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March 6, 2024

**SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

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San Francisco, California 94102

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San Francisco Public Utilities Commission
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San Francisco Public Utilities Commission
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Angela Calvillo
Clerk of the Board of Supervisors
San Francisco City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, California 94102

Re: Notice of Violation and Intent to File Suit Under the Clean Water Act

Dear Mayor Breed, Mr. Herrera, Mr. Prather, Mr. Chiu, and Board of Supervisors:

I am writing on behalf of San Francisco Baykeeper (“Baykeeper”) regarding violations of the Clean Water Act¹ (“CWA” or “Act”) and the National Pollution Discharge Elimination System (“NPDES”) Permit² (“Bayside Permit” or “Permit”) for the Southeast Water Pollution Control Plant, North Point Wet Weather Facility, Bayside Wet Weather Facilities, and Wastewater

¹ Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*

² NPDES Permit No. CA0037664, San Francisco Bay Regional Water Quality Control Board (“Regional Board”) Order No. R2-2013-0029.

Baykeeper NOI to SFPUC

Collection System (“Bayside Facilities”) operated by the San Francisco Public Utilities Commission (“SFPUC”), an agency of the City and County of San Francisco (“City”). The Bayside Permit lists the Bayside Facilities’ address as 750 Phelps Street, San Francisco, California 94124. The purpose of this letter (“Notice Letter”) is to put the City and SFPUC on notice that, at the expiration of sixty days from the date the Notice Letter is sent,³ Baykeeper intends to file a “citizen suit” action against the City and SFPUC in U.S. Federal District Court. The civil action will: (1) allege ongoing violations of the Act and the Bayside Permit at the Bayside Facilities, including but not limited to unlawful discharges to San Francisco Bay, Mission Creek, and Islais Creek (“Receiving Waters”) during combined sewer discharges (“CSDs”) and overflows (“CSOs”), causing violations of water quality standards for Receiving Waters, impairing the Receiving Waters’ designated Beneficial Uses, failing to comply with the federal Combined Sewer Overflow Policy as implemented by the Permit, and failing to revise operating protocols as necessary to comply with the Bayside Permit; and (2) seek judicial imposition of injunctive relief and civil penalties.

The Act is a strict liability statute. To establish liability under section 301 of the Act, Baykeeper must only establish that the City and SFPUC have (i) discharged, *i.e.*, added, (ii) a pollutant (iii) to navigable waters (iv) from a point source (v) in violation of an NPDES permit. *See Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994); *Nat’l Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). As described in detail below, the City and SFPUC are liable for ongoing violations of the Act as a consequence of the Bayside Facilities’ failure to comply with the Bayside Permit’s Discharge Prohibitions, Receiving Water Limitations, and CSO Controls. Each violation of any term or condition of the Bayside Permit is an independent violation of the Act. As explained below, the City and SFPUC are liable under the Act for daily, date-specific, monthly, and annual violations of the Bayside Permit since March 6, 2019. 33 U.S.C. §§ 1311(a), 1319(d); 40 C.F.R. § 19.4.

This Notice Letter contains sufficient information to permit the City and SFPUC to understand and ameliorate alleged violations, and to comply with applicable regulations. *See* 40 C.F.R. § 135.3. The Notice Letter includes, without limitation: (1) citations to the Act’s relevant mandates, and descriptions of the statutory permitting scheme; (2) citations to specific provisions in the Bayside Permit that have been and are being violated by the City and SFPUC; (3) a description of the City and SFPUC’s combined sewer system and the Bayside Facilities; (4) descriptions of the impacts of the City and SFPUC’s discharges on the Receiving Waters and their Beneficial

³ Section 505(b) of the CWA requires that sixty days prior to initiating a civil action under Section 505(a), 33 U.S.C. § 1365(a), a citizen must give notice of their intention to file suit to the alleged violator, the Administrator of the United States Environmental Protection Agency (“U.S. EPA”), the Regional Administrator of the U.S. EPA, the Executive Officer of the water pollution control agency in the State in which the violations occur, and, if the alleged violator is a corporation, the registered agent of the corporation. 33 U.S.C. § 1365(b); 40 C.F.R. § 135.2.

Baykeeper NOI to SFPUC

Uses; and (5) specific date(s) and locations of discharges violating the Bayside Permit, and timeframes during which non-discharge violations took place.

I. BACKGROUND

A. San Francisco Baykeeper

Baykeeper is a non-profit public benefit corporation organized under the laws of California. Baykeeper's mission is to defend San Francisco Bay from the biggest threats, and hold polluters accountable to create healthier communities and help wildlife thrive. Baykeeper has over five thousand members and supporters who use and enjoy San Francisco Bay and connected surface waters for various recreational, educational, and spiritual purposes. At the behest of its members, Baykeeper has sought to protect and promote water resources that are swimmable, drinkable, fishable, and sustainable. To further this mission, Baykeeper actively seeks federal and state implementation of the Act.

Members of Baykeeper reside in San Francisco, and near San Francisco Bay and use the waters in and near Mission Creek, and Islais Creek, as well as other parts of the Bay that are impacted by SFPUC and the City's failure to comply with the Act. The Bayside Facilities persistently discharge pollutants into the Receiving Waters in violation of the Act and the Bayside Permit. Baykeeper members use the Receiving Waters to bird watch, view wildlife, kayak, hike, bike, walk, run, and sightsee, as well as for aesthetic enjoyment. Additionally, Baykeeper members use local waters to engage in educational and scientific study through pollution and habitat monitoring and restoration activities. As explained herein, the Bayside Facilities' historic and ongoing discharge of pollutants into the Receiving Waters in violation of the Act and Bayside Permit have adversely affected, are adversely affecting, and continue to adversely affect the interests of Baykeeper's members.

B. Responsible Entities for Combined Sewer System

The City and SFPUC are the owners and operators of the Bayside Facilities. The City and SFPUC are responsible for operating and maintaining the Bayside Facilities. Operating and maintaining the Bayside Facilities includes tasks such as collecting and conveying wastewater and stormwater through the Bayside Facilities, providing treatment for combined sewer flows prior to discharge into Receiving Waters, conducting routine maintenance, cleaning and inspecting the Bayside Facilities, and responding to citizen complaints related to the combined sewer system. Further, the City and SFPUC are responsible for preventing discharges from the Bayside Facilities that violate the Bayside Permit.

Baykeeper NOI to SFPUC

1. The City and County of San Francisco

The City is a municipality incorporated under the laws of the State of California. The City has offices at 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102. The current Mayor is London Breed. San Francisco Charter sec. 3.100 provides that “[t]he Mayor shall enforce all laws relating to the City and County, and accept service of process on its behalf” and “[t]he Mayor shall have responsibility for . . . [r]eceipt and examination of complaints relating to the administration of the affairs of the City and County, and timely delivery of notice to the complainant of findings and actions taken.”

2. San Francisco Public Utilities Commission

SFPUC is a department of the City. The department’s mission is “to provide [its] customers with high quality, efficient and reliable water, power, and sewer services in a manner that is inclusive of environmental and community interests, and that sustains the resources entrusted to [its] care.” SFPUC has offices at 525 Golden Gate Avenue, 13th Floor, San Francisco, California 94102. The current General Manager of SFPUC is Dennis J. Herrera and the Acting Assistant General Manager for the Wastewater Enterprise is Joel Prather.

II. San Francisco’s Combined Sewer System and Clean Water Act Permits

A. The Combined Sewer System

The City, through SFPUC, operates two distinct combined sewer systems that convey, store, treat, and discharge combined sewage and stormwater flows: the Bayside Facilities, which serve approximately 580,000 residents of eastern San Francisco and portions of Brisbane and Daly City; and the “Oceanside” or “Westside” facilities, which serve a population of approximately 250,000 residents of western San Francisco and a small portion of Daly City. Only the Bayside Facilities located within the City operate under the Bayside Permit and are at issue here. *See* Permit, Fact Sheet at F-4.

1. Relevant History

The Bayside Facilities comprise approximately 600 miles of pipe, and seven major and eleven minor pump stations, the Southeast Plant, the North Point Facility, and the “Bayside Wet Weather Facilities,” which consist of large storage/transport structures. Permit, Fact Sheet at F-4. The Southeast Plant and North Point Facility were originally constructed in 1951. SFPUC, San Francisco Wastewater Long Term Control Plan Synthesis (2018) at 10 (“Long Term CSO Control Plan Synthesis”). In 1967, the City published a “Characterization and Treatment of Combined Sewer Overflows Report,” which concluded that separation of stormwater and sewer flows was

Baykeeper NOI to SFPUC

“not advised because it was anticipated to only provide reductions of some constituents, namely in biological oxygen demand and nutrients, whereas treatment of combined flows would provide greater pollution control.” *Id.*

In 1971, the San Francisco Master Plan for Waste Water Management recommended “a system-wide approach to minimize [wet weather] overflows” by “balanc[ing] system storage and treatment to reduce the number of wet weather discharges at the lowest cost, using a combination of pumps, pipes, storage reservoirs, treatment plants, and outfalls.” Long Term CSO Control Plan at 10–11. After the passage of the CWA, the City revised the Master Plan and developed a programmatic environmental impact report and environmental impact statement for its implementation. *Id.* At the direction of the Regional Board, the City studied and recommended “the appropriate frequency of overflows based on several considerations, including the [1975] Basin Plan’s water quality objectives and an evaluation of cost-effective combinations of storage, outfall location and length, and treatment.” *Id.* at 12 (internal quotations omitted). The Regional Board then issued Order R2-79-67 providing design criteria for construction of the storage pipes and boxes, pump stations, treatment facilities, and outfall structures “deemed necessary by the Regional Water Board to protect beneficial uses during wet weather events” given long term annual average overflow frequencies of fifteen total discharges across three drainage basins. *Id.* at 13. Full implementation of the Master Plan, including updated treatment facilities at the Southeast Water Pollution Control Plant, was completed in 1997. *Id.* at 14.

2. Current Operations

During dry weather, the Bayside Wet Weather Facilities transport wastewater to the Southeast Plant, located on Phelps Street at Jarrold Avenue near the Islais Creek Channel, for primary and secondary treatment. *Id.* at F-5. When wet weather adds stormwater to the wastewater flows, the Bayside Wet Weather Facilities transport flows exceeding the Southeast Plant’s capacity to the North Point Facility, located on Bay Street near The Embarcadero, which provides primary treatment of combined wastewater and stormwater. *Id.* The Bayside Wet Weather Facilities can store an additional 120 million gallons of combined wastewater and stormwater. *Id.*

The Southeast Plant has a dry weather design capacity of 85.4 million gallons per day (MGD). Permit, Fact Sheet at F-5. Treatment consists of coarse and fine bar screens and grit removal, primary sedimentation tanks, pure oxygen aeration basins, secondary clarifiers, chlorination using sodium hypochlorite, and dechlorination using sodium bisulfite. *Id.* During dry weather, all wastewater receives secondary treatment before being discharged to Lower San Francisco Bay through a deepwater outfall (Discharge Point No. 001) at Pier 80, immediately north of the Islais Creek Channel. *Id.* at F-6. During wet weather, the Southeast Plant is designed to fully treat up to 150 MGD of combined wastewater and stormwater, and provide only primary treatment and disinfection to another 100 MGD. *Id.* at F-5. Up to 140 MGD of wet weather secondary-treated

Baykeeper NOI to SFPUC

effluent then discharges to the Quint Street shallow water outfall (Discharge Point No. 002) within Islais Creek, while up to 100 MGD of disinfected primary-treated effluent mixed with at least 10 MGD of secondary-treated effluent discharges to Discharge Point No. 001. *Id.*

During wet weather, the North Point Facility provides primary treatment for up to an additional 150 MGD of combined wastewater and stormwater. Permit, Fact Sheet at F-5. Treatment technologies include bar screens, sedimentation tanks equipped with skimmers, sodium hypochlorite injection, and dechlorination using sodium bisulfite. *Id.* When necessary to prevent or mitigate combined sewer overflows in the Central and Southeast Drainage Basins, the North Point Facility discharges primary-treated effluent to Central San Francisco Bay through four deepwater outfalls, Discharge Point Nos. 003 and 004 at the end of Pier 33 and Discharge Point Nos. 005 and 006 at the end of Pier 35. *Id.* at F-6.

Wet weather consistently overwhelms the combined sewer system's treatment and storage capacity. According to the Bayside Permit, “[i]n the event that the capacities of the Southeast Plant, North Point Facility, and storage/transport structures are exceeded, the combined wastewater receives the equivalent of primary treatment in the storage/transport structures and is discharged to San Francisco Bay through any one of 29 shoreline combined sewer discharge structures.” Permit, Fact Sheet at F-5. The treatment allegedly provided by the Bayside Wet Weather Facilities “consists of settling solids with a series of baffles and weirs that also remove floatable materials prior to discharge.” *Id.*

3. Bayside Combined Sewer Discharge Outfalls

The 29 Bayside CSD outfalls discharge from three hydraulically connected drainage basins: the North Shore Drainage Basin, the Central Drainage Basin, and the Southeast Drainage Basin. Permit at 1–3. The North Shore Drainage Basin contains CSD Nos. 009 (Baker Street), 010 (Pierce Street), 011 (Laguna Street), 013 (Beach Street), 015 (Sansome Street), and 017 (Jackson Street). *Id.* at 1–2. The Central Drainage Basin contains CSD Nos. 018 (Howard Street), 019 (Brannan Street), 022 (Third Street), 023 (Fourth Street North), 024 (Fifth Street North), 025 (Sixth Street North), 026 (Division Street), 027 (Sixth Street South), 028 (Fourth Street South), 029 (Mariposa Street), 030 (20th Street), 030A (22nd Street), 031 (Third Street North), 031A (Islais Creek North), 032 (Marin Street), 033 (Selby Street), and 035 (Third Street South). *Id.* at 2–3. The Southeast Drainage Basin contains CSD Nos. 037 (Evans Avenue), 038 (Hudson Avenue), 040 (Griffith Street South), 041 (Yosemite Avenue), 042 (Fitch Street), and 043 (Sunnydale Avenue). *Id.* at 3.

In the North Shore Drainage Basin, CSD No. 009 discharges to Marina Beach⁴, CSD No. 011

⁴ CSD No. 010 (Pierce Street) was decommissioned in May 2021 due to “poor condition.” Letter from Regional Board to SFPUC (July 21, 2023) at 2. SFPUC modeling indicates that CSD flows previously

Baykeeper NOI to SFPUC

discharges to Yacht Harbor #2, and CSD Nos. 013–017 discharge directly to Central San Francisco Bay. Permit at 1–2. According to the Bayside Sensitive Areas Report, CSDs in the North Shore Drainage Basin discharge approximately 34.3 MGD of minimally-treated combined sewer effluent over the course of three CSO events in a typical year. SFPUC, Bayside Sensitive Areas Report (2018) at 15. The Bayside Sensitive Areas Report indicates that primary contact recreation, including swimming and wading, occurs at Crissy Field East Beach near CSD No. 009. *Id.* at 13.

In the Central Drainage Basin, CSD No. 018 discharges directly to Central San Francisco Bay, CSD No. 019 discharges directly to Lower San Francisco Bay, CSD Nos. 022–028 discharge to Mission Creek, CSD Nos. 029, 030, and 030A discharge to the Central Basin, and CSD Nos. 031–035 discharge to Islais Creek. Permit at 2–3. According to the Bayside Sensitive Areas Report, CSDs in the Central Drainage Basin discharge approximately 1,222 MGD of minimally-treated combined sewer effluent over the course of twelve CSO events in a typical year. Bayside Sensitive Areas Report at 21. The Bayside Sensitive Areas Report indicates that kayaking occurs throughout Mission and Islais Creeks, near CSD Nos. 022–028 and 031–035. *Id.* at 13.

In the Southeast Drainage Basin, CSD Nos. 037 and 038 discharge to India Basin, CSD Nos. 040 and 042 discharge to the South Basin, and CSD No. 041 discharges to Yosemite Creek. Permit at 3. According to the Bayside Sensitive Areas Report, CSDs in the Central Drainage Basin discharge approximately 0.01 MGD of minimally-treated combined sewer effluent over the course of one CSO event in a typical year. Bayside Sensitive Areas Report at 29. The Bayside Sensitive Areas Report indicates that primary contact recreation, including wind surfing and wading, occurs in the Candlestick Point State Recreation Area near CSD No. 043. *Id.* at 13.

B. Bayside NPDES Permit

1. The NPDES Permit Program

The Act is the primary federal statute regulating the protection of the nation’s water. The Act aims to prevent, reduce, and eliminate the discharge of pollution in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish this goal, Section 301(a) prohibits the discharge of any pollutant into waters of the United States unless the discharge complies with other enumerated sections of the Act, including

discharging through CSD-010 “primarily shift to the nearby Baker Street CSD outfall to the west, with some flows also discharging through the nearby Laguna Street CSD outfall to the east,” and that “the outfall closure could increase flooding from about 0.1 feet to 0.4 feet (about 4 inches) during a 5-year 3-hour storm” and from about 1.1 feet to 1.3 feet (about 2 inches) during a 100-year 3-hour storm.” *Id.* at 3. Extensive flooding did occur in the North Shore Basin on October 24, 2021 and December 31, 2022. *See* Table 4.

Baykeeper NOI to SFPUC

the prohibition on discharges not authorized by, or in violation of, the terms of a NPDES permit issued pursuant to section 402(b). 33 U.S.C. §§ 1311, 1342(b). The Act requires all point source discharges of pollutants to waters of the United States be regulated by an NPDES permit. *Id.*; *see also* 40 C.F.R. § 122.26(c)(1).

Compliance with the Bayside Permit⁵ constitutes compliance with the Act. 33 U.S.C. § 1342(k). Conversely, a permittee that fails to comply with the terms and conditions of its permit is liable for violations of the Act. *Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979, 988, 986 (9th Cir. 1995) (“[T]he plain language [of the CWA] authorizes citizens to enforce *all* permit conditions.” (emphasis in original)); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) (finding that “the Clean Water Act allows citizen suits based on violations of any conditions of an NPDES permit, even those which are purely procedural.”); *see also* Permit at 7 (“Any sanitary or combined sewer discharge of untreated or partially-treated wastewater to waters of the United States not expressly [sic] authorized by this Order is prohibited.”)

a. The Combined Sewer Overflow Control Policy

Regulations governing CSOs were promulgated by the U.S. EPA in 1994 as the Combined Sewer Overflow Control Policy (“CSO Control Policy”), 59 Fed. Reg. 18688–98. In 2000, the Wet Weather Water Quality Act mandated that “[e]ach permit . . . for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy.” 33 U.S.C. § 1342(q)(1). The CSO Control Policy prohibits any CSO in dry weather and sets limits on wet weather CSOs to protect the beneficial uses of receiving waters. The CSO Control Policy’s technology-based requirements include nine “minimum control measures”: (1) Proper operation and regular maintenance programs for the sewer system; (2) Maximum use of the collection system for storage; (3) Review and modification of pretreatment requirements to assure CSO impacts are minimized; (4) Maximization of flow to Publicly Owned Treatment Works (“POTW”) for treatment; (5) Prohibition of dry weather CSOs; (6) Control of solid and floatable materials in CSOs; (7) Pollution prevention; (8) Public notification of CSO occurrences and impacts; and (9) Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls. 59 Fed. Reg. 18691; *see also* Permit at 19–20. In addition, the CSO Control Policy requires municipalities to develop a “Long Term CSO Control Plan” “that will ultimately result in compliance with the requirements of the CWA.” 59 Fed. Reg. 18691; *see also* Permit at 23–25.

⁵ In addition to the Bayside Permit, discharges from the Bayside Facilities are also regulated under NPDES Permit No. CA0038849, which establishes requirements on mercury and polychlorinated biphenyls (PCBs) from wastewater discharges to San Francisco Bay, as well as NPDES Permit No. CA0038873, which establishes requirements on nutrients for the entire SFPUC combined sewer system. Neither of these permits is at issue here.

Baykeeper NOI to SFPUC

The CSO Control Policy allows a municipality to elect either a “Demonstration Approach” or a “Presumption Approach” to determine whether its Long Term CSO Control Plan will meet the CWA’s water quality-based requirements. The Demonstration Approach requires a successful demonstration that a municipality’s selected controls will meet relevant water quality objectives and protect the receiving waters’ beneficial uses, including designation of Total Maximum Daily Load allocations for impaired receiving waters. 59 Fed. Reg. 18693. Under the Presumption Approach, a municipality’s CSO program is reasonably presumed to meet these requirements where selected controls result in any one of the following criteria: (1) no more than an average of four CSOs not meeting minimum treatment requirements per year; (2) elimination or treatment of at least 85% of the annual average volume of combined sewage collected during precipitation events; or (3) elimination or treatment of the equivalent pollutant mass contained in at least 85% of the annual average volume of combined sewage collected during precipitation events. *Id.* at 18692–93. Such a reasonable presumption must be based on “the data and analysis conducted in the characterization, monitoring, and modeling of the system and the consideration of sensitive areas.” *Id.* at 18692. Therefore, receiving water monitoring data and analysis may rebut the presumption that a municipality’s CSO program meets CWA’s water quality-based requirements. *See, e.g.,* Regional Board, Response to Written Comments on the Reissuance of an NPDES Permit for Discharges from the [Bayside Facilities] (2013) at 2 (“the policy explicitly requires our presumption to be reasonable and supported by evidence obtained through post-construction compliance monitoring.”); Permit, Fact Sheet at F-42 (“The Order requires the Discharger to continue monitoring wet weather discharges to characterize their impacts and evaluate . . . whether beneficial uses are protected.”). When the CSO Control Policy went into effect, the City and SFPUC elected to employ the Presumption Approach.

2. Current Bayside Permit Requirements

The Bayside Permit contains the following provisions and mandates:

a. Discharge Prohibitions

Discharge Prohibition A prohibits discharges of untreated or partially-treated wastewater to waters of the United States except as expressly authorized in the Permit. Permit § III.A.

Discharge Prohibition C prohibits bypass of untreated or partially-treated wastewater to waters of the United States except during wet weather and as provided in the Permit. Permit § III.C.

Discharge Prohibition D prohibits any dry weather discharges from Discharge Points Nos. 002 through 043. Permit § III.D. Discharge Prohibition F prohibits discharges of treated wastewater in any location or manner different from that described in the Permit. Permit § III.F.

Baykeeper NOI to SFPUC

b. Receiving Water Limitations

Receiving Water Limitation A prohibits any discharge that causes certain conditions, including floating, suspended or deposited macroscopic particulate matter or foams, alteration of temperature, turbidity, or color, and “toxic or other deleterious substances,” to exist in receiving waters outside the “near-field mixing zone (i.e., where mixing is not controlled by effluent discharge momentum and buoyancy).” Permit § V.A.

Receiving Water Limitation C prohibits any discharge that causes “a violation of any water quality standard for receiving waters outside near-field mixing zones.” Permit § V.C. Enforceable water quality standards for the Receiving Waters include those promulgated in the Water Quality Control Plan for the San Francisco Bay Basin (“Basin Plan”), which do not differentiate between dry and wet weather discharges.

c. Combined Sewer System Controls

The Combined Sewer System Controls require the Bayside Facilities to “maximize flows to the Southeast Plant and pollutant removal during wet weather in accordance with the Nine Minimum Controls and the Discharger’s Long-Term Control Plan,” Permit § VI.C.5, and specify performance criteria and monitoring requirements for wet weather combined sewer system operations consistent with their implementation, *see* Permit at 19–20, 23–25, and Fact Sheet at F-15, F-42. The City and SFPUC must implement the Long Term Control Plan and revise it “as necessary to ensure compliance with the Nine Minimum Controls and the Long Term Control Plan requirements of the Combined Sewer Overflow Control Policy.” Permit § VI.C.5.a.

Among other provisions, the Permit’s “Nine Minimum Controls” term requires proper operation and maintenance of the collection system and the combined sewer discharge outfalls “to reduce the magnitude, frequency, and duration of combined sewer discharges,” Permit § VI.C.5.b.i.(b), requires operation of the Southeast Plant at maximum treatable flow during wet weather, Permit § VI.C.5.b.iv, and prohibits dry weather CSOs from CSD Nos. 002 through 043, Permit § VI.C.5.b.v.

Among other provisions, the Permit’s “Long Term Control Plan” term requires “capture for treatment, or storage and subsequent treatment, [of] 100 percent of the combined sewage flow collected in the combined sewage system during precipitation events” for secondary treatment, equivalent-to-primary treatment, or primary treatment. Permit § VI.C.5.c.ii. “Primary Clarification,” as described in the CSO Control Policy, requires removal of “floatables and settleable solids.” 59 Fed. Reg. 18693. The term also details the operating conditions for each wet weather facility, including flow and storage capacities required to be met prior to CSD events. Permit § VI.C.5.c.iii.

III. RELEVANT WATERWAYS AND STANDARDS

A. Receiving Waters

The combined sewer system pipes and other conveyances from the Bayside Facilities discharge to the Central and Lower San Francisco Bay, Mission Creek Channel, Islais Creek Channel, and other local waterbodies. These receiving waters are waters of the United States within the San Francisco Bay watershed. Permit, Fact Sheet, at F-4.

1. Central and Lower San Francisco Bay

San Francisco Bay is an ecologically-sensitive waterbody and a defining feature of Northern California. San Francisco Bay is an important and heavily-used resource, with special aesthetic and recreational significance for people living in the surrounding communities. Aquatic sports are very popular in the Bay Area. The San Francisco Bay shoreline has numerous highly-valued beaches with public access that offer unique recreational opportunities for swimmers, kayakers, stand up paddleboarders, and windsurfers. The large-scale urbanization of the Bay Area makes these recreational and aesthetic uses critically important to the quality of life of Bay Area residents. Unfortunately, sewage spills and combined sewage overflows render San Francisco Bay's coastal resources inaccessible and/or hazardous for human contact or non-contact recreation for significant periods every year.

Further, San Francisco Bay's water quality is impaired and continues to decline. Central and Lower San Francisco Bay are both impaired for chlordane, DDT (dichlorodiphenyltrichloroethane), dieldrin, dioxin compounds, furan compounds, invasive species, mercury, PCBs (polychlorinated biphenyls), and trash; Central San Francisco Bay is further impaired for selenium. San Francisco Bay's once-abundant and varied fisheries have been drastically diminished by pollution, and much of the wildlife habitat of San Francisco Bay has been degraded.

2. Mission Creek

Mission Creek is a dredged channel that runs approximately 2/3 mile between San Francisco Bay at Oracle Park and the start of Interstate 280 at 7th Street to the southwest, fed by a freshwater culvert originating at headwaters in the Castro District. The Creek abuts five wastewater pump stations and six combined sewer discharge outfalls. Mission Creek borders Oracle Park and its adjacent ferry terminal, China Basin Park, a Bay Area Water Trail kayak and small boat launch, and a continuous Shoreline Park, which contain walking paths, picnic areas, an amphitheater, sports courts, and a dog park. Mission Creek hosts approximately 20 houseboats and is a popular

Baykeeper NOI to SFPUC

area for water recreation activities. A wetland mitigation area near the kayak launch provides ecologically important habitat, and Mission Creek is also considered potential habitat for herring and shoreline wetland species.⁶ Again, sewage spills and combined sewage overflows render Mission Creek hazardous for human contact or non-contact recreation for significant periods every year. Further, Mission Creek is impaired for ammonia, chlordane, dieldrin, hydrogen sulfide, lead, mercury, PAHs (polycyclic aromatic hydrocarbons), PCBs (polychlorinated biphenyls), silver, and zinc, all commonly found in raw sewage.

3. Islais Creek

Islais Creek Channel is an approximately one mile long, east-west estuary connecting Central San Francisco Bay at Pier 84 and mostly underground freshwater culverts originating from Upper Islais Creek in Glen Park Canyon and Precita Creek in Diamond Heights. The Channel abuts the Southeast Wastewater Treatment Plant. Islais Creek was once San Francisco's largest freshwater body prior to extensive land reclamation, and the Channel continues to serve as a salt marsh and marine habitat to many aquatic species, including fish, marine mammals, vegetation, and over 168 species of birds. The Channel's shoreline hosts numerous small parks and walking trails, as well as a Bay Water Trail kayak and small boat launch.⁷ As with other waters impacted by discharges from the City and SFPUC, sewage spills and combined sewage overflows render Islais Creek hazardous for human contact or non-contact recreation for significant periods every year. Further, Islais Creek Channel is impaired for ammonia, chlordane, dieldrin, hydrogen sulfide, PAHs (polycyclic aromatic hydrocarbons), and toxicity—impairments caused by raw sewage discharges.

B. Water Quality Standards and Impairments

The Basin Plan designates beneficial uses and water quality objectives for waters receiving discharges from the Bayside Facilities. The existing beneficial uses for both Mission Creek and Islais Creek include: commercial and recreational fishing, estuarine habitat, wildlife habitat, water contact recreation, noncontact water recreation, and navigation. The existing beneficial uses for Central and Lower San Francisco Bay include: industrial service supply, industrial process supply, commercial and sport fishing, shellfish harvesting, estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, water contact recreation, noncontact water recreation, and navigation. *See* Basin Plan, Ch. 2 at Table 2-1: Existing and Potential Beneficial Uses of Water Bodies in the San Francisco Bay Region.

The Basin Plan provides narrative and numeric water quality objectives to define appropriate

⁶ Port of San Francisco, Waterfront Resilience Story Maps (Dec. 17, 2021), <https://storymaps.arcgis.com/stories/39325a275f4a487d890b4608125595c5/>.

⁷ Port of San Francisco, Waterfront Resilience Story Maps.

Baykeeper NOI to SFPUC

environmental quality and to control activities that can adversely affect aquatic systems. Water quality objectives are necessary to protect the present and potential beneficial uses. Numeric objectives describe pollutant concentration, physical/chemical conditions of the water itself, and the toxicity of the water to aquatic organisms, and are designed to represent the maximum amount of pollutants that can remain in the water column without causing any adverse effect on aquatic organisms, on people consuming those organisms or water, and on other current or potential beneficial uses. Table 3-1 of the Basin Plan⁸ provides numeric water quality objectives for bacteria, specifically fecal coliform, total coliform, E. coli, and enterococcus, including water contact recreation receiving water standards of 110 cfu/100 mL standard threshold value (“STV”) for enterococcus concentrations and 320 cfu/100 mL STV for E. Coli concentrations. Water quality objectives for bacteria in Table 3-1 of the Basin Plan shall be strictly applied. See Basin Plan, Ch. 3.

Information available to Baykeeper documents the presence of fecal indicator bacteria in the Receiving Waters following modest storm events and even during dry weather at concentrations orders of magnitude greater than water quality standards for water contact recreation for E. Coli and enterococcus. Targeted epidemiological studies have shown a number of adverse health outcomes associated with fecally-polluted recreational water. Such health impacts result in a significant burden of disease and economic loss. Studies conducted worldwide have correlated gastrointestinal symptoms to recreating in water with high bacterial counts.⁹

California-specific studies show a higher incidence of upper respiratory and gastrointestinal symptoms associated with swimming in the vicinity of storm drains contaminated with high bacteria counts.¹⁰ Contaminated creeks run through San Francisco’s parks, posing public health threats, particularly to children, and significantly diminishing recreation-based beneficial uses. Additionally, the Receiving Waters are also listed on the State of California’s 2020-2022 Clean Water Act Section 303(d) list of impaired waterbodies. A waterbody that is listed as impaired cannot support the designated beneficial uses for that waterbody.

C. The City and County of San Francisco and SFPUC’s Discharges’ Impacts on Receiving Waters and Beneficial Uses

Self-Monitoring Reports submitted by SFPUC show 40 combined sewer overflows (“CSOs”),

⁸ See Exhibit C.

⁹ Annette Pruss, *Review of Epidemiological Studies on Health Effects from Exposure to Recreational Water*, 27 Int’l J. Epidemiology 1, 1–9 (1998), <https://academic.oup.com/ije/article/27/1/1/813163/>.

¹⁰ Robert W. Haile et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, 10 Epidemiology 4, 355–63 (1999), <https://journals.lww.com/epidem/pages/articleviewer.aspx?year=1999&issue=07000&article=00004&type=abstract#pdf-link>.

Baykeeper NOI to SFPUC

releasing untreated or minimally-treated sewage, between March 2019 and February 2024 from the Bayside Facilities. SFPUC further reported at least one (1) bypass event, four (4) leaks, and numerous other operational failures from the Bayside Facilities during this same time period. Combined wastewater and stormwater effluent contains human waste, viruses, protozoa, mold spores, bacteria, and chemicals that cause cancer or reproductive toxicity.¹¹ High concentrations of these pollutants are typically found in raw and/or inadequately-treated effluent. Raw and minimally-treated sewage enters the Bayside Facilities and then subsequently flows directly to the Receiving Waters during CSO and bypass events.

As a direct result of these releases of untreated or minimally-treated sewage, self-reported monitoring data shows enterococcus concentrations exceeding the water contact recreation receiving water standard of 110 cfu/100 mL STV at one or more CSO monitoring locations for at least 17 months between March 2019 and February 2024 sampling shows E. Coli levels exceeding the water contact recreation receiving water standard of 320 cfu/100 mL STV for at least five (5) months between March 2019 and April 2021.¹² Sampling results demonstrated the presence of fecal indicator bacteria at concentrations that were orders of magnitude greater than numeric water quality objectives for water contact and non-contact recreation. This data demonstrates that the Bayside Facilities' CSO discharges are causing exceedances of fecal indicator bacteria water quality objectives in the Receiving Waters.

CSOs and dry weather discharges are recognized sources of impairing pollutants, including human fecal matter. The discharge of raw and/or inadequately-treated sewage via the Bayside Facilities harms the Receiving Waters and poses a serious risk to human health and the environment. The intensive use of San Francisco Bay and its tributaries for water-contact, and non-water-contact recreation ensures that people will come into contact with fecal matter and other pollutants from the raw and minimally-treated sewage discharged by the Bayside Facilities during CSO events. By discharging raw and/or inadequately-treated sewage and its associated pollutants into waters of the United States, the City and SFPUC have caused and are causing the continuing impairment of the Receiving Waters in violation of the Bayside Permit and the Act.

¹¹ See Mark Dorfman, *Swimming in Sewage: The Growing Problem of Sewage Pollution and How the Bush Administration Is Putting Our Health and Environment at Risk* (2004), <https://www.csu.edu/cerc/documents/SwimmingInSewage.pdf>; Elizabeth Frick et al., *Presence of Pharmaceuticals in Wastewater Effluent and Drinking Water, Metropolitan Atlanta, Georgia July-Sept. 1999*, *Proceedings of the 2001 Georgia Water Resources Conference* (Mar. 26–27, 2001), <https://repository.gatech.edu/server/api/core/bitstreams/f014ec77-2e44-479b-b9e1-8dbd588dc29e/content>; Assoc. Press, *Death by Dirty Water: Storm Runoff a Risk for Fish* (Nov. 17, 2014, updated Jan. 10, 2019), https://www.oregonlive.com/today/2014/11/death_by_dirty_water_storm_run.html.

¹² No E. Coli sampling results were reported after April 2021.

IV. CLEAN WATER ACT VIOLATIONS

A. Bayside Permit Discharge Prohibition A

Discharge Prohibition A prohibits discharges of treated wastewater in any location or manner different from that described in the Bayside Permit. Permit § III.A. SFPUC and the City violate this prohibition in a host of ways.

First, SFPUC's self-reported violations on the State Board's California Integrated Water Quality System Project ("CIWQS") database indicate that discharges occurred as a result of equipment, operation and/or maintenance failures on numerous occasions in the past five years. See Table 1. The information in Table 1 demonstrates at least 146 violations and days of violations of the Permit's Discharge Prohibition A.¹³

Second, to the extent the City and SFPUC assert that the CSO discharges consist of "treated wastewater," the CSO operations and associated discharge events violate Discharge Prohibition A because they occur in a manner that is "different from" what the Permit mandates. SFPUC's Permit incorporates its Maintenance and Operations Plan and its Long Term Control Plan. See Permit § VI.C.5. Where SFPUC does not operate its system as described in those documents and the Permit, it is in violation of Discharge Prohibition A each time a CSO discharge occurs.

Since March 6, 2019, SFPUC's CSO maintenance failures and discharge point closures mean that each CSO discharge in that time is inconsistent with Discharge Prohibition A. Three specific examples of these differences are: (1) the closure of the Pierce Street outfall; (2) the inoperability or closure of the Brannan Street Combined Sewer Discharge Point during that entire period, and (3) the inoperability or closure of the 4th Steet South Combined Sewer Discharge Point during that entire period. In each instance, the Permit, as well as SFPUC's representations to the Regional Board and EPA about how its system operates were based on these outfalls being open and operable. Closing these discharge points results in changes to the quantity and pollutant content of discharges occurring during CSO events from other outfalls. As a result of these closed and/or inoperable discharge points, discharges occur from the system in substantially different ways than required or allowed by the Permit.

The Permit allows deviation from these requirements only if the City and SFPUC demonstrate that changes to the operating parameters "will result" in improvements in storage or treatment of wastewater flows *and* the Executive Officer of the Regional Water Board concurs with that demonstration, in writing, prior to implementation of the changes by the City and SFPUC. The City and SFPUC have neither made the required demonstration that their closure or non-use of

¹³ Tables 1 through 7 referenced herein are attached as Exhibit A to this Notice Letter.

Baykeeper NOI to SFPUC

the Pierce Street, Brannon Street, and Fourth Street South outfalls “will result” in improvements, nor has SFPUC obtained written consent to deviate from the Permit’s operational requirements. *See* Permit § VI.C.5.c.iii.

The City and SFPUC’s prohibited discharges from the Bayside Facilities to the Receiving Waters are ongoing and continuous. Each day and/or occasion that the City and SFPUC have discharged and continues to discharge treated wastewater in ways that violate Discharge Prohibition A is a separate and distinct violation of the Act. The City and SFPUC’s violations will continue each day and/or occasion that the City and SFPUC fail to operate their system as required by the Permit when it discharges sewage and wastewater from the Bayside Facilities to the Receiving Waters in violation of the requirements of the Permit and the Act. The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

B. Bayside Permit Discharge Prohibition C

Discharge Prohibition C prohibits bypass of untreated or partially-treated wastewater to waters of the United States except during wet weather and as provided in the Permit. Permit § III.C. Available data indicates that at least one bypass of untreated or partially-treated wastewater occurred since March 6, 2019. *See* Table 2. The information in Table 2 demonstrates at least one violation and day of violation of Discharge Prohibition C.

The City and SFPUC’s prohibited discharges from the Bayside Facilities to the Receiving Waters are ongoing and continuous. Each day and/or occasion that the City and SFPUC have discharged and continue to discharge untreated or partially treated wastewater in violation of the Permit’s Discharge Prohibition C is a separate and distinct violation of the Act. The City and SFPUC’s violations will continue each day and/or occasion that the City and SFPUC fail to prohibit the unpermitted bypass of untreated or partially treated wastewater from the Bayside Facilities to the Receiving Waters in violation of the requirements of the Permit and the Act. The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

C. Bayside Permit Discharge Prohibition D

Discharge Prohibition D prohibits any dry weather discharges from Discharge Points Nos. 002 through 043. Permit § III.D. Available data indicates that dry weather discharges occurred from unauthorized discharge points on at least four occasions since March 6, 2019. *See* Table 3. The information in Table 3 demonstrates at least four violations and days of violation of Discharge Prohibition D.

Baykeeper NOI to SFPUC

The City and SFPUC's prohibited discharges from the Bayside Facilities to the Receiving Waters are ongoing and continuous. Each day and/or occasion that the City and SFPUC have discharged and continue to discharge sewage during dry weather in violation of the Permit's Discharge Prohibition D is a separate and distinct violation of the Act. The City and SFPUC's violations will continue each day and/or occasion that the City and SFPUC fail to prohibit the unpermitted discharge of sewage from the Bayside Facilities to the Receiving Waters during dry weather in violation of the requirements of the Permit and the Act. The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

D. Bayside Permit Discharge Prohibition F

Discharge Prohibition F prohibits CSOs of untreated or partially-treated wastewater to waters of the United States except as expressly authorized in the Permit. Permit § III.F. Again, the City and SFPUC have and continue to violate this prohibition in several ways.

First, SFPUC self-reporting demonstrates that the Bayside Facilities discharged untreated or partially-treated wastewater on at least 14 occasions since March 6, 2019. *See* Table 4. The information in Table 4 demonstrates at least 14 violations and 16 days of violation of Discharge Prohibition F.

Second, the City and SFPUC's wastewater discharges during CSO events are discharges of untreated wastewater in violation of Discharge Prohibition F. As described below, the City and SFPUC fail to comply with the Combined Sewer Overflow controls that arise from the Permit, the federal CSO Policy, the Nine Minimum Controls, the Long Term Control Plan, and the Operations and Maintenance Plan. As a result of these failures, the CSO discharges by the City and SFPUC into the Receiving Waters consist of untreated wastewater. While SFPUC and the City presume that all of the wastewater discharged during CSO events receives at least primary treatment, this presumption is belied by the reality of the harmful contents of those discharges, including trash, floatable materials, human fecal matter, and other waste inconsistent with primary treatment.

Third, the City and SFPUC's wastewater discharges during CSO events are discharges of partially treated wastewater that are not "expressly authorized by the Permit." Permit § III.F. To the extent some of the CSO discharges do in fact receive primary or equivalent to primary treatment, such discharges still violation Discharge Prohibition F because those discharges of partially treated wastewater are not expressly authorized by the Permit because they occur in ways that are different from and inconsistent with the Permit's requirements. *See* Permit § VI.C.5.

Baykeeper NOI to SFPUC

The City and SFPUC's prohibited combined sewer discharges from the Bayside Facilities to the Receiving Waters are ongoing and continuous. Each day and/or occasion that the City and SFPUC have discharged and continues to result in combined sewer discharges of untreated or partially treated wastewater in violation of the Permit's Discharge Prohibition F is a separate and distinct violation of the Act. The City and SFPUC's violations will continue each day and/or occasion that the City and SFPUC fail prohibit the unpermitted discharge of untreated or partially treated wastewater, including raw sewage, from the Bayside Facilities to the Receiving Waters in violation of the requirements of the Permit and the Act. The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

E. Receiving Water Limitations

1. Receiving Water Limitation A

Receiving Water Limitation A prohibits any discharge that causes floating, suspended or deposited macroscopic particulate matter or foams, alteration of temperature, turbidity, or color, and "toxic or other deleterious substances," to exist in receiving waters outside the "near-field mixing zone." Permit § V.A.

Videos taken by SFPUC and photos taken by Baykeeper during and shortly after storm and combined discharge events reveal myriad floating objects, including feces, trash, condoms, and syringes, discharging to Mission Creek from Bayside overflow structures on at least the following dates: December 27, 2022; December 31, 2022; January 9, 2023; January 14, 2023; February 24, 2023; March 9, 2023; March 14, 2023; March 21, 2023; March 28, 2023; December 18, 2023; December 19, 2023. *See Exhibit D.* Due to the velocity of flow during combined sewer overflow and discharge events into Mission Creek, each time SFPUC conducts a combined sewer discharge it contains harmful levels of trash, floating objects, and other deleterious materials.

Further, the discharges from the Bayside Facilities to Mission Creek violate Receiving Water Limitation A every time these facilities overflow during rain events or bypass normal treatment processes during dry weather. CSOs from the Mission Creek CSD outfalls have occurred on at least the following dates during the relevant time period: March 6, 2019; March 20, 2019; November 26, 2019; December 7, 2019; January 16, 2020; January 27, 2021; January 29, 2021; October 21, 2021; October 22, 2021; October 23–24, 2021; November 8–9, 2021; December 13, 2021; December 16, 2021; December 23, 2021; December 27, 2022; December 31, 2022; January 4, 2023; January 9, 2023; January 10, 2023; January 11, 2023; January 14, 2023; January 15, 2023; January 16, 2023; February 23–24, 2023; March 9, 2023; March 10, 2023; March 14, 2023; March 21–22, 2023; March 28, 2023; November 18, 2023; December 18, 2023;

Baykeeper NOI to SFPUC

December 19, 2023; December 20, 2023; December 29, 2023; January 13, 2024; January 14, 2024; January 22, 2024; and January 31, 2024. This information demonstrates at least 42 violations and days of violation of Receiving Water Limitation A.

In addition, millions of gallons of untreated combined wastewater discharged to the San Francisco Bay due to extensive flooding in the Marina Boulevard area on October 24, 2021 and December 31, 2022. *See* Table 4. This information demonstrates at least an additional two (2) violations of Receiving Water Limitation A.

These violations are ongoing and will continue each time contaminated water is discharged in violation of Receiving Water Limitation A of the Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Each time discharges from the Bayside Facilities cause floating, suspended or deposited macroscopic particulate matter or foams, alteration of temperature, turbidity, or color, and “toxic or other deleterious substances,” to exist in receiving waters outside the “near-field mixing zone” is a separate and distinct violation of Receiving Water Limitation A of the Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The City and SFPUC are subject to civil penalties for all violations of the Clean Water Act occurring in the five years prior to the date of this Notice Letter.

2. Receiving Water Limitation C

Receiving Water Limitation C prohibits any discharge that causes “a violation of any water quality standard for receiving waters outside near-field mixing zones.” Permit § V.C.

SFPUC’s self-monitoring data demonstrates that discharges from the Bayside Facilities contain elevated concentrations of pollutants, such as E. Coli and enterococcus, at levels exceeding applicable water quality standards by orders of magnitude. *See, e.g.*, Exhibit B (listing results of SFPUC’s water quality monitoring and instances when violations of water quality standards occurred); *see also* Basin Plan, Table 3-1. Discharges with elevated levels of bacteria and other pollutants adversely affect the beneficial uses of the Receiving Waters, and thus violate Receiving Water Limitation C of the Permit and the Act.

SFPUC’s self-reporting demonstrates that CSO events caused standard threshold values (STV) for concentrations of enterococcus and/or E. Coli exceeding applicable water quality standards at one or more Bayside CSO monitoring locations during at least 17 months since March 6, 2019.¹⁴ Water quality monitoring showed no exceedances during only one month (May 2019) when a CSO event occurred in the past five years. *See* Table 5; *see also* Exhibit B. The information in Table 5 demonstrates at least 114 violations and 495 days of violation of Receiving Water

¹⁴ SFPUC’s self-monitoring reports for April-August 2020 and October 2020-February 2021 are missing data for Monitoring Location 210.1. Reported data for Monitoring Location 230 begins January 2021.

Baykeeper NOI to SFPUC

Limitation C. SFPUC’s sampling indicates that the discharges from the Bayside Facilities violate Receiving Water Limitation C every time these facilities overflow during rain events or bypass normal treatment processes during dry weather.

These violations are ongoing and will continue each time contaminated water is discharged in violation of Receiving Water Limitation C of the Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a). Each time discharges from the Bayside Facilities cause a violation of an applicable water quality standard is a separate and distinct violation of Receiving Water Limitation C of the Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a). The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

F. CSO Controls

1. Nine Minimum Control Measures

The Bayside Permit’s “Nine Minimum Controls” term requires proper operation and maintenance of the collection system and the combined sewer discharge outfalls “to reduce the magnitude, frequency, and duration of combined sewer discharges,” Permit § VI.C.5.b.i.(b), requires operation of the Southeast Plant and North Point Facility at maximum treatable flow during wet weather, Permit § VI.C.5.b.iv, and prohibits dry weather CSOs from CSD Nos. 002 through 043, Permit § VI.C.5.b.v.

SFPUC’s self-reporting indicate at least 171 occasions combined sewer system operation and/or maintenance failures since March 6, 2019. *See* Table 6. The operation and maintenance failures listed in Table 6 further violated the requirement to operate the Southeast Plant and North Point Facility at maximum treatable flow during wet weather on at least the following dates: October 21, 2021; October 24, 2021; December 31, 2022; March 21–22, 2023; and March 28, 2023. These operation and maintenance failures further violated the prohibition against dry weather CSOs from Discharge Points No. 002 on at least the following dates: August 5, 2021; March 17, 2023; and June 25, 2023.

The information in Table 6 demonstrates at least 180 violations and 171 days of violation of the Bayside Permit’s “Nine Minimum Controls” term. The City and SFPUC’s failure to meet the Bayside Permit’s “Nine Minimum Controls” term is ongoing and continuous. The City and SFPUC have therefore been in daily and continuous violation of the Permit every day since at least March 6, 2019. Each day and/or occasion that the City and SFPUC fail to properly operate and maintain its sewer system, prevent dry weather CSOs, and control solid and floatable materials in CSOs is a separate and distinct violation of the Act. The City and SFPUC’s violations will continue each day and/or occasion that the City and SFPUC fail to meet the

Baykeeper NOI to SFPUC

requirements of the Permit and the Act. The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

2. Long Term CSO Control Plan

The Bayside Permit’s “Long Term Control Plan” term requires capture of “100 percent of the combined sewage flow collected in the combined sewage system during precipitation events” for equivalent-to-primary, primary, or secondary treatment. Permit § VI.C.5.c.ii. “Primary Clarification,” as described in the CSO Control Policy, requires removal of “floatables and settleable solids.” 59 Fed. Reg. 18693. The term also details the operating parameters for each wet weather facility, including flow and storage capacities required to be met prior to CSD events, Permit § VI.C.5.c.iii, and requires revision of operating protocols “as necessary to ensure compliance with the Nine Minimum Controls and the Long-Term Control Plan requirements of the Combined Sewer Overflow Control Policy,” Permit § VI.C.5.a.

Videos taken by SFPUC and photos taken by Baykeeper during storm events reveal myriad floating objects, including feces, trash, condoms, and syringes, discharging to Mission Creek from Bayside overflow structures, as well as the two self-reported occasions of extensive flooding in the Marina Boulevard area, demonstrate failure to capture and treat the required 100 percent of combined sewage flow collected in the combined sewage system during precipitation events. Discharges from the Bayside Facilities to Mission Creek violate the Bayside Permit’s “Long Term Control Plan” term every time these facilities overflow during rain events or bypass normal treatment processes during dry weather. CSOs from the Mission Creek CSD outfalls have occurred on at least the following dates during the relevant time period: March 6, 2019; March 20, 2019; November 26, 2019; December 7, 2019; January 16, 2020; January 27, 2021; January 29, 2021; October 21, 2021; October 22, 2021; October 23–24, 2021; November 8–9, 2021; December 13, 2021; December 16, 2021; December 23, 2021; December 27, 2022; December 31, 2022; January 4, 2023; January 9, 2023; January 10, 2023; January 11, 2023; January 14, 2023; January 15, 2023; January 16, 2023; February 23–24, 2023; March 9, 2023; March 10, 2023; March 14, 2023; March 21–22, 2023; November 18, 2023; December 18, 2023; December 19, 2023; December 20, 2023; December 29, 2023; January 13, 2024; January 14, 2024; January 22, 2024; and January 31, 2024. In addition, millions of gallons of untreated combined wastewater discharged to the San Francisco Bay due to flooding on October 24, 2021 and December 31, 2022. This information demonstrates at least 39 violations and days of violation of the Bayside Permit’s “Long Term Control Plan” section VI.C.5.c.ii since March 6, 2019.

SFPUC’s self-reporting indicate wet weather facility operating parameter violations on at least 11 occasions since March 6, 2019. *See* Table 7. The information in Table 7 demonstrates at least 11 violations and days of violation of the Bayside Permit’s “Long Term Control Plan” section VI.C.5.c.iii since March 6, 2019.

Baykeeper NOI to SFPUC

Moreover, SFPUC's self-reported monitoring data demonstrate that the Bayside Facilities do not achieve relevant water quality objectives and therefore do not overcome the "presumption" described in the Long Term Control Plan and the CSO Policy. Specifically, CSO events caused standard threshold values (STV) for concentrations of enterococcus and/or E. Coli exceeding applicable water quality standards at one or more Bayside CSO monitoring locations during at least 17 months since March 6, 2019.¹⁵ See Table 5; see also Exhibit B. Water quality monitoring showed no exceedances during only one month (May 2019) when a CSO event occurred in the past five years.

Regulators have confirmed SFPUC's failure to meet water quality standards as required. For example, the Bayside Permit Fact Sheet recounts that CSD monitoring conducted under the previous permit, Order No. R2-2008-0007, showed average combined sewer discharge pollutant concentrations "below acute water quality objectives for metals and other priority pollutants, *with the exceptions of copper and zinc.*" Bayside Permit, Fact Sheet at F-42 (emphasis added). In a November 21, 2019 letter to SFPUC regarding the reissuance of the Oceanside Permit, the EPA stated its concern that the approach adopted by San Francisco in the 1970s, with its continued reliance on primary treatment, does not meet the "presumption" approach under the CSO Policy. Further, SFPUC has self-reported more than the four (4) CSOs failing to meet minimum treatment requirements per year, and SFPUC's failure to treat 85% of CSO volume, or to remove 85% of the mass of impairing pollutants in CSOs, for at least the last five years. The City and SFPUC have undertaken no Long Term Control Plan revisions to bring operating protocols into compliance with the CWA and therefore operate in violation of the Bayside Permit.

Additionally, as described above, SFPUC fails to operate the system as dictated and required by the Permit because it has chosen to cease using discharge points without demonstrating that those closures will result in beneficial impacts related to storage or treatment, and with the written consent of the Regional Water Board. Instead, SFPUC has and continues to operate its combined sewer discharges in ways not authorized by the Permit and which are inconsistent with its Long Term Control Plan and Operations and Maintenance Plan.

The information in Table 7 as well as the City and SFPUC's other failures to comply with the CSO Policy demonstrate that the City and SFPUC have operated the Bayside Facilities every day for at least the last five years in a manner inconsistent with the Permit. The City and SFPUC have failed to revise the Long Term Control Plan to bring the Bayside Facilities into compliance with the CWA, violating Permit § VI.C.5.a every day for at least the last five years. These violations are ongoing and will continue each time insufficiently treated water is discharged. Each time discharges from the Bayside Facilities cause a violation of an applicable water quality

¹⁵ SFPUC's self-monitoring reports for April-August 2020 and October 2020-February 2021 are missing data for Monitoring Location 210.1. Reported data for Monitoring Location 230 begins January 2021.

Baykeeper NOI to SFPUC

standard is a separate and distinct violation of the Bayside Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a). The City and SFPUC are subject to civil penalties for all violations of the Act occurring in the five years prior to the date of this Notice Letter.

V. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

Upon expiration of the 60-day notice period, Baykeeper will file a citizen suit enforcement action pursuant to Section 505(a) of the Act, 33 U.S.C. § 1365(a), for the above-referenced violations and any additional violations stemming from the same conduct. Baykeeper will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects the violator to a penalty for all violations occurring during the period commencing five years prior to the date of a notice of intent to file suit letter. The Act imposes civil penalty liability of up to \$64,618 per day per violation for violations occurring after November 2, 2015. 33 U.S.C. § 1319(d); 40 C.F.R. §§ 19.1-19.4. Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. §1365(d), Baykeeper will seek to recover its costs, including attorneys' and experts' fees, associated with this enforcement action.

VI. PERSONS RESPONSIBLE FOR THE VIOLATIONS

Baykeeper puts the City and SFPUC on notice that they are the entities responsible for the violations described above. If additional persons are subsequently identified as also being responsible for the violations set forth above, Baykeeper puts the City and SFPUC on notice that it intends to include those persons in this action.

VII. NAME AND ADDRESS OF NOTICING PARTY

The name, mailing address, and telephone number of the noticing party is:

Eric Buescher (Bar No. 271323)
Nicole C. Sasaki (Bar No. 298736)
San Francisco Baykeeper
1736 Franklin Street, Suite 800
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Baykeeper NOI to SFPUC

Baykeeper has retained legal counsel to represent it in this matter. Please direct all communications to:

Daniel Cooper (Bar No. 153576)
Sycamore Law, Inc.
1004 O'Reilly Avenue
San Francisco, California 94129
daniel@sycamore.law
(415) 360-2962

VIII. CONCLUSION

Baykeeper is willing to discuss effective remedies for the violations described in this Notice Letter. If you wish to pursue settlement discussions, please reach out to counsel at Sycamore Law, Inc. using the contact information above. I suggest that, if interested, those discussions be initiated soon, as Baykeeper does not intend to delay filing a complaint in federal court if discussions are continuing when the 60-day period ends.

Sincerely,



Daniel Cooper

Cc:

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U.S. Environmental Protection Agency
Mail Code: 1101A
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Eileen White, Executive Officer
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Enclosures

Baykeeper NOI to SFPUC

List of Exhibits

Exhibit A – Tables 1 – 7

Exhibit B – Summary of SFPUC Bacteria Water Quality Sampling

Exhibit C – Basin Plan, Table 3.1

Exhibit D – Examples of floatables (trash, feces, etc.) in and after CSO events in Mission Creek