



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 21 2019

Harlan L. Kelly, Jr.
General Manager
San Francisco Public Utilities Commission
525 Golden Gate Avenue, 13th Floor
San Francisco, California 94102

Dear Mr. Kelly:

Your Deputy General Manager, Michael Carlin, copied the U.S. Environmental Protection Agency's Office of Water on his September 9, 2019 letter to Michael Stoker, Region 9 Regional Administrator, on behalf of the San Francisco Public Utilities Commission (SFPUC) regarding the reissuance of the SFPUC Oceanside NPDES permit. The Oceanside permit was issued on October 1, 2009 and expired on September 30, 2014. It has been continued administratively since that date. In his letter, Mr. Carlin requested a delay in the adoption of the renewed permit to allow a path forward "that is consistent with the intent of the Combined Sewer Overflow (CSO) Policy, protects receiving water quality, and creates improved regulatory certainty for the benefit of all parties." Given the national policy and consistency issues raised in his letter, we are responding on behalf of Mr. Stoker. EPA Administrator Andrew Wheeler also has asked us to respond on his behalf to the October 1, 2019, letter that you sent to him. The analysis set forth below applies not only to the Oceanside Publicly Owned Treatment Plant (POTW), but also to the Southeast (Bayside) POTW, which similarly is operating under an expired permit that has been continued administratively.

In summary, the interpretation of the CSO Policy set forth in the SFPUC letters, as well as the objection to permit terms that require compliance with water quality standards (WQS), have been reviewed by the EPA at the Headquarters level because they raise national issues. As articulated below, your asserted positions are inconsistent with the approach taken with respect to CSO and water quality issues across the country. If adopted, the EPA would be holding the City and County of San Francisco to a different and much lower standard than other communities that are addressing CSO issues.

In the September 9 letter, the SFPUC objects to permit conditions that require compliance with WQS and states that such permit conditions would impose "unlimited liability risk." According to that letter, the SFPUC does not need to comply with WQS because, following implementation of a Long-Term Control Plan (LTCP), "all parties should be assured that water quality standards and beneficial uses are being protected." Such an assertion is a complete misstatement of the CSO Policy, which was incorporated by reference into the Clean Water Act (CWA) in 2000. *See* 59 Fed. Reg. 18,688 (Apr. 19, 1994); CWA section 402(q), 33 U.S.C. 1342(q).

The CSO Policy does not waive any CWA requirements. Rather, the CSO Policy provides guidance on the planning, selection, and implementation of CSO controls "that meet the requirements of the CWA." 59 Fed. Reg. at 18,688. The Policy establishes nine minimum controls that are the minimum technology-based requirements for CSO discharges. 59 Fed. Reg. at 18,695. Water quality-based requirements "are to be established based on applicable water quality standards." *Id.*

To develop a LTCP to meet WQS, the Policy lays out two alternative approaches to evaluate CSO controls: the “presumption” approach and the “demonstration” approach. The City and County of San Francisco began constructing CSO controls before the issuance of the CSO Policy and completed those controls in 1997. However, the CSO Policy still applies. As stated in the Policy, “[i]f, after monitoring, it is determined that WQS are not being attained, the permittee should be required to submit a revised CSO control plan that, once implemented, will attain WQS.” *Id.* at 18,690. Moreover, the Policy specifically states that preexisting CSO controls “should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.” *Id.* For example, far from waiving WQS, the CSO Policy specifies that a permit must include a post-construction monitoring program that is sufficient “to demonstrate compliance with WQS and protection of designated uses as well as to determine the effectiveness of CSO controls.” *Id.* at 18,696. Permits also must include “[a] reopener clause authorizing the NPDES authority to reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses.” *Id.* The Policy also specifies that “[t]he selected controls should be designed to allow cost effective expansion or cost-effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses.” 59 Fed. Reg. at 18,691.

The SFPUC’s September 9 letter states that the collection system exceeds its “design objectives” and that SFPUC believes that the discharges are “consistent with applicable water quality standards.” “Consistent with” standards is not the same as meeting standards and the CWA requires compliance with WQS. WQS, their applicability, and policies generally affecting their application and implementation (such as mixing zones) are all established by state law, subject to EPA approval. The EPA is well aware that since 1979, California has provided San Francisco with a variance from the bacteria standards applicable to the Oceanside POTW and even allows “floatables” (i.e., fecal matter and other organic and inorganic substances) in the water that can directly impact beaches with recreation impacts. The CWA requires that states review applicable WQS, including variances, at least every three years. 33 U.S.C. 1313(c)(1); 40 CFR 131.20(a). The EPA’s WQS regulations also require that a variance longer than five years be reevaluated at least every five years. *See* 40 CFR 131.14(b)(v). EPA Headquarters’ review of the history of the variance seems to indicate that there have been no attempts to update this variance since its initial implementation in 1979. The EPA notified California in writing on August 14, 2017 and again on August 12, 2019 that the variance must be reviewed to ensure compliance with the CWA and the EPA’s WQS regulations. That review must take place and if California cannot demonstrate that this variance meets the requirements set forth in 40 CFR 131.14, it should remove the variance.

The September 9 letter also argues that the Pacific Ocean is not impaired, including for bacteria, and that the Basin Plan and the San Francisco Bay Bacteria Total Maximum Daily Load (TMDL) found that combined sewer discharges are not a significant source of bacteria to the receiving waters. The attainment status of the receiving water does not obviate the need for a CSO discharge to meet WQS. The CWA is designed to protect receiving waters that already meet WQS, as well as to restore waters that are impaired. Further, reliance on the San Francisco Bay Bacteria TMDL to create a presumption that the Oceanside plant is not a significant source of bacteria is inapposite. First, the Oceanside plant discharges were not analyzed under the San Francisco Bay Bacteria TMDL. Second, the State of California has given the Oceanside POTW a variance from bacteria and must comply with other WQS to the extent practical. Third, the prior Oceanside permits had even given SFPUC an exemption from monitoring for bacteria in effluent so the utility has no factual basis for quantifying its bacteria loading. Finally, as applied to the Southeast plant, the TMDL assumes compliance with the existing permit. That assumption has been seriously called into question by the October 2, 2019 Notice of Violation issued to the SFPUC by EPA Region 9.

In addition to requiring discharges to meet WQS, the CSO Policy requires that permits must include “[a] requirement to reassess overflows to sensitive areas in those cases where elimination or relocation of the overflows is not physically possible and economically achievable. The reassessment should be based on consideration of new or improved techniques to eliminate or relocate overflows or changed circumstances that influence economic achievability.” 59 Fed. Reg. at 18,696. The SFPUC has combined sewer overflow outfalls that discharge into the Pacific Ocean at Ocean Beach (Discharge Point Nos. CSD-001, CSD-002, and CSD-003), China Beach (Discharge Point No. CSD-005), and Baker Beach (Discharge Point Nos. CSD-006 and CSD-007). These are popular recreation areas used by the community and tourists throughout the year. As noted in Region 9’s comments on the draft Oceanside permit, SFPUC has conducted a study that suggests that elimination of CSOs in the typical year at Baker Beach and China Beach is achievable. *See Westside Drainage Basin Urban Watershed Technical Opportunities Technical Memorandum* (Feb. 2015). However, the SFPUC’s permit would continue to authorize those outfalls as well as other outfalls that are near other beaches. Like most beaches, these sites are used for primary contact recreation and thus are considered sensitive areas under the CSO Policy. 59 Fed. Reg. at 18,692. To comply with the CSO Policy, the physical possibility and economic achievability of the elimination or relocation of CSOs that discharge to primary contact recreation beaches must be addressed. The fact that Baker Beach was formerly impaired and may now be meeting WQS, as noted in your October 1, 2019 letter, does not obviate the need to determine if these combined sewer discharges can be eliminated or relocated. The revised Oceanside permit appropriately requires SFPUC to evaluate that elimination or relocation. Further, the beaches on the Bayside remain impaired.

The October 1, 2019 SFPUC letter argues in favor of continuing to use the same controls developed in the 1970s to addressing combined sewer discharges. Upgrading publicly owned treatment works from primary to secondary treatment was a significant impetus for the 1972 amendments to the CWA. Since that time, the vast majority of cities have made enormous investments to meet the secondary treatment standard. While secondary treatment standards do not apply to CSOs, the CSO Policy, technology-based limits based on best available technology economically achievable and best conventional technology, and WQS do.¹ We all might agree that in 1994 San Francisco was ahead of the curve in addressing CSOs. However, after 25 years of implementing the CSO Policy, San Francisco is now far behind.

As discussed above, the CSO Policy requires compliance with water quality standards. The EPA’s concerns regarding WQS exceedances are clearly identified in the October 2, 2019 Notice of Violation. The EPA is also concerned that the approach adopted by San Francisco in the 1970s, with its continued reliance on primary treatment, does not even meet the “presumption” approach under the CSO Policy.² Under the presumption approach a city may initially presume compliance with WQS by either reducing the number of CSO overflows each year to no more than four to six, by eliminating or capturing for treatment no less than 85% of the volume of the combined sewage collected, or by eliminating or removing the mass of pollutants causing water quality impairments. 59 Fed. Reg. at 18,692-93. SFPUC’s system is designed to route 100% of the sewage that does not receive treatment at a POTW to storage/transport and diversion structures that are intended to provide equivalent to primary treatment before sending the sewage to the combined sewer discharge outfalls. These structures are equipped with baffles that are intended to retain “floatables” instead of flowing through the outfall. However, if the structures fill with water it is unclear whether they operate as designed. Further, after a rainfall event, it

¹ *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 592 (D.C. Cir. 1980).

² Under CSO Control Policy I.C.1 and 2, communities such as San Francisco that were already constructing or operating controls as of the date of the policy are not subject to the initial planning and construction provisions in the policy. “Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.” 59 Fed. Reg. at 18,690.

is unclear whether SFPUC cleans out the storage/transport structures to prevent “floatables” from the last storm from being discharged during the next storm. These operation and maintenance issues are among the subjects raised by the October 2, 2019 Notice of Violation.

Even if operated as designed, these structures do not constitute 85% “capture for treatment” that the CSO Policy identifies as an option for initially presuming WQS are met. Under the CSO Policy, capture for treatment means capture for *secondary* treatment. This is clear from the text of the Policy that requires that any combined sewer overflows *remaining after 85% is captured for treatment* receive at least *primary* clarification, i.e., treatment. 59 Fed. Reg. at 18,693. If “capture for treatment” meant primary treatment, this additional condition would have no meaning. Thus, the SFPUC’s design for CSO treatment does not even warrant a presumption that WQS are met because it only achieves primary treatment. Of course, even if applicable, any presumption may be rebutted and the October 2, 2019 Notice of Violation rebuts that presumption.

The October 1, 2019 letter further argues that the SFPUC’s combined sewer outfalls each discharge between one and 10 times a year. According to SFPUC’s September 2017 Bayside System Efficacy Report, CSOs have occurred from discharge points CSD 009-043 an average of 17.6 times per year between 2012 and 2017, and according to SFPUC’s September 2013 Monitoring Study to Effectively Characterize Overflow Impacts and Efficacy of CSD Controls for Oceanside, CSOs occurred from discharge points CSD 001-007 25 times in 2012-2013. SFPUC’s own data show that the design and actual performance of San Francisco’s combined sewer system exceed the four to six overflow events per year contemplated under the approach for presuming an adequate level of control to meet WQS under the CSO Policy. 59 Fed. Reg. at 18,692.

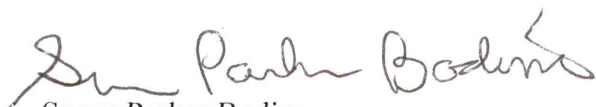
Finally, we need to address the claim in your October 1, 2019 letter that operational deficiencies by SFPUC “do not result in routine exposure to raw sewage.” We would certainly hope that even when flooding occurs, basement backups are not “routine” for the residents of San Francisco. However, the fact that they exist may well be an indication that the City is not properly operating and maintaining its system. This issue also is a subject of the October 2, 2019 Notice of Violation.

These issues do not preclude reissuance of the Oceanside permit. However, they may prevent the SFPUC from being able to demonstrate compliance with the terms of both the Oceanside and Southeast permits immediately. Indeed, the October 2, 2019 Notice of Violation issued to the SFPUC by EPA Region 9 alleges that you are currently in violation of the terms of your expired 2009 Oceanside permit. The CSO Policy states that “[i]f compliance with the Phase II permit is not possible, an enforceable schedule, consistent with the Enforcement and Compliance Section of this policy, should be issued in conjunction with the Phase II permit which specifies the schedule and implementation of the long-term CSO control plan.” *Id.* at 18,696. At present, we do not see how SFPUC can demonstrate compliance with WQS, its NPDES permits, or the CSO Policy in the near term. Accordingly, we strongly urge you to enter into such an enforceable agreement with the EPA.

Sincerely,



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cc: John Roddy, Office of the San Francisco City Attorney
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