

# United States Senate

July 6, 2020

The Honorable Gene Dodaro  
Comptroller General, Government Accountability Office  
444 G St NW  
Washington, DC 20548

Dear Mr. Dodaro:

The EPA Inspector General (IG) recently informed us in the attached June 1, 2020, letter that the Inspector General is coordinating with the Government Accountability Office (GAO) in its review of EPA's enforcement actions against California.

We urge GAO to work with the Inspector General on one important part of this potential investigation: whether EPA has failed to apply a consistent approach to enforcement against San Francisco as compared to other water utilities with combined sewer systems. The attached letter from the San Francisco Public Utilities Commission clearly spells out how EPA has singled out San Francisco for water quality enforcement in contrast to other municipalities. In fact, EPA's September 2019 finding of San Francisco's alleged water quality violations was inconsistent with both:

- EPA Region IX's history of permit approvals for San Francisco's wastewater collection and treatment system and EPA Region IX's conclusion that San Francisco's system protects beneficial uses in the Pacific Ocean and San Francisco Bay; and
- EPA's lack of comparable enforcement action against other municipalities with highly similar treatment systems for water quality discharges.

EPA's internal guidance states that its "goal is to emphasize the value of deterrence and to establish a minimal national consistency by taking actions across the country so that no one state is singled out." (See Interim Guidance to Strengthen Performance in NPDES Program (June 22, 2010).) We ask GAO to investigate whether EPA has, in fact, applied this "national consistency" in its water quality enforcement actions.

We request that GAO examine whether EPA's enforcement actions against San Francisco are comparable to the agency's enforcement actions against other municipalities which also have combined sewage systems. Thank you for considering our request.

Sincerely,

  
Dianne Feinstein  
United States Senator

  
Kamala D. Harris  
United States Senator

Attachments: May 15, 2020 Letter from San Francisco to Senators Feinstein and Harris  
June 1, 2020 Letter from EPA Inspector General to Feinstein and Harris



May 15, 2020

The Honorable Dianne Feinstein  
 The Honorable Kamala D. Harris  
 U.S. Senate  
 Washington, D.C. 20510

Dear Senators Feinstein and Harris,

Thank you for sharing with us the letters from EPA Inspector General O’Donnell indicating he is considering an investigation into the EPA’s enforcement of its Clean Water Act authorities. We are encouraged to hear about this development. Consistent with our previous discussions on this topic, the San Francisco Public Utilities Commission (SFPUC) continues to be deeply concerned that the White House may have directed EPA to single out California and the city of San Francisco in the exercise of those authorities. As you continue your dialogue with the Inspector General, we wanted to bring the following specific to your attention.

- September 18, 2019: President Trump Statement re: San Francisco. President Trump made the following statement from Air Force One before leaving California:

“There's tremendous pollution being put into the ocean [from San Francisco],” he said, noting “there are needles, there are other things.”

“We’re going to be giving San Francisco — they’re in total violation — we’re going to be giving them the notice very soon,” Trump said.

“The EPA is going to be putting out a notice and you know they’re in serious violation and this is environmental, very environmental,” Trump said. “And they have to clean it up. We can’t have our cities going to hell.”<sup>1</sup>

- September 26, 2019: Administrator Wheeler Correspondence to Governor Newsom. The week after the President’s off-the-cuff statement, EPA Administrator Wheeler issued a letter to Governor Newsom raising “concern that California’s implementation of federal environmental laws is failing to meet its obligations under the delegated federal programs.” The letter continued, singling out San Francisco, with a variety of inaccurate and misleading claims, including that:

“‘piles of human feces’ on sidewalks and streets in [San Francisco] are becoming all too common. The EPA is concerned about the potential water quality impacts from pathogens and other contaminants from untreated human waste entering nearby waters. ... Even more troubling is the City of San Francisco’s years-long practice – allowed by CalEPA – of routinely discharging more than a billion

**London N. Breed**  
 Mayor  
**Ann Moller Caen**  
 President  
**Francesca Vietor**  
 Vice President  
**Anson Moran**  
 Commissioner  
**Sophie Maxwell**  
 Commissioner  
**Tim Paulson**  
 Commissioner  
**Harlan L. Kelly, Jr.**  
 General Manager

<sup>1</sup> See Trump threatens San Francisco with EPA violation because of city's homeless, NBC News, available at: <https://www.nbcnews.com/politics/donald-trump/trump-threatens-san-francisco-epa-violation-because-city-s-homeless-n1056206> (last visited April 28, 2020).



gallons of combined sewage and stormwater into San Francisco Bay and the Pacific Ocean on an annual basis.”<sup>2</sup>

The press release issued by EPA further chastised California for the “state’s recent lack of urgency addressing serious issues in San Francisco resulting from lack of proper oversight and enforcement ...”<sup>3</sup> Contrary to Administrator Wheeler’s representation that EPA was somehow forced to act after decades of state mismanagement, the characterizations in the letter demonstrate a substantial reversal of EPA’s long-standing position with regard to San Francisco’s combined sewer system without reasonable explanation or transparency.

- October 1, 2019: San Francisco’s Response to Administrator Wheeler. The San Francisco Public Utilities Commission’s (“SFPUC”) General Manager, Harlan Kelly, substantively responded to Administrator Wheeler’s letter on October 1 identifying the extensive mischaracterizations and inaccuracies about San Francisco’s combined sewer system.<sup>4</sup> Mr. Kelly offered to travel to Washington DC to meet with Administrator Wheeler to explain the nature and performance of the combined sewer system or to make the SFPUC staff available to meet with other EPA representatives. Mr. Kelly’s letter was copied to EPA Regional Administrator Mike Stoker and others.
- October 2, 2019: US EPA Region 9 Notice of Violation. Despite Mr. Kelly’s response to Administrator Wheeler on October 1, one day later, on October 2, Regional Administrator Stoker issued a Notice of Violation (“NOV”) to the SFPUC.<sup>5</sup> Although the EPA has either co-issued or provided concurrence on the SFPUC’s National Pollutant Discharge Elimination System (“NPDES”) permits for decades – which explicitly approves the operation of the combined sewer system that necessarily discharges through authorized combined sewer outfalls during heavy rainfall – the NOV feigns surprise and concern about the City’s discharge of “approximately one and a half billion gallons of combined sewage annually onto beaches and other sensitive areas, including areas where recreation takes place.”<sup>6</sup>
- October 2, 2019: Unilateral Elevation of Permitting Decisions to US EPA Headquarters: On October 2, 2019, SFPUC’s NPDES permit for the Oceanside facilities, which was pending approval by the Region, was unilaterally elevated away from EPA Region 9 to the Principal Deputy Assistant Administrator at the Office of Water in US EPA Headquarters, without explanation.<sup>7</sup>

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<sup>2</sup> See Letter from EPA Administrator Andrew Wheeler to California Governor Gavin Newsom dated September 26, 2019, *available at*: [https://www.epa.gov/sites/production/files/2019-09/documents/9.26.19\\_letter-epa.pdf](https://www.epa.gov/sites/production/files/2019-09/documents/9.26.19_letter-epa.pdf) (last visited April 28, 2020).

<sup>3</sup> See EPA Administrator Wheeler calls out California’s environmental protection failure - State’s homelessness crisis threatens human health and the environment, EPA Press Release, *available at*: <https://www.epa.gov/newsreleases/epa-administrator-wheeler-calls-out-californias-environmental-protection-failure> (last visited April 28, 2020).

<sup>4</sup> See Letter from San Francisco Public Utilities Commission General Manager Harlan Kelly to EPA Administrator Andrew Wheeler dated October 1, 2019, [‘ with this letter.

<sup>5</sup> See Notice of Violation issued by US EPA Region 9 to San Francisco Public Utilities Commission on October 2, 2019, *available at*: <https://www.epa.gov/ca/city-and-county-san-francisco-npdes-notice-violation-october-2-2019> (last visited April 28, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> See Transcript of Tomas Torres (Director, Water Division, EPA) Voicemail on October 2, 2019, *available at*: [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/Attachments%20By%20ParentFilingId/6EEFEC49FD39DE708525854C004337E8/\\$FILE/Att.%2017%20%20T.%20Torres%20Voicemail%20\(10-2-2019\).pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Attachments%20By%20ParentFilingId/6EEFEC49FD39DE708525854C004337E8/$FILE/Att.%2017%20%20T.%20Torres%20Voicemail%20(10-2-2019).pdf) (last visited April 28, 2020).

- January 2, 2020: SFPUC Response to Notice of Violation: On January 2, 2020, SFPUC General Manager Kelly wrote to EPA Regional Administrator Stoker, responding to the Notice of Violation (“NOV”). Mr. Kelly explained that, “The SFPUC has struggled to find a way to substantively respond to the NOV because of its political nature, the evident misunderstanding that the EPA has of the SFPUC’s combined sewer system, and the lack of explanation or factual support for the allegations.” The letter highlights significant inconsistencies between the allegations in the NOV and EPA’s prior actions and findings, and expresses concern that the “genesis of the NOV appears to be politically charged statements attacking San Francisco made by President Trump on September 18, 2019 and subsequent political actions taken by EPA in furtherance of those attacks.”<sup>8</sup>
- February 27, 2020: Administrator Wheeler’s Congressional Testimony: On February 27, 2020, Administrator Wheeler testified before Congress at the Fiscal Year 2021 EPA Budget Meeting. During his testimony, Mr. Wheeler repeated falsehoods about San Francisco (stating, for example, “. . . San Francisco has been putting 1.5 billion gallons of raw sewage into the Pacific Ocean” and “They’ve been in violation of their permits I believe since the 1970s.”), made it clear that he continued to be involved in San Francisco’s NPDES permitting process, and agreed with the mischaracterization that the pursuit of San Francisco’s rights via its administrative appeal to the Environmental Appeals Board were a “delay” tactic intended to “game the system.”<sup>9</sup>

San Francisco believes that these actions and statements by EPA represent an unprecedented level of politicization of enforcement and permitting decisions by political appointees at the highest levels of the Agency. Many of the characterizations in Administrator Wheeler’s letter and Congressional testimony are wrong (and ordinarily would have been identified as such by career EPA staff that routinely interfaces with San Francisco had they been consulted) and serve no legitimate programmatic purpose. San Francisco is concerned that the only purpose served by the pillorying of San Francisco is a political one intended to further the interests of the White House and ensure that the President’s September 18, 2019 attack on San Francisco was pursued as official EPA policy, notwithstanding the facts or the law.

Similarly, San Francisco is concerned that the timing and nature of EPA’s issuance of the NOV on October 1 is such that the only conceivable basis was to embarrass San Francisco by scoring political points consistent with Trump’s threat to San Francisco made on September 18. We are concerned that evidence indicates that the decision to issue the NOV was made by political appointees, without the support of career staff, and in a manner inconsistent with EPA’s standard procedures for issuing NOVs and coordinating with other federal agencies such as the Department of Justice. None of these steps is an acceptable or reasonable use of EPA’s resources and signals a dangerous weaponization of EPA’s enforcement authority for political purposes.

Public reaction to this series of statements about San Francisco from the President and the EPA echoes our concerns that these actions are a politically motivated misuse of EPA’s enforcement authority. Examples include:

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<sup>8</sup> See Letter from San Francisco Public Utilities Commission General Manager Harlan Kelly to EPA Regional Administrator Michael Stoker dated January 2, 2020, enclosed with this letter.

<sup>9</sup> See Excerpt of Testimony from Congressional Hearing on the Fiscal Year 2021 EPA Budget on February 27, 2020, *available at*: [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/Attachments%20By%20ParentFilingId/40C7E5EA150473808525854C0043381F/\\$FILE/Att.%2021%20-%20Excerpt%20of%20Fiscal%20Year%202021%20EPA%20Budget%20Hearing%20Transcript%20\(2-27-2020\).pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Attachments%20By%20ParentFilingId/40C7E5EA150473808525854C0043381F/$FILE/Att.%2021%20-%20Excerpt%20of%20Fiscal%20Year%202021%20EPA%20Budget%20Hearing%20Transcript%20(2-27-2020).pdf) (last visited April 28, 2020).

- On September 26, 2019, at the fall meeting of the Environmental Council of the States (ECOS),<sup>10</sup> the membership approved a statement in reaction to EPA Administrator Wheeler’s September 26 letter that read, in part:

Constructive, collaborative, and respectful engagement between state and federal governments is an essential element in the protection of our nation’s public health and environment. ECOS, as the nonprofit, nonpartisan association of state and territorial environmental agency leaders, is concerned that recent communications and actions by U.S. EPA are damaging this engagement and eroding our ability to jointly protect our citizens and the environment. ECOS is seriously concerned about a number of unilateral actions taken by U.S. EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states...<sup>11</sup>

- On September 30, 2019, former Assistant Administrator of the EPA Office of Enforcement and Compliance Assurance Cynthia Giles wrote a letter to EPA Administrator Wheeler reacting to his September 26 letter and stating that the available data “is compelling evidence that compliance issues are not the real reason for your aggressive stance toward California.” Ms. Giles explained that “California has one of the best compliance records in the country. EPA’s own data shows that forty-five states have higher rates of violation for [the Safe Drinking Water Act and the Clean Water Act].”<sup>12</sup>
- On October 9, 2019, Speaker Nancy Pelosi and California Rep. Jackie Speier requested the EPA Inspector General conduct an investigation saying the EPA’s actions and statements “raises serious questions about the possibility of an abuse of enforcement authority.”<sup>13</sup>
- On October 10, 2019, nearly 600 former EPA personnel signed a letter sent by the Environmental Integrity Project to The Honorable Elijah Cummings, Chairman of the House Committee on Oversight and Government Reform. The letter asked for an investigation into whether the Administrator Wheeler’s September 26 letter was “intended as retaliation for the state’s failure to support President Trump’s political agenda.”<sup>14</sup>

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<sup>10</sup> ECOS is a nonpartisan association of state and territorial environmental agency leaders. The purpose of ECOS is to improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment of the US. *See* <https://www.ecos.org/about-ecos/> (last visited, April 28, 2020).

<sup>11</sup> *See* Letter from Environmental Council of the States to EPA Administrator Andrew Wheeler on September 26, 2019, *available at*: <https://www.ecos.org/documents/ecos-letter-to-u-s-epa-on-state-federal-cooperation/> (last visited April 28, 2020).

<sup>12</sup> *See* Letter from former Assistant Administrator of the EPA Office of Enforcement and Compliance Assurance Cynthia Giles to EPA Administrator Andrew Wheeler on September 30, 2019, *available at*: [https://archive.org/stream/6535940-Giles-Letter-to-Administrator-Wheeler-9-30-19/6535940-Giles-Letter-to-Administrator-Wheeler-9-30-19\\_djvu.txt](https://archive.org/stream/6535940-Giles-Letter-to-Administrator-Wheeler-9-30-19/6535940-Giles-Letter-to-Administrator-Wheeler-9-30-19_djvu.txt) (last visited April 28, 2020).

<sup>13</sup> *See* Letter from Speaker of the House Nancy Pelosi and Congresswoman Jackie Speier to EPA Acting Inspector General Charles Sheehan on October 9, 2019, *available at*: [https://www.eenews.net/assets/2019/10/10/document\\_gw\\_03.pdf](https://www.eenews.net/assets/2019/10/10/document_gw_03.pdf) (last visited April 28, 2020).

<sup>14</sup> *See* Letter from Environmental Integrity Project to House Committee on Oversight and Government Reform Chairman Elija Cummings on October 10, 2019, *available at*: <https://www.environmentalintegrity.org/wp-content/uploads/2019/10/Letter-to-U.S.-House-Prottesting-Trump-EPA-Threats-against-CA.pdf> (last visited April 28, 2020).

- On October 25, 2019, the New York Times published an article entitled, “E.P.A. Bypassed Its West Coast Team as a Feud with California Escalated.” This article discussed the evidence suggesting that Administrator Wheeler’s September 26 letter was a component of the Trump Administration’s efforts to retaliate against California. In particular, the article highlighted information from EPA Region 9 employees, who characterized Administrator Wheeler’s allegations as “exaggerated” and noted that the letter had been developed without Region 9’s knowledge, which would normally issue such notices. “Instead, it was put together by a small group of political appointees in Washington assigned specifically to target California, according to three current E.P.A. officials.”<sup>15</sup>

EPA’s approach on this matter seems to conflict with an Executive Order<sup>16</sup> issued on October 9, 2019, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, which declares:

Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement . . . No person should be subjected to a civil administrative enforcement action . . . absent prior public notice of both the enforcing agency’s jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.<sup>17</sup>

The Executive Order mandates that EPA not take actions that would cause “unfair surprise,”<sup>18</sup> and *before* EPA takes an action, like issuing a “notice of noncompliance” (*i.e.*, an NOV), EPA “must afford that person an opportunity to be heard, in person or in writing, regarding the agency’s proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.”<sup>19</sup>

Finally, Senators, we would like to point out that numerous municipalities, including many on the East Coast, have combined sewage systems such as ours. Our inquiries of several of those municipalities, and to the National Association of Clean Water Agencies, has revealed no other instances where EPA is pursuing an enforcement proceeding along the lines of that being pursued against San Francisco. And, as referenced above, California has one of the best Clean Water Act compliance records—better than 45 other States.

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<sup>15</sup> See E.P.A. Bypassed Its West Coast Team as a Feud With California Escalated, New York Times, available at: <https://www.nytimes.com/2019/10/15/climate/epa-trump-california.html> (last visited April 28, 2020).

<sup>16</sup> See Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/> (last visited April 28, 2020).

<sup>17</sup> *Id.* at Section 1.

<sup>18</sup> *Id.* at Sections 2(e), 4.

<sup>19</sup> *Id.* at 6.

We appreciate your efforts to ensure that the investigation into this apparent abuse of power is thorough and complete. Please let us know how we can continue to support your efforts. In the meantime, San Francisco remains steadfast in working cooperatively with EPA, including career staff, and ensuring that operation of its combined sewer system is compliant with federal and state permits and operates in a manner protective of human health and the environment.

Sincerely,



Michael P. Carlin  
Deputy General Manager  
San Francisco Public Utilities Commission



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

THE INSPECTOR GENERAL

June 1, 2020

The Honorable Dianne Feinstein  
U.S. Senate  
Washington, D.C. 20510

Dear Senator Feinstein:

In a letter dated May 21, 2020, you provided additional information regarding your request that the U.S. Environmental Protection Agency's Office of Inspector General review the reasons for the initial support of the EPA for the September 11, 2019 permit issued to San Francisco's Oceanside Treatment Plant and the later change of its position due to alleged water quality violations by the State of California.

We appreciate the additional information and are carefully reviewing it. As noted in my May 19, 2020 letter, we are considering conducting a project in fiscal year 2021 to review aspects of the EPA's oversight of state water enforcement that could include California, as well as other states, and are coordinating with the U.S. Government Accountability Office to avoid duplication with any engagements the GAO plans to begin soon. We will notify you and your staff if we decide to initiate a project.

We appreciate your interest in the work of the OIG. A similar letter is being sent to Senator Harris. If you have questions about this or any other matter, please contact Jennifer Kaplan, deputy assistant inspector general for Congressional and Public Affairs, at (202) 578-6098

Sincerely,

A handwritten signature in blue ink that reads "Sean W. O'Donnell".

Sean W. O'Donnell