DAVID CHIU
City Attorney

MEMORANDUM

TO: Honorable Mayor London N. Breed
Honorable Members, San Francisco Board of Supervisors

FROM: David Chiu, City Attorney

DATE: October 4, 2024

RE: *City and County of San Francisco v. United States Environmental Protection Agency*
United States Supreme Court Case No. 23-753

On September 24, Supervisors Melgar and Peskin introduced a proposed resolution concerning the case *San Francisco v. EPA* that is set for argument before the United States Supreme Court on October 16, 2024. The case involves the narrow question of whether Environmental Protection Agency ("EPA") can impose "Generic Prohibitions" on the City's Oceanside stormwater and sewage system permit. Constituting a few sentences within extensive discharge permits, Generic Prohibitions make the permitholder broadly responsible for the quality of the water in a receiving body of water, rather than the quality of the permitholder's discharge into the water body. The City is not challenging the Clean Water Act ("CWA"), any EPA regulation or rule, or the extent of EPA's jurisdiction over water or air quality. Rather, the City argues that Generic Prohibitions contravene the letter and spirit of the CWA and EPA's own regulations.

There has been a significant amount of incorrect information and misguided speculation about this case. The proposed resolution incorporates recitals that are factually false, misleading, and missing vital context, and it does not accurately represent what this lawsuit is actually about. Unfortunately, it does so even though deputies from my Office, the General Manager and Deputy General Manager of the San Francisco Public Utilities Commission ("SFPUC"), and I spent nearly three hours immediately before introduction in a closed session advising the Board about the case. To set the public record straight, here we summarize the underlying facts, litigation, settlement posture, and what's at stake for the City and its ratepayers.

SUMMARY

In a split decision, the Ninth Circuit upheld EPA's ability to use "Generic Prohibitions" in San Francisco's stormwater and sewage system discharge permit. If that decision were to stand, the ramifications would be significant – San Francisco would be legally responsible for the quality of the Pacific Ocean and Bay as a whole, despite not having control over the other sources of pollutants to these waterbodies. To even attempt to meet this standard, the City would need to spend over $10 billion more on the Bayside alone to modify its stormwater and sewage infrastructure—even though those modifications would have a negligible impact on improving Bay water quality and would result in San Francisco ratepayers paying nearly $9,000 per

household annually in wastewater utility rates over the next 15 years—an average 10-fold increase of current rates.

As City Attorney, I have a duty to protect San Franciscans from such needlessly high utility rates that could drive many into poverty, as well as to make sure San Francisco complies with its obligations to protect the environment. Contrary to the inaccurate assertion in the proposed resolution, this lawsuit is not seeking any changes to the CWA. Rather, it simply asks the United States Supreme Court to ensure EPA follows the CWA in one discrete respect, as we describe below, and gives permitholders defined standards that actually prevent pollution before it happens.

To be clear, San Francisco's commitment to being a leader in protecting the environment and the CWA remains strong and unwavering. The City has already invested about $2 billion and will invest more than $3 billion more over the next 15 years in capital projects to reduce occasional discharges from large storms (which are authorized under the City's discharge permit) and upgrade its sewer treatment system. The City will continue to comply with the CWA and the City's discharge permits, and the City does not contest EPA oversight or regulation. The problem in this case is two discrete unlawful permit provisions memorialized in just three sentences. These provisions are referred to as the "Generic Prohibitions" that EPA has insisted be included in the City's discharge permits. The Generic Prohibitions comprise only three sentences in a 150-plus page permit. And those few sentences effectively say the City must not contribute to excess pollution in the Bay or Pacific Ocean, without making any effort to define what constitutes excess or which pollutants the City needs to control.

San Francisco has tried for years to work with EPA to clarify what standards the City must meet, to no avail. As a result, San Francisco, along with thousands of cities, counties, and clean water public agencies across the country, face an impossible situation. The City seeks to remove the Generic Prohibitions, and have EPA replace them with any necessary discharge requirements so that the City can continue to comply with those in addition to the permit's already extensive and detailed numeric, narrative, and operational discharge requirements, without facing the constant looming threat of enforcement action for conditions it has no control over – the overall water quality of the San Francisco Bay or the Pacific Ocean.

If the City were to accept these two discrete Generic Prohibitions, then it could be subject not only to continuous enforcement proceedings by EPA but also to litigation by private parties, based on the overall water quality of the Bay or Ocean, even if the City's discharges are negligible. Those proceedings could result in billions of dollars in liability to the City, from fines and injunctive relief requiring unplanned capital projects. According to the SFPUC, the City's ratepayers could be liable for more than $10 billion just for Bayside capital projects, plus billions more dollars in outlays for the Oceanside. Those capital projects would be not only expensive but also disruptive to City residents and businesses because of the extensive sewer

system work that the City would have to perform. Indeed, the City could comply with the detailed requirements of its discharge permits and make extraordinary expenditures on its sewer system *and still* be held liable for violating the two unlawful permit provisions. And, what is worse, those major capital outlays at ratepayer expense will likely not result in measurably improved water quality because San Francisco is just one entity occasionally discharging into the Bay or Ocean. There are many other dischargers and other factors that affect overall water quality.

For these reasons, as we explain more fully below, and contrary to statements in the proposed resolution, the City's posture in the pending litigation does not seek to undermine the CWA or to curtail its scope or reach, or undercut EPA's administrative jurisdiction to protect the water and the air across this country. The City does not contest any of the provisions in the 150-page plus EPA permits beyond the three sentences that comprise the Generic Prohibitions. What San Francisco seeks is narrow – removal only of the Generic Prohibitions, and replacement by EPA with clear guidelines about discharge requirements, so that the City can continue to comply with the CWA and EPA regulations. We wish we were not at this point. We have been trying unsuccessfully to resolve this case for years, and the appeal before the Supreme Court is regrettably a last resort.

DISCUSSION

I. BACKGROUND

San Francisco has a combined stormwater and sewage system. Unlike other municipalities that maintain separate sewer and stormwater systems, San Francisco treats both wastewater and stormwater before discharge, which benefits overall water quality. San Francisco has two treatment plants that operate 365 days a year and a third "wet-weather facility" that only operates during rain events. The City also owns and operates about 1,000 miles of sewer mains to convey flows to these plants, which function as two distinct systems. The first is the Oceanside system which serves the western portion of San Francisco and conveys flows to the Oceanside Water Pollution Control Plant (the "Oceanside Plant") for treatment before discharge. The second is the Bayside system which serves the eastern part of San Francisco, conveying flows to the Southeast Water Pollution Control Plant (the "Southeast Plant") for treatment before discharge. The Oceanside and Southeast Plants each have their own discharge permits that authorize their discharges of treated effluent and combined sewer discharges ("CSDs") –discharges that occur in large storms - into the Ocean and the Bay, respectively.

Through multi-decade, multi-billion dollar investments in improving its system, the City, acting through the SFPUC, has demonstrated its abiding commitment to compliance with the CWA and environmental stewardship. San Francisco has invested in major improvements to its combined sewer system over the last four decades and has dramatically reduced its CSDs.

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Between 1976 and 1997, San Francisco performed a major $2 billion upgrade of its systems and reduced CSDs citywide by 80%, to 10 or fewer per year. These CSDs occur during unusually intense rain storms that exceed the capacity of the City's system. Currently, San Francisco is undertaking a major overhaul of its Southeast Plant, including new facilities for biosolids and headworks (the first stage of sewage treatment) and performing other significant public work projects to address flooding in low-lying areas of the City, at a total cost of over $3 billion. Further, the SFPUC has been working with EPA and the California Regional Water Quality Control Board (the "RWQB") on other areas of its system and has offered to implement another $2 billion in additional capital projects and programs.

Generally, discharges of stormwater and sewage are governed by federal and state laws and policies as well as related permits. San Francisco is challenging in this case two discrete provisions in its National Pollutant Discharge Elimination System ("NPDES") permit governing our Pacific Ocean water discharges (the "Oceanside Permit"). These particular conditions are generic, lacking any clarity about how the City can possibly comply; again, we refer to these as the Generic Prohibitions. They are set forth in the following three sentences which are distinct from the narrative and other provisions of the 150-plus page Oceanside and Bayside Permits. The City is not challenging the narrative and other provisions. The two discrete conditions are memorialized in the following three sentences:

- "Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board No. WQ 79-16) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board (State Water Board), or U.S. EPA as required by the CWA and regulations adopted thereunder." [Oceanside Permit]
- "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code Section 13050." [Oceanside and Bayside Permits]
- "The discharge shall not cause a violation of any water quality standard for receiving waters adopted by the Regional Water Board or State Water Board as required by the CWA and regulations adopted thereunder (including the *Combined Sewer Overflow (CSO) Control Policy)* outside near-field mixing zones (i.e. where mixing is not controlled by effluent discharge momentum and buoyancy)." [Bayside Permit]

As illustrated above, the Generic Prohibitions require the City to avoid any discharge that causes or contributes to violating water quality standards for the *receiving water* – in the case at issue, the Pacific Ocean. What that means in practice is the City can be held liable for contamination in the Ocean that others – not the City – have caused or are causing. That's not how the law is supposed to work.

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The CWA itself and EPA's own regulations and guidance require that permit provisions relate to *points of discharge.* This difference between quality of discharge and the quality of the receiving water is crucial. Making San Francisco liable for the water quality in the Pacific Ocean rather than focusing on the City's particular discharges not only contradicts the CWA's plain meaning and intent but also it creates an obligation that is impossible for the City to comply with. San Francisco does not control the water quality of the Pacific Ocean off its shores, much less every source that might discharge into those waters. And without clear requirements for compliance for its own discharges, San Francisco risks violating the CWA, being dragged into an enforcement proceeding and facing huge liability for acts outside of its control. By analogy, consider holding San Francisco residents accountable for the costs to address impacts to air quality by wildfire smoke from outside the region causing orange skies or by emissions from airplanes flying overhead – that would be patently unfair.

Still, while the risk of enforcement flies in the face of common sense, this risk is not theoretical. Just a few months ago, EPA, the RWQCB acting under authority from EPA, and Baykeeper, a nonprofit environmental group, sued San Francisco in federal district court to enforce the Generic Prohibitions. With this new action, the severe consequences of the Generic Prohibitions come into stark relief, bringing potentially devastating consequences to both San Francisco and its ratepayers. As described above, the City has made and continues to make significant investments to improve its sewer system infrastructure. Again, it is worth emphasizing that if EPA uses its Generic Prohibitions to demand additional capital projects, then San Francisco ratepayers would bear the crushing consequences of funding untold capital projects, that San Francisco estimates would include well over $10 billion for the costs of those projects just for the Bayside. With currently planned investments, the average annual sewer bill will go from approximately $851 today to an estimated $3,500 in 15 years; on top of that, the additional $10-plus billion would result in an average annual sewer bill of nearly $9,000. That would compound the City's cost of living crisis that is already burdening many ratepayers and would disproportionately harm economically disadvantaged residents, who may no longer be able to afford their homes. According to an analysis commissioned by the SFPUC, between 8,100 and 10,600 more San Franciscans would be forced into poverty. All for the possibility of a negligible increase in water quality.

II. SAN FRANCISCO'S LAWSUIT ON THE OCEANSIDE PERMIT

San Francisco has been voicing its concerns about the Generic Prohibitions since 2013 when EPA included them in the Bayside permit over San Francisco's objections. In 2017, under the Trump Administration, EPA threatened enforcement action on the Bayside CSDs. In 2019, two weeks after former President Trump tweeted about San Francisco pollution and threatened to put San Francisco on notice, EPA issued a Notice of Violation alleging, "failure to comply with water quality standards" and specifically citing the Generic Prohibitions in the Bayside permit. Later that year, when San Francisco, EPA, and the RWQCB were negotiating renewal of the

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Oceanside permit, San Francisco again objected to the inclusion of the Generic Prohibitions. EPA and RWQCB overruled San Francisco's objections and included the Generic Prohibitions in the 2019 Oceanside permit. San Francisco pursued an administrative appeal to the Environmental Appeals Board (the "EAB"). Former President Trump's EAB upheld the permit. San Francisco then sought review by the Ninth Circuit Court of Appeals. The Ninth Circuit heard the case in 2022 and issued a divided opinion in 2023, narrowly ruling in EPA's favor.

The Ninth Circuit opinion left San Francisco with the unenviable choice of either (1) accepting the Generic Prohibitions, exposing the City and its ratepayers to enforcement for unspecified, unknown, and unknowable receiving water quality at a huge potential cost or (2) appealing the decision. San Francisco chose the latter and then appealed to the United States Supreme Court. Seeking Supreme Court review was critical to protect San Francisco's ratepayers and also to resolve the legality of the Generic Prohibitions for San Francisco and other discharge permitholders.

Importantly, the Ninth Circuit opinion in this case created a split with the Second Circuit Court of Appeals (*National Resources Defense Council v. EPA*, 808 F.3d 556 (2nd Cir. 2015). In the Second Circuit, environmental organizations, led by the Natural Resources Defense Council, brought a lawsuit against EPA, challenging discharge permit conditions similar to the Generic Prohibitions. The Second Circuit unanimously found such permit terms fail to protect the environment, because they "add nothing" to instruct permitholders on how to prevent pollution, instead only imposing liability after water quality violations have occurred, and "[t]he point of a permit is to prevent discharges that violate water quality standards *before* they happen" (emphasis in original, at p. 579).

Notably, over the last 10 years the United States Supreme Court has granted review in approximately 14 environmental cases. In the vast majority of those cases, the Supreme Court adhered to the questions presented. Specifically, of the 21 questions presented in the 14 cases, the Supreme Court answered 20 of the 21 as presented, more narrowly, or ruled in EPA's favor, and did not use the opportunity to reach for a broader statement or principle.

San Francisco framed its case at the Supreme Court narrowly. Once more, the City did not challenge the CWA, any EPA policy or rule, or the extent of EPA's administrative jurisdiction over water or air quality. San Francisco contested only the Generic Prohibitions – a few lines in a 150-plus page permit. The precise question presented to the Supreme Court is simply this: "Whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in [discharge] permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform."

The Supreme Court agreed to hear the case and has scheduled oral argument for October 16, 2024. The matter is fully briefed by the City and EPA. Numerous *amicus curiae*

(friend of the court) briefs have been filed in support of the City's position, as municipal sewer utilities around the country are similarly addressing the implications of the generic prohibitions in their discharge permits. The City has been joined by more than 60 amici, including the 400 cities represented by the California League of Cities, the 2,800 members of the National League of Cities, over 2,300 members of the National Association of Counties, and the National Association of Clean Water Agencies. And the breadth of this support is not surprising. From Washington State to Washington D.C., and from Massachusetts to California, more than two dozen public water agency amici grapple with similar provisions in their discharge permits and understand how important this issue is. The economic stakes for residents and ratepayers in our collective communities are high.

Again, we wish we were not at this point, and it is regrettably a last resort. San Francisco has been and remains eager to cooperate with EPA. And in fact, the City attempted for years to no avail to discuss with EPA the very real concerns with the Generic Prohibitions. In 2021, San Francisco tried to resolve its concerns through mediation but those efforts were unsuccessful. Because EPA refused to comply with the law and its own regulations as to the narrow issue of the Generic Provisions and rebuffed San Francisco's attempts to address its permitting concerns, San Francisco was left with no choice but to seek clarity from the Supreme Court on that narrow issue. Also, if San Francisco declined to appeal the Generic Prohibitions, there are many others similarly affected who might seek Supreme Court review and frame the issues in the case for the Court to decide much more broadly.

III. OUTCOME

If San Francisco succeeds in this case, the Supreme Court could conclude that EPA cannot impose Generic Prohibitions tied to water quality of receiving waters and instead must fashion clear, individualized point-of-discharge requirements, consistent with the language and intent of the statute. And indeed, San Francisco's discharge permits without the Generic Prohibitions already do just that through detailed numeric and narrative limitations and operational requirements. Moreover, a successful outcome at the Supreme Court would end the existing and ongoing arbitrary enforcement actions from regulators and private plaintiffs leveraging the Generic Prohibitions to allege that permitholders are 'violating' unspecified, unknown, and unknowable requirements. But the City would still have to comply with the extensive water quality discharge requirements in its permits and environmental laws and regulations, as well as make capital improvements to its system. In sum, the City seeks merely to have discharge permits say what they mean and mean what they say.

CONCLUSION

The City has arrived at this point despite exhaustive efforts over many years to try to resolve the dispute that began with the Trump Administration, and to cooperate with EPA. But the City was compelled to appeal this case to the Supreme Court as a last resort. The City in

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this litigation is far from alone, joined by many other cities, counties, and water districts across the country, including from liberal jurisdictions, that face a similar impossible situation. As stated above, what the City seeks in court is narrow – the City is not challenging the CWA, any EPA regulation or rule, or the extent of EPA's jurisdiction over water or air quality. Instead, the City is challenging just a few vague sentences in a 150-plus page permit. Those words contravene the letter and spirit of the CWA and EPA's own regulations. San Francisco just wants clarity on what it needs to do to protect water quality, which it does have in the bulk of the permit, but for those three impermissible sentences. And what's at stake for San Francisco ratepayers is shouldering potentially extraordinary increases which would translate to nearly $9,000 per household annually in wastewater utility rates over the next 15 years—an average 10-fold increase over current rates, with negligible impact on improving the water quality in the Ocean.

Finally, I wish to make one thing clear about our Office's role. While we always appreciate and consider the perspective of others throughout the City, and are open to policy concerns from the Board of Supervisors about this case or any ongoing litigation, the City Attorney is charged under Section 6.102 of the City Charter with representing the City in legal proceedings. San Francisco spent the better part of a decade trying to resolve these issues with EPA. Regardless of the outcome at the Board of Supervisors on the proposed resolution, it is too late now to resolve this case before the October 16, 2024 Supreme Court argument.

D.C.