋮
Influent	EFF-001-Ind	Prior to completing the plant upgrades described in Provision 6.3.5.3, ~~A~~a point following all treatment from the Industrial Plant, prior to combining with effluent from the Sanitary Plant. After completing the plant upgrades described in Provision 6.3.5.3, this point shall be before or immediately after PFAS removal shown in Figure C-3. The Discharger may relocate its sampling location if plant upgrades cause the identified location to be infeasible. The Discharger shall notify the Executive Officer at least 30 days before relocating its sampling location and provide documentation that it will be representative of Industrial Plant effluent.

Comment 5: *San Francisco requests that we add language that allows relocation of the sampling location for Monitoring Location EFF-001 if treatment plant upgrades make the identified location infeasible.*

Response: This change is unnecessary. As written, San Francisco can already sample at any point following all treatment, at which all treated effluent from the Sanitary Plant and Industrial Plant is present, but prior to commingling with other flows to the North Bayside System Unit shared use forcemain. The sampling point can change at any time, as long as it meets this requirement.