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Superior Court of California
County of Sacramento
Civil
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

CALIFORNIA BUILDING INDUSTRY,
ASSOCIATION; BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION; and
CALIFORNIA BUSINESS PROPERTIES
ASSOCIATION,

Case No. 34-2009-80000338
Dept. 33

Petitioners,

RULING ON SUBMITTED MATTER

v.

STATE WATER RESOURCES CONTROL
BOARD, and Does 1 through 50, inclusive,

Respondents.

On September 2, 2009, respondent State Water Resources Control Board ("Board") adopted Order No. 2009-0009-DWQ, a General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities ("CGP") pursuant to provisions of the federal Clean Water Act ("CWA"; 33 U.S.C. § 1251 et seq.) and the state Porter-Cologne Water Quality Control Act ("Porter-Cologne"; Wat. Code § 13000 et seq.). (Administrative Record ("AR") at 1763.) Petitioners challenge portions of the CGP in this mandate proceeding, contending that its adoption was procedurally flawed and that its provisions violate CWA and Porter-Cologne requirements.

1 BACKGROUND

2 Regulatory Framework

3 The CWA was enacted to restore and maintain the chemical, physical and biological
4 integrity of waters of the United States. (33 U.S.C. § 1251(a).) It establishes a goal of
5 eliminating the discharge of pollutants into navigable waters and implements that goal by
6 prohibiting the discharge of pollutants by any person, public entity or business except as
7 authorized by a permit issued under the National Pollutant Discharge Elimination System
8 (“NPDES”) by the United State Environmental Protection Agency (“EPA”). (33 U.S.C. §§
9 1251(a)(1), 1311(a), 1342, 1362.)

10 To accomplish the CWA’s goal of restoring and maintaining the chemical, physical
11 and biological integrity of U.S. waters, an NPDES permit places limits and conditions upon the
12 type and quantity of pollutants that may be discharged from any point source, i.e., a conveyance
13 or conduit by which pollutants are or may be discharged into waters of the United States. (33
14 U.S.C. § 1311, 1342, 1362(14).) The permit may be issued by the EPA or by a state, like
15 California, which has been approved by the EPA to issue NPDES permits in accordance with the
16 CWA and implementing regulations. (33 U.S.C. §§ 1314(i)(2), 1342(b); 40 C.F.R. Part 123.)

17 Any permit issued by a state must provide for compliance with all applicable
18 provisions of the CWA; the state may not adopt or enforce any limit or prohibition on the
19 discharge of pollutants or any requirement for pollution control or abatement which is less
20 stringent than a limit, prohibition or requirement established under the CWA. (33 U.S.C. §
21 1370; 40 C.F.R. §§ 122.4, 124.1.) The state retains authority, however, to adopt and enforce
22 additional limits, prohibitions and other requirements for pollution control and abatement that
23 are consistent with or more stringent than those established under the CWA. (*Ibid.*) Thus,
24 Porter-Cologne provides a comprehensive program of measures for the attainment and
25 maintenance of the quality of California’s water bodies and resources which are to be adopted
26 and administered in compliance with the requirements of the CWA along with measures
27 necessary to implement any more stringent Porter-Cologne requirements. (Wat. Code §§ 13372-

1 13374, 13377. See *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 626-
2 627.)

3 Among the discharges subject to permitting under the NPDES are storm water
4 discharges associated with industrial activity, including construction activities. (33 U.S.C. §
5 1342(p).) A permit may be individual, covering a particular discharger, or like the CGP at issue
6 here, it may be general, covering a category of discharges, such as discharges from storm water
7 point sources. (40 C.F.R. § 122.28(a)(2).)

8 To reduce or eliminate discharges of pollutants into the waters of the United States,
9 every NPDES permit is required to set forth effluent limitations, that is, restrictions on the
10 quantities, rates, and concentrations of chemical, physical, biological, and other constituents
11 discharged from the point sources covered by the permit into navigable waters. (33 U.S.C. §§
12 1311(b), 1362 (11); 40 C.F.R. §§ 122.2, 122.44(a).) Effluent limitations are either technology
13 based or water quality based (33 U.S.C. §§ 1314(b), 1312(a); 40 C.F.R. § 125.3).

14 A technology-based effluent limitation (“TBEL”) – the type of effluent limitation at
15 issue in this case – is established on the basis of the capabilities of available technologies to
16 control and reduce discharges of pollutants. The TBEL is established in accordance with
17 technological standards set forth in the CWA: the best practicable control technology currently
18 available (“BPT”), applicable to discharges of any constituents defined as pollutants under the
19 CWA; the best available technology economically achievable (“BAT”), applicable to discharges
20 of pollutants listed as toxic under the CWA; and the best conventional pollutant control
21 technology (“BCT”), applicable to discharges of pollutants listed as conventional under the
22 CWA. (33 U.S.C. § 1314(b).) Because the TBELs challenged in this case limit the conventional
23 pollutants of storm water turbidity and pH (40 C.F.R. §§ 1314(a)(4), 1362(6); 40 C.F.R. §
24 401.16),¹ BCT is the technological standard applicable to the TBELs.

25
26 ¹ The fact sheet for the amended draft CGP issued in March 2008 describe the pH and turbidity of storm water
27 discharges from construction sites as follows:

28 “Pollutants expected in the discharge from construction activity include pH, sediment (i.e., suspended sediment
concentration (SSC), turbidity), and non-visible pollutants. . . .

“a. pH

1 A TBEL imposed for a specific discharge or pollutant in an NPDES permit must
2 incorporate an effluent limitation guideline (“ELG”) promulgated by the EPA for the specific
3 discharge or pollutant. (33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44(a)(1), 125.3(c).) If no
4 applicable ELG has been promulgated, the EPA or the state writing and issuing the permit must
5 identify a TBEL for the pollutant on a case-by-case basis using its best professional judgment
6 (“BPJ”) to consider the technological standard and various evaluative factors applicable to the
7 pollutant under the CWA. (33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(d); *Natural Resources*
8 *Defense Council v. U.S. Environmental Protection Agency* (1988) 863 F.2d 1420, 1424.) In this
9 case where no ELG has been promulgated for the pollutants of turbidity and pH,² the Board was
10 required to exercise its best professional judgment to identify TBELs for turbidity and pH in the
11 CGP by considering the factors for BCT, the applicable technology standard. (U.S.C. §
12 1314(b)(4)(B); 40 C.F.R. § 125.3(d)(2).)

13 A water quality-based effluent limitation (“WQBEL”), the other type of effluent
14 limitation that may be imposed in an NPDES permit, must be imposed when the TBEL for a
15 specific pollutant is not stringent enough, i.e., does not sufficiently reduce or eliminate
16 discharges of the pollutant to a receiving water body to attain or maintain the water quality
17 standard adopted for the pollutant and the water body pursuant to CWA requirements. (33

18
19 “Construction storm water may become contaminated from contact with alkaline construction materials resulting in
20 high pH (greater than pH 7). Alkaline construction materials include, but are not limited to, concrete, mortar, lime,
21 cement kiln dust (CKD), Portland cement treated base (CTB), fly ash, recycled concrete, and masonry work.

22 “b. Sediment as Turbidity

23 “Construction activity involves land-disturbing operations such as clearing, grading, stockpiling, and excavating.
24 Disturbed soils that are exposed to precipitation are susceptible to erosion, resulting in runoff contaminated with
25 suspended sediment. Suspended sediment is the primary constituent in construction storm water and is commonly
26 measured as turbidity. Turbidity, expressed as Nephelometric Turbidity Units (NTU), is a measure of the ability of
27 light to penetrate the water. Turbidity is a function of the suspended solids in water. It has been demonstrated to
28 affect biological functions, such as the ability of submerged aquatic vegetation to receive light and the ability of fish
gills to absorb dissolved oxygen.” (AR 652.)

29 ² In 2009, the EPA issued a numeric ELG of 280 NTU for discharges of turbidity from construction and
30 development point sources. (74 Fed. Register 62996, 63058 (December 1, 2009).) Effective January 4, 2011, the
31 EPA stayed implementation of the ELG pending correction of a calculation error identified by the Small Business
32 Administration and the National Association of Home Builders. (76 Fed. Register 22886 (April 25, 2011).)
33 Subsequently, the EPA submitted a proposed revision of the turbidity limit to the Office of Management and Budget
34 (OMB) but withdrew the proposal and decided to seek additional treatment performance data from construction
35 sites before proposing a revised numeric ELG. (See
36 <http://water.epa.gov/scitech/wastetech/guide/construction/index.cfm>) Once the OMB completes its review of a
37 proposed rule revising the numeric turbidity limit, the EPA plans to publish the proposed rule for public comment.

1 U.S.C. § 1312, 1313(d).) In California, such water quality standards are developed and adopted
2 by each of nine Regional Water Quality Control Boards in a water quality control plan for its
3 region, known as a Basin Plan. (Wat. Code §§ 13050, subd. (j), 13240 et seq. See 33 U.S.C. §
4 1313(a).) No WQBEL is at issue in this case.

5 TBELs and WQBELs may be expressed as numeric concentrations or levels of
6 pollutants. (40 C.F.R. §§ 122.44(d), (k), 131.11(b).) If numeric expression is infeasible, TBELs
7 and WQBELs may be expressed as narrative descriptions of best management practices
8 (“BMPs”) used to control or abate the discharge of pollutants. (*Ibid.*) BMPs include
9 prohibitions, maintenance procedures, treatment requirements, operating procedures, and
10 practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw
11 material storage. (40 C.F.R. §§ 122.22 (“Best management practices”).) As delineated in an
12 EPA guidance document, BMPs to control the concentrations or levels of turbidity and other
13 pollutants in storm water discharges from a construction site include erosion controls to keep
14 sediment in place, sediment controls to capture any sediment moved by storm water before it
15 leaves the site, and housekeeping practices designed to prevent contamination of storm water by
16 building materials and wastes generated during construction. (U.S. EPA, *Developing your
17 Stormwater Pollution Prevention Plan: A Guide for Construction Sites*, pp. 17-27,
18 <http://cfpub.epa.gov/npdes/stormwater/swppp.cfm>, set forth as Exhibit 3 to Request for Judicial
19 Notice in Support of Petitioners’ Reply Brief.) Petitioners herein challenge the numeric
20 expression of a TBEL for pH and a TBEL for turbidity, imposed by the CGP on certain
21 dischargers.

22 Adoption of the CGP

23 The prior CGP adopted by Board in 1999 imposed narrative but no numeric effluent
24 limitations on the basis of a conclusion that numeric limitations were infeasible. (AR 7-8.) In
25 considering whether to include numeric effluent limitations in reissuing the CGP, the Board
26 convened a panel of experts (“Blue Ribbon Panel”) in 2005 to address the feasibility of
27 establishing numeric TBELs (“NELs”) and numeric WQBELs for inclusion in general permits
28

1 regulating storm water discharges associated with municipal, industrial and construction
2 activities. (AR 354.005-354.006, 2077.)

3 The Blue Ribbon Panel issued its conclusions and recommendations in June 2006.
4 Regarding the feasibility of numeric effluent limits applicable to construction activities, the
5 panel observed that traditional erosion and sediment controls were highly variable in controlling
6 turbidity levels in discharges from construction sites while active treatment technologies or
7 systems ("ATS") consistently provided very low discharges of turbidity on larger construction
8 sites. (AR 354.18.) With respect to larger construction sites, the panel found that ATS made
9 numeric limitations technically feasible for pollutants, like turbidity, commonly associated with
10 storm water discharges from construction sites. With respect to smaller construction sites, the
11 panel found that technical practicalities and cost-effectiveness made ATS less feasible.

12 The panel concluded that, if ATS were not permitted, numerical limitations were not
13 likely feasible.³ (AR 354.18-354.19.) The panel also concluded that statewide numeric limits
14 for turbidity based on traditional erosion and sediment control BMPs would be difficult to set
15 because of the variability in background turbidity levels in storm water runoff in different areas
16 of the state. (AR 354.19.)

17 The panel recommended that the Board consider selectively applying numeric
18 effluent limits only to certain site conditions or only during certain seasons and phasing
19 implementation of numeric limits or action levels commensurate with the capacity of dischargers
20 and support industry to respond. (AR 354.020.) The panel further recommended numeric
21 effluent limits or action levels for pollutants relevant to construction sites in addition to turbidity,
22 particularly pH levels for storm water potentially exposed to fresh concrete or wash water from
23 cement mixers and equipment. (*Ibid.*)

24
25 ³ The Blue Ribbon Panel recommended "action levels" as more feasible than numeric effluent limitations.
26 As used by the panel, an "action level" is a numeric value of an effluent limit clearly above the normal observed
27 variances of pollutant concentrations in storm water discharges and thus an indication that existing BMPs have
28 failed to adequately control pollutant discharges. (AR 354.011, 354.019-354.020.) The action level requires
corrective action to improve BMP control and reduction of the pollutant concentrations to an acceptable level.
(*Ibid.*) The CGP imposes numeric action levels ("NALs") on discharges from certain construction sites (AR 1774,
("Determining Compliance with Numeric Limitations")), but the NALs are not challenged in this proceeding.

1 In March 2007, the Board issued a preliminary draft CGP and a fact sheet⁴ which
2 reviewed the conclusions and recommendations of the Blue Ribbon Panel. (AR 366ff., 371-373,
3 407ff.) The Board received public comments in writing and orally at two public workshops on
4 these documents held in April 2007. (AR 485-487, 641.)

5 In March 2008, after considering the public comments on the preliminary draft and
6 conducting further analysis, the Board issued an amended draft CGP and fact sheet. (AR 696-
7 778, 633-695.) The Board received public comments on the amended draft in writing and orally
8 at two public workshops in May 2008 and a public hearing in June 2008. (AR 779-781, 830-
9 832, 833-1055.)

10 In April 2009, after considering the public comments on the amended draft, the
11 Board issued a proposed draft CGP and fact sheet. (AR 1178-1401, 1130-1177.) The Board
12 received public comments on the proposal orally at a hearing on June 3, 2009, and in writing
13 through June 17, 2009. (AR 1408-1410, 1436-1535.)

14 In August 2009, on the basis of the public comments on the proposed draft, the
15 Board issued Change Sheet #1, proposing changes to the proposed draft to be considered by the
16 Board at a hearing regarding adoption of the proposed draft on September 2, 2009. (AR 8162-
17 8200.) Change Sheet #1 was informational and did not invite public comment. (*Ibid.*)

18 On September 2, 2009, the Board conducted a hearing on the proposed draft, the
19 changes in Change Sheet #1, and further changes proposed by staff in Change Sheet #2. (AR
20 2066-2070, 2122-2371, 8162-8200, 2008-2044.) Following public comments, the Board
21 considered and adopted the proposed draft with the changes proposed in Change Sheets #1 and
22 #2. (AR 2370.) The Board provided a written Response to Significant Comments submitted on
23 the draft CGP issued in April 2009 and voiced at the hearing on September 2, 2009. (AR 1651-
24 1762.)

25 CGP Contents

26 ⁴ Federal regulations governing NPDES permits require the EPA or state issuing the permits to prepare a
27 fact sheet for each permit draft. (40 C.F.R. § 124.8.) The fact sheet must briefly set forth the principal facts and
28 significant factual, legal, methodological and policy questions considered in preparing the draft permit. (*Ibid.*) In
particular, the fact sheet for an NPDES permit must explain any effluent limitations set on a case-by-case basis
applying BCT or BAT requirements. (40 C.F.R. § 124.56(b)(1)(iv).)

1 Pursuant to CWA requirements for NPDES permits (33 U.S.C. § 1311(a); 40 C.F.R.
2 §§ 122.41-122.49), the CGP sets forth prohibitions on the discharge of pollutants from
3 construction sites (AR 1784-1785); authorizes storm water and specified non-storm water
4 discharges subject to TBELs and WQBELs/receiving water limitations (AR 1785, 1793-1796);
5 requires dischargers to design, implement and maintain BMPs at BAT/BCT standards and to
6 take other actions adapted to their construction sites to achieve compliance with the permit
7 prohibitions and effluent limitations (AR 1798-1799-1801, 1863-1869, 1876-1884, 1896-1904,
8 1919-1924); and requires dischargers to monitor and report the effectiveness of the BMPs and
9 other required actions in achieving the prohibitions and effluent limitations and to correct any
10 identified deficiencies. (AR 1870-1875, 1885-1895, 1905-1918, 1925-1928.) Under the CGP,
11 the particular effluent limitations and monitoring requirements applicable to a construction site
12 vary with the level of risk of water quality impacts posed by storm and non-storm water
13 discharges from the site to receiving waters.

14 Using methodology set forth in the CGP, dischargers calculate and rank the potential
15 negative impact of discharges from their construction site to the water quality of receiving
16 waters. (1798, 1929-1933, 2102-2104.) The methodology provides a three-step process which
17 focuses on the amount of sediment transported in discharges from a site disturbed by
18 construction project activities and on the water quality standards for sediment in receiving waters
19 and beneficial uses of the waters for fish.⁵ (*Ibid.*) Step one calculates the sediment risk to obtain
20 an estimate of project-related soil loss from the construction site, considering the factors of
21 rainfall-runoff erosivity, soil erodibility, and site topography (slope length and gradient). (AR
22 1772, 1930-1931, 2102-2104.) Step two calculates the receiving water risk during periods of
23 soil exposure (i.e., grading and site stabilization) by determining whether discharges from a
24 construction project site drain to a sediment-sensitive water body, i.e., a water body impaired for
25 sediment or a water body with beneficial uses as cold water aquatic habitat or for fish migration
26 or spawning. (AR 1932, 2104.) Step three combines the calculated sediment and receiving water

27 ⁵ At indicated in Footnote 1, suspended sediment is the primary constituent in construction storm water and
28 is commonly measured as turbidity. Turbidity, expressed as Nephelometric Turbidity Units ("NTU"), is a measure
of the ability of light to penetrate the water. Turbidity is a function of the suspended solids in water.

1 risks pursuant to a matrix to determine the risk level of a construction project site under the CGP
2 as Level 1 (low), Level 2 (medium), or Level 3 (high). (AR 1933, 2104.)

3 Pursuant to the CGP, construction project sites with a Level 1 (low) risk must
4 comply with narrative effluent limitations by implementing BMPs that achieve BAT/BCT
5 standards in minimizing or preventing pollutants in discharges of storm water and authorized
6 non-storm water, visually monitor BMP efficiency and effectiveness in controlling discharges of
7 pollutants, and sample and analyze discharges of storm water exposed to non-visible pollutants.
8 (AR 1793, 1863-1875, 2096-2097, 2104.) These Level 1 requirements largely repeat the
9 requirements for the contents of a storm water pollution prevention plan ("SWPPP") in the
10 previous CGP (AR 69-82.)

11 Construction project sites with a Level 2 (medium) risk must comply with all the
12 requirements for Level 1 project sites. In addition, Level 2 sites must comply with a numeric
13 action level ("NAL")⁶ for pH between 6.5 and 8.5 and an NAL for turbidity of 250 NTU;
14 develop a rain event action plan ("REAP");⁷ and sample and analyze discharges of storm water
15 to determine compliance with a NAL for pH between 6.5 and 8.5 and an NAL for turbidity of
16 250 NTU. (AR 1774, 1793, 1876-1879, 2096-2098, 2104.)

17 Construction project sites with a Level 3 (high) risk must comply with all the
18 requirements for Level 1 and Level 2 project sites. In addition, Level 3 sites must comply with
19 an NEL for pH between 6.0 and 9.0, and an NEL for turbidity of 500 NTU for storms and must
20 sample and analyze discharges of storm water to determine compliance with an NEL for pH
21 between 6.0 and 9.0, and an NEL for turbidity of 500 NTU. (AR 1773-1774, 1793-1794, 1896-
22 1918, 2096-2098, 2104.) Compliance with the NELs is not required if a storm event causing a
23 NEL exceedance is equal to or larger than the Compliance Storm Event, defined as a five-year,
24 24-hour storm which exceeds the capacities of available BMPs to minimize discharges. (AR
25 1794, 1916.)

26 ⁶ An "action level" is explained in Footnote 3, *ante*.

27 ⁷ A REAP is a written plan designed to protect all exposed portions of a construction site within 48 hours
28 of any likely precipitation event. The REAP requirement is intended to ensure that the discharger has adequate
materials, staff, and time to implement erosion and sediment control measures that are intended to reduce the
amount of sediment and other pollutants generated from the active site. (AR 2106.)

1 projects, and bioassessment monitoring by Level 3 construction projects disturbing 30 or more
2 acres are more stringent than CWA requirements.

3 Petitioners challenge the evidentiary sufficiency of the CGP requirement for the
4 monitoring of receiving waters by some Level 3 construction projects following a NEL violation
5 and the evidentiary sufficiency of the CGP requirement for bioassessment monitoring by Level 3
6 construction projects that disturb 30 or more acres lack evidentiary support.

7 Petitioners challenge the validity of the post-construction requirement applicable to
8 all construction sites on the ground that the requirement is not authorized by the CWA.
9 According to petitioners, the post-construction requirement is more stringent than CWA
10 requirements and violates Porter-Cologne because it was adopted by the Board without the
11 requisite consideration of economic and other factors specified in Porter-Cologne.

12 Petitioners contend that the Board violated due process and the procedural
13 requirements of the Administrative Procedure Act and the CWA for public participation.

14 Standard of Review

15 Because the CGP is an order and permit approved and issued by the Board under
16 Division 7 of the Water Code (i.e., Porter-Cologne), the court reviews petitioners' contentions
17 that the CGP violates provisions of the CWA and Porter-Cologne violations pursuant to Code of
18 Civil Procedure section 1094.5. (Wat. Code § 12330, subs. (a), (d). See 40 C.F.R. § 123.30.)
19 With respect to petitioners' contentions that certain conditions in the CGP and findings in Order
20 2009-0009-DWQ lack evidentiary support, the court determines whether the conditions and
21 findings are supported by substantial evidence in light of the whole administrative record of
22 proceedings on the CGP. (*Id.*, subd. (d); Code Civ. Proc. 1094.5, subd. (c).) The court does not
23 exercise its independent judgment upon the evidence in the record because the CGP does not
24 involve a decision of a regional water quality control board reviewable by the Board pursuant to
25 Water Code section 13320, the only statutorily identified instance in which the court is
26 authorized to exercise its independent judgment on the evidence. (See Wat. Code § 12330, subd.
27 (e).)

28

1 With respect to petitioners' contentions that present issues of statutory and
2 regulatory construction, the court reviews such issues of law de novo. *North Gualala Water Co.*
3 *v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1587.) However, the court
4 defers to the Board's interpretation of a statute or regulation involving its area of expertise unless
5 the interpretation flies in the face of the clear language and purpose of the interpreted provision.
6 (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109
7 Cal.App.4th 1089, 103-1004, 1007, following *Yamaha Corp of America v. State Bd. of*
8 *Equalization* (1008) 19 Cal.4th 1, 12-13.)

9 Contrary to petitioners' claim, the CGP is not a quasi-legislative action subject to
10 review under Code of Civil Procedure section 1085. The quasi-adjudicatory nature of the CGP
11 does not become quasi-legislative because it is a general rather than an individual permit.
12 Rather, a general permit is authorized as a means of streamlining the process of permitting storm
13 water discharges from individual point sources that involve the same or similar types of
14 operations, discharges, effluent limitations and monitoring. (See 40 C.F.R. §§ 122.28(a)(2),
15 125.3.)

16 Turbidity and pH NELs

17 As indicated above, technology-based effluent limitations are developed under the
18 CWA on a case-by-case basis by a permitting authority using BPJ when EPA-promulgated
19 limitation guidelines are inapplicable. (33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(c)(2).)
20 Specifically, the permitting authority must identify and assess pollution control technology
21 applicable to the category of point sources in accordance with statutorily specified factors. (33
22 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. § 125.3(c)(2), (d).)

23 In developing the turbidity and pH NELs in the CGP pursuant to these provisions of
24 the CWA, the Board is required to identify the degree of effluent reduction attainable by BCT
25 measures and practices, using the following factors to assess the BCT measures and practices:

- 26 • The reasonableness of the relationship between the costs of attaining a reduction in effluent
27 and the effluent reduction benefits derived;

- 1 • A comparison of the cost and level of reduction of such pollutants from the discharge from
- 2 publicly-owned treatment works to the cost and level of reduction of such pollutants from a
- 3 class or category of industrial sources;
- 4 • The age of equipment and facilities involved;
- 5 • The process employed;
- 6 • The engineering aspects of the application of various types of control techniques;
- 7 • Process changes; and
- 8 • Non water quality environmental impact (including energy requirements).

9 (33 U.S.C. §§ 1311(b)(2)(E), 1314(b)(4); 40 C.F.R. § 125.3(c)(2), (d)(2).)

10 The Fact Sheet for the CGP discusses the development of TBELs for the CGP within
11 this CWA framework and details the technical basis of the turbidity NEL of 500 NTU and the
12 pH NEL of 6.0-9.0 imposed on Risk Level 3 construction projects by the CGP. (AR 2087-
13 2093.) The Fact Sheet indicates that the turbidity and pH NELs provide a specific and objective
14 criterion to facilitate the evaluation and enforcement of compliance and do not require a higher
15 level of technology or BMPs for the control of storm water discharges than has been required by
16 previous CGPs. (AR 2088. See 2144-2146.) “[T]he additional numeric effluent limitations,
17 compared to the existing permit’s narrative effluent limitations, do not increase compliance
18 requirements; rather, they simply represent a point where one can quantitatively measure
19 compliance with the lower end of the range of required technologies. Therefore, the compliance
20 costs associated with the BAT/BCT numeric effluent limitations in this permit only differ by the
21 costs required to measure compliance with the NELs when compared to the baseline compliance
22 costs to comply with the limitations already established through EPA regulations and the
23 existing Construction General Permit.” (*Ibid.*) The technical basis for the turbidity and pH NELs
24 are then detailed. Measurement costs are estimated to be approximately \$1,000 per construction
25 site. (AR 2088.)

26 Petitioners contend that the turbidity and pH NELs imposed by the CGP have not
27 been developed and evaluated in compliance with the CWA provisions for TBELs: the NELs
28 have not been derived from performance data for applicable BCT measures and practices, while

1 the technical capabilities and cost benefit of using the applicable BCT measures and practices
2 have not been assessed pursuant to CWA factors. (See 33 U.S.C. § 1314(b)(4); 40 C.F.R.
3 § 125.3(d)(2).) Petitioners also contend the NELs contain a variety of scientific and calculation
4 errors. (See AR 7552, 7553-7565.)

5 Petitioners' contention that the NELs have not been properly developed and assessed
6 under the CWA has merit. The discussion of the turbidity and pH NELs in the CGP Fact Sheet
7 initially outlines the case-by-case analytical process required by the CWA for the NELs,
8 including the factors for assessing BCT measures and practices. (AR 2087.) The discussion
9 briefly reviews and discounts any non water quality environmental impacts of the NELs and
10 devotes two paragraphs to a cost-benefit analysis. But no performance data for any BCT or
11 BMPs characterized as BCT reflect the values of the turbidity and pH NELs.

12 --*Turbidity NEL*

13 The turbidity NEL of 500 NTU is based on three different analyses:

- 14 (1) The calculation of a median turbidity of 544 NTU using a published dataset of flow and
15 suspended-sediment transport rates developed by Simon et al. (2004) for ecoregions of the
16 United States, including 12 ecoregions in California (AR 2089, 2090-2091. See AR 2157-2158);
17 (2) The calculation of a mean turbidity value of 512.23 NTU and the construction of a 95 percent
18 confidence interval between 190.78 to 833.68 NTU using a dataset of turbidity readings in
19 administrative civil liability actions brought by regional water quality control boards against
20 construction sites from 2003-2009 (AR 2089, 2091-2092. See AR 2160-2161); and
21 (3) Published, peer-reviewed studies and reports on the in-situ performance of BMPs in
22 controlling erosion on active construction sites (sedimentation ponds, mulches and other slope
23 coverings, and silt fences), particularly a study of erosion control materials by Horner et al.
24 (1990) that recorded mean and maximum turbidity values of 21 and 73 NTU respectively for
25 wood fiber mulch and turbidity values at or near 100 NTU for other materials. (AR 2089-2092.
26 See AR 2161-2163, 5350-5360.)

27 Considering these analytical results, Board staff concluded "that: (1) results of the
28 Simon et al. dataset reveals turbidity values in background receiving water in California's

1 ecoregions range from 16 NTU to 1716 NTU (with a mean of 544 NTU); (2) based on a
2 constructed 95% confidence interval, construction sites will be subject to administrative civil
3 liability (ACL) when their turbidity measurement falls between 190.78 - 833.68 NTU; and
4 (3) sites with highly controlled discharges employing and maintaining good erosion control
5 practices can discharge effluent from the BMP with turbidity values less than 100 NTU.
6 Therefore, the appropriate threshold to set the technology-based limit to ensure environmental
7 protection, effluent quality, and cost effectiveness ranges from 100 NTU to over 1700 NTU. To
8 keep this parameter and the costs of compliance as low as possible, State Water Board staff has
9 determined, using its BPJ, that it is most cost effective to set the numeric effluent limitation for
10 turbidity at 500 NTU.” (AR 2092. See AR 2162-2165.)

11 Absent from the Board’s discussion of how the turbidity NEL of 500 NTU was
12 developed is performance data for the specific BMP measures and practices in various
13 construction site conditions. The analysis based on the Simon study provides information about
14 turbidity levels in background receiving waters in California ecoregions, not turbidity levels in
15 storm water discharged from construction sites to receiving waters. The analysis based on ACL
16 data provide a range of turbidity values for 19 construction sites in two regions of California
17 without identifying any BMPs employed by the sites to control storm water discharges of
18 sediment. And the analysis based on the Horner study provides performance data for certain
19 BMPs available to prevent and control erosion at three highway construction sites in Washington
20 State that may not reflect the variety of soil, rainfall and topography conditions at California
21 construction sites. None of these analyses provide data from which it can be determined that
22 available technologies are capable of controlling erosion and reducing sediment discharges from
23 construction sites with a variety of soils, climates and topographies to a turbidity of 500 NTU or
24 lower.

25 It is true, as the Board argues in this proceeding, that the CGP cannot reasonably
26 identify and prescribe the BCT that will achieve a turbidity of 500 NTU for each construction
27 site because of the variability of construction site conditions. Rather, as required by the CGP,
28 each construction project must select and implement those BCT measures and practices, singly

1 or in combination, that will control erosion and sediment discharges under the specific site
2 conditions of the project. (See AR 1802, 1900-1901.) Nonetheless, the CWA requires the
3 Board, in developing a TBEL, to determine “the degree of effluent reduction attainable through
4 the application of the best conventional pollutant control technology.” (33 C.F.R.
5 §§ 1314(b)(4)(A). 1342(a)(1).) To comply with this CWA requirement, at a minimum, the
6 Board must identify available technologies, gather data characterizing the performance of the
7 technologies under various site conditions, and derive a numeric TBEL or NEL for turbidity
8 consistent with the performance data. The Board cannot properly base a turbidity NEL on theory
9 and inferences drawn from limited or inconclusive studies of BCT performance using best
10 professional judgment.⁸

11 Until an attainable turbidity value is derived from performance data for available
12 technologies, individual construction projects subject to the turbidity NEL in the CGP are not
13 able to select suitable technologies to carry out their obligations to control sediment discharges
14 with reasonable assurance that the technologies are capable of achieving the turbidity NEL.
15 Moreover, until an attainable turbidity value is derived, the technical aspects and cost-benefits of
16 the BCT cannot be assessed in accordance with the multi-factor analysis required by the CWA.
17 For example, the costs of installing and maintaining technologies shown by performance data to
18 be capable of attaining the turbidity NEL cannot be identified and compared to the water-quality
19 benefits and non water quality environmental impacts attributable to the technologies until an
20 attainable turbidity value is derived from the performance data. (See 33 U.S.C. § 1314(b)(4)(B);
21 40 C.F.R. § 125.3(d)(2).)

22 Absent such BCT identification and assessment, the Board’s conclusion, that the
23 turbidity NEL does not exceed the capabilities of BMPs in previous CGPs and does not increase

24 ⁸ The court notes the Board’s concern regarding the lack of data on the in situ performance of BMPs for the
25 control of sediment in storm water discharges from active construction sites. (See AR 2092, 2161.) As petitioners
26 and other commenters pointed out to the Board during proceedings on the CGP, such performance data will be
27 collected by Risk Level 2 and Risk Level 3 construction projects in carrying out their responsibilities with respect to
28 numeric action levels (“NAL”) under the CGP: “The purpose of the NAL and its associated monitoring
requirement is to provide operational information regarding the performance of the measures used at the site to
minimize the discharge of pollutants and to protect beneficial uses and receiving waters from the adverse effects of
construction-related storm water discharges.” (AR 1774. See 1876, 1896.) Apparently, such data collection by
construction projects has not been previously required.

1 compliance requirements, lacks substantial evidentiary support. In addition, the Board's
2 adoption of the turbidity NEL fails to comply with CWA requirements for the development of
3 TBELs. In such circumstances, the turbidity NEL is invalid and unenforceable. (See *Texas Oil*
4 *& Gas Ass'n v. EPA* (5th Cir. 1998) 161 F.3d 923, 934; *Natural Resources Defense Council* (9th
5 Cir. 1998) 863 F.2d 1420, 1425; *American Petroleum v. Environmental Protection Agency* (5th
6 Cir. 1986) 787 F.2d 965, 976-977.)

7 --pH NEL

8 The Fact Sheet identifies the BCT for controlling the pH of storm water discharges
9 from construction project sites as a variety of BMPs, including site management "housekeeping"
10 measures and natural or chemical treatment of pH-impaired storm water in a filter or settling
11 basin. (AR 2088. See AR 1896-1899.) A pH NEL of 6.0-9.0, determined by the Board using
12 best professional judgment, is calculated as three standard deviations above and below the mean
13 pH of runoff from highway construction sites recorded in a Caltrans study. (AR 2089. See
14 4291-4380.) Proper implementation of BMPs is expected to result in discharges from
15 construction sites within the range of 6.0 to 9.0 pH units. (AR 2089.)

16 The Caltrans study collected and recorded the concentrations of various pollutants,
17 including pH, in storm water runoff at 27 highway construction sites with a wide range of
18 physical characteristics and conditions during the rainy season of four years from 1998 to 2002.
19 (AR 4296, 4306-4318.) The study data was collected for various informational purposes,
20 including the identification of "pollutants most prevalent in construction runoff under various
21 site conditions to help [Caltrans design engineers] make decisions about the size and magnitude
22 of recommended temporary BMPs." (AR 4380.) For these informational purposes, the data for
23 specific pollutants was analyzed and compared between years, between northern and southern
24 California sites, between new construction and modifications to existing facilities, and between
25 construction runoff and highway runoff. (AR 4302-4303.) The BMPs in place at each study site
26 were specified (AR 4313-4314), but their effect on the concentrations of pollutants in storm
27 water runoff from the site was not analyzed.

28

1 The Board's development of the pH NEL on the basis of the Caltrans study data does
2 not, as required by CWA provisions on the development of TBELs, derive the NEL from
3 performance data for the BMPs characterized as BCT in the Fact Sheet. As pointed out by
4 Caltrans in comments on the March 2008 draft of the CGP and Fact Sheet, the Caltrans study
5 does not provide evidence that pH readings above or below the proposed pH NEL resulted from
6 inadequate BMPs or other controls. (AR 6641.) In the absence of such evidence, the range of
7 the pH NEL three standard deviations above and below the mean pH of the Caltrans study data
8 has no demonstrated relationship to management practices at the study sites; pH above and
9 below that range could be attributed as easily to natural variations in soil and rainfall as to BMP
10 inadequacies. (AR 6641, 6647.)

11 As indicated above with respect to the turbidity NEL, unless and until a pH NEL is
12 derived from BCT performance data, the technical aspects and cost-benefits of the BCT cannot
13 be assessed in accordance with the multi-factor analysis required by the CWA. Absent such
14 assessment, the Board's conclusion, that the pH NEL does not increase the compliance
15 requirements of previous CGPs, lacks substantial evidentiary support; the Board's development
16 of the pH NEL does not comply with CWA requirements for the development of TBELs; and the
17 turbidity NEL is invalid and unenforceable.⁹

18 Compliance Storm Event

19 The CGP establishes a 5-year, 24-hour Compliance Storm Event exemption from the
20 turbidity and pH NELs. (AR 1774, 1916.) The exemption is based on a determination that the
21 BMPs available to construction projects covered by the CGP lack the capability to handle a
22 storm equal to or larger than a 5-year, 24-hour storm. (AR 2092-2093.)

23
24
25 ⁹ Because the turbidity and pH NELs have been invalidated and are subject to reconsideration and
26 modification by the Board, it is unnecessary for the court to resolve petitioners' contention that the NELs contain
27 scientific and calculation errors. Nonetheless, the court notes that one of the alleged errors, the Board's failure to
28 consider background conditions in receiving waters when setting the NELs, appears to lack merit. TBELs,
including NELs, pertain only to the quality of effluent discharges and are developed without regard to the potential
impact of discharges on the water quality of receiving waters. That potential impact is separately addressed by the
receiving water limitations or WQBELs under a subsequent section of the CGP. (AR 1796, 2153-2154. See
Weyerhaeuser Co. v. Costle (D.C. Cir. 1978) 590 F.2d 1011, 1041-1044.)

1 Petitioners contend that the Compliance Storm Event selected by the Board lacks
2 evidentiary support in the administrative record. In addition, petitioners contend that the
3 Compliance Storm Event is a component of the turbidity and pH NELs which must be evaluated
4 with the same factors used to assess BCT requirements for the NELs. Absent such assessment,
5 in petitioners' view, the Compliance Storm Event is invalid and unenforceable.

6 These issues are now moot in light of the court's invalidation of the turbidity and pH
7 NELs. Should the Board reconsider and adopt new turbidity and/or pH NELs in accordance with
8 CWA requirements for the development of TBELs, the size of a Compliance Storm Event,
9 exempting construction projects from compliance with the NELs, would be subject to the
10 Board's review and redetermination, and potentially to review by this court. Should the Board
11 not reconsider and adopt new NELs, the Compliance Storm Event would have no function, and
12 its review by the court would have no use.

13 Debris Prohibition

14 Under the CGP, construction projects are prohibited from discharging debris
15 resulting from construction activities on the construction site. (AR 1771, 1785.) As examples of
16 debris, the CGP lists "litter, rubble, discarded refuse, and remains of destroyed inorganic
17 anthropogenic waste." (AR 1771.) Petitioners characterize this prohibition as a "debris NEL of
18 zero" and contend that the Board established the NEL without identifying and explaining its
19 basis in technical studies and data.

20 The CGP's prohibition on discharges of debris is, as the Board points out, based on
21 the CWA's general prohibition on the discharge of pollutants into U.S. waters except as
22 authorized by an NPDES permit. (33 U.S.C. § 1311(a).) On its face, the total prohibition on the
23 discharge of debris is consistent with the purpose of the CWA, to eliminate all discharges of
24 pollutants, including pollutants such as garbage, chemical wastes, biological materials, industrial
25 wastes and discarded equipment. (33 U.S.C. §§ 1251, 1362(6).)

26 In addition, the total prohibition on debris discharges is evidently feasible when
27 considered in the context of the Good Site Management "Housekeeping" BMPs that all
28 construction projects covered by the CGP are required to use in minimizing or preventing

1 pollutants. (AR 1863, 1876, 1896.) Such BMPs include measures for waste management that
2 focus on the containment of waste and the prevention of discharges containing waste. (AR
3 1864-1865, 1877-1878, 1897-1898.) Thus, the total prohibition is a reasonable exercise of the
4 Board's permitting authority under the CWA to issue the CGP.

5 Porter-Cologne

6 As indicated above under "Regulatory Framework," the Board may not adopt any
7 discharge prohibitions, limitations or conditions in the CGP which are less stringent than the
8 prohibitions, limitations or conditions established under the CWA to control or eliminate
9 discharges of pollutants into U.S. waters. (33 U.S.C. § 1370; 40 C.F.R. §§ 122.4, 124.1.) The
10 Board may, however, adopt any discharge prohibitions, limitations or conditions under state law
11 that are consistent with or more stringent than those established under the CWA. (*Ibid.*) In
12 particular, the Board may prescribe general waste discharge requirements under Porter-Cologne,
13 the equivalent of general NPDES permits (Wat. Code § 13374), that are more stringent than
14 CWA requirements for NPDES permits. (See Wat. Code § 13263, subs. (i), (j); 13377.)
15 Should the Board adopt waste discharge requirements more stringent than CWA requirements, it
16 must comply with Porter-Cologne procedures for the adoption of waste discharge requirements,
17 including the procedure for consideration of factors listed in Water Code section 13241. (Wat.
18 Code § 13263, subs. (a), (j). See *Burbank v. State Water Resources Control Bd.* (2005) 35
19 Cal.4th 613, 626-627.) These factors include economic considerations. (Wat. Code § 13241,
20 subd. (d).)

21 Petitioners contend that a number of the Board's adopted requirements in the CGP
22 are more stringent than the requirements for NPDES permits under the CWA and, therefore, the
23 Board was required but failed to consider the factors in Water Code section 13241 before
24 adopting the CGP. Specifically, petitioners note that no federal statutory or regulatory standard
25 establishes numeric limitations for pH and turbidity like those in the CGP. The EPA has not
26 promulgated an ELG establishing numeric limitations, and the EPA's Permit for Stormwater
27 Discharges from Construction Activities establishes narrative effluent limitations implemented
28

1 by BMPs which, according to petitioners, are less demanding than the pH and turbidity NELs in
2 the CGP.

3 Similarly, petitioners contend that no federal statutory or regulatory standard
4 prescribes an absolute prohibition on storm water and non-storm water discharges of debris from
5 construction sites comparable to the prohibition on the discharge of debris in the CGP.
6 Petitioners indicate that no federal standard prescribes any requirements comparable to the
7 requirements in the CGP for the Compliance Storm Event exemption from the NELs; for
8 receiving water monitoring by Risk Level 3 construction projects which discharge directly into
9 the waters and which have violated a NEL; or for bioassessment monitoring of receiving waters
10 by Risk Level 3 construction projects which discharge directly into the receiving waters and
11 which disturb 30 acres or more. In petitioners' view, any CGP condition adopted by the Board
12 in the absence of a comparable CWA condition is more stringent than CWA requirements and
13 properly triggers the Board's consideration of Section 13241 factors.

14 --NELs

15 The CGP Fact Sheet states that the Section 13241 factors need not be considered by
16 the Board for the pH and turbidity NELs and other requirements imposed by the CGP because
17 those requirements are not more stringent than federal requirements. (AR 2088.) As detailed in
18 this proceeding, this statement is correct.

19 The Board correctly indicates that the CWA requirement for TBELs is satisfied by
20 either narrative or numeric limitations developed on a case-by-case basis using best professional
21 judgment when no applicable ELG has been promulgated by the EPA. (See 33 U.S.C. §
22 1311(b), 1342(a)(1); 40 C.F.R. §§ 122.2 ("effluent limitation"), 122.44(k), 125.3(c)(2).) A
23 TBEL under the CWA, whether narrative or numeric, is a restriction on the discharge of
24 pollutants into U.S. waters designed to protect the quality of the waters. (*Ibid.*) A numeric
25 TBEL or NEL that restricts the discharge of pollutants from construction sites for the protection
26 of water quality, when properly developed by the Board on a case-by-case basis using best
27 professional judgment, is no stricter than a narrative TBEL developed with the same protective
28 water quality goal when a numeric TBEL is not feasible. (See 40 C.F.R. § 122.44(k)(3).) The

1 precision, clarity, and enforceability of a numeric TBEL may be greater than a narrative TBEL –
2 hence the regulatory preference for a numeric TBEL when feasible (*Ibid.*; AR 2021, 2088, 2145-
3 2146) – but the level of restriction and degree of water quality protection achieved is intended to
4 be the same.

5 The lack of a numeric ELG for pH or turbidity does not indicate that the pH and
6 turbidity NELs in the CGP are more stringent than CWA requirements.¹⁰ When the EPA has
7 promulgated an ELG for a specific pollutant, a TBEL in an NPDES permit must incorporate that
8 ELG; when the EPA has not promulgated an ELG for the pollutant, a TBEL in an NPDES permit
9 for the pollutant must be developed by the state writing and issuing the permit on a case-by-case
10 basis using its best professional judgment. (33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44(a)(1),
11 125.3(c).) The state develops the TBEL in the same manner as the ELG would be developed by
12 the EPA, identifying and assessing pollution control technology to determine the degree of
13 attainable effluent reduction. (33 U.S.C. §§ 1314(b), 1342(a)(1); 40 C.F.R. § 125.3(c)(2), (d).)
14 The resulting TBEL is intended to be comparable in degree of effluent reduction to that of an
15 ELG developed in the same manner, not more stringent.

16 Likewise, the narrative TBELs in the EPA’s NPDES General Permit for Stormwater
17 Discharges from Construction Activities (Exhibit 1 to Request for Judicial Notice in Support of
18 Petitioners’ Opening Brief, pp. 9-12) do not provide a standard by which to measure whether the
19 pH and turbidity NELs in the CGP are more stringent than the CWA requirement for TBELs.
20 The narrative TBELs to be met through BMPs under the EPA’s NPDES General Permit do not
21 apply to construction projects covered by the CGP, issued and enforced by California in lieu of
22 the EPA’s NPDES General Permit. (See 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 123.1.) The pH
23 and turbidity NELs in the CGP, when properly developed by the Board under the CWA, comply
24 with and do not exceed the TBEL requirements under the CWA.

25 --*Debris*

26
27 ¹⁰ As set forth in Footnote 2, *ante*, the EPA has stayed implementation of a numeric turbidity ELG of 280
28 NTU, issued by the EPA in 2009 for discharges from construction and development point sources. The EPA is
currently seeking additional data to adequately characterize the performance of pollution control technology before
proposing a revised numeric turbidity ELG. (<http://water.epa.gov/scitech/wastetech/guide/construction/index.cfm>.)

1 The CGP prohibition on the discharge of debris resulting from construction activities
2 (AR 1785) implements the general CWA prohibition on the discharge of pollutants into U.S.
3 waters except as authorized by an NPDES permit. (See 33 U.S.C. § 1311(a).) As defined by the
4 CWA, pollutants include garbage, industrial waste and discarded equipment. (U.S.C. § 1362
5 (6).) Such pollutants reasonably include debris, detailed in the CGP as “litter, rubble, discarded
6 refuse, and remains of destroyed inorganic anthropogenic waste.” (AR 1771.) The Board’s
7 decision not to authorize any discharge of debris from construction sites falls squarely within and
8 is not more stringent than the general prohibition on discharges of pollutants in the CWA.

9 --*Compliance Storm Event*

10 The Compliance Storm Event is defined in the CGP as a five year/24 hour storm.
11 (AR 1794, 1916, 2092-2093.) Upon the occurrence of such a storm, construction site projects
12 covered by the CGP are exempted from compliance with the pH and turbidity NELs imposed in
13 the CGP. This exemption is based on a determination that the pollution control technology on
14 which the numeric TBELs are required to be based is not capable of controlling storm water
15 discharges produced by a storm of that size.

16 By limiting the obligation of Risk Level 3 construction projects to comply with the
17 pH and turbidity NELs imposed in the CGP, the Compliance Storm Event eases rather than
18 increases the obligation to comply with the NELs, an obligation which itself does not exceed
19 CWA requirements when the NELs are properly developed. In these circumstances, the
20 Compliance Storm exemption does not plausibly exceed CWA requirements.

21 --*Bioassessment*

22 The CGP requirements for receiving water monitoring and bioassessment monitoring
23 by certain Risk Level 3 construction projects comply with CWA regulatory requirements.
24 Pursuant to those requirements, NPDES permits include monitoring of storm water and
25 authorized non-storm water discharges from construction sites to assure compliance with permit
26 conditions. (40 C.F.R. § 122.44(i).) As discussed in the following sections of this ruling, the
27 Board made determinations, that (1) monitoring of receiving waters by a Risk Level 3
28 construction project discharging directly into the receiving waters after the project violates a

1 NEL and (2) bioassessment monitoring of receiving waters by a Risk Level 3 construction
2 project disturbing 30 or more acres and discharging directly into receiving waters are necessary
3 to assure compliance with receiving water limitations, that assess the effects of sediment in
4 discharges from construction sites on aquatic life in the receiving waters, and as necessary,
5 support enforcement actions. (AR 1676, 1679, 1683.) Thus, the receiving water and
6 bioassessment monitoring requirements in the CGP comply with the CWA requirement for
7 inclusion of monitoring provisions in NPDES permits and do not exceed CWA requirements.

8 In sum, petitioners do not establish that any requirements in the CGP exceed CWA
9 requirements. Hence, the Board is not required to consider the Section 13241 factors pursuant to
10 Porter Cologne before adopting the CGP.

11 Receiving Water Monitoring

12 Petitioners contend that no substantial evidence in the administrative record supports
13 the CGP requirement for the monitoring of receiving waters by a Risk Level 3 construction
14 project discharging directly into the waters after the project has exceeded and violated a NEL.
15 Petitioners contend that the CGP, its Fact Sheet and the Board's responses to significant
16 comments merely state and restate the monitoring requirement without explaining how the Board
17 determined that the requirement is necessary.

18 Contrary to petitioners' contention, substantial evidence in the administrative record
19 supports the Board's determination that the monitoring requirement is reasonable and necessary
20 to ensure compliance with receiving waters limitations by the Risk Level 3 construction projects
21 subject to the requirement. (AR 2100.) Exceedance of a NEL provides a clear indication that
22 storm water and authorized non-storm water discharges directly from a construction project to
23 receiving waters potentially threaten the quality of the receiving waters and trigger corrective
24 action by the project to manage the exceedance and to achieve compliance with the NEL and its
25 CWA goal and function of protecting water quality. (AR 1675, 1685, 1686, 1906, 1908, 1916.)
26 Because the monitoring requirement applies only to a project directly discharging to receiving
27 waters, the discharge can be accurately traced to obtain data specific to discharges from the
28

1 project site. (AR 2133, 1724, 6415, 6668-6669, 6758, 6910.) In addition, the data can help to
2 clarify how NELs relate to the overall goal of water quality protection. (AR 1685.)

3 Bioassessment Monitoring

4 The CGP requires Risk Level 3 construction projects that disturb 30 or more acres
5 and discharge directly to receiving waters to conduct bioassessments upstream and downstream
6 of the project's point of discharge to the receiving waters before and after the project. (AR 1775,
7 1908, 1957.) Petitioners contend that the bioassessment monitoring requirement lacks adequate
8 explanation and justification in the administrative record.

9 The record establishes that bioassessments are conducted to determine whether
10 significant degradation to the aquatic ecosystems and biota of the receiving waters has occurred
11 as a result of discharges of sediment from construction sites. (AR 1676, 1683, 1775, 1908, 1957-
12 1960, 2100.) Bioassessments are also conducted to evaluate the effectiveness of the effluent
13 limitations and waste discharge requirements and to facilitate enforcement actions. (AR 1676,
14 3082.)

15 Large, high risk construction projects discharging directly to receiving waters are
16 required to conduct bioassessments because, as indicated in referenced EPA documents, those
17 projects pose a significant risk to water quality. (AR 1679.) Bioassessments by smaller projects
18 are not required because they may not yield accurate data. (1685.) Thus the bioassessment
19 monitoring requirement is reasonably explained and substantially justified in the administrative
20 record as an appropriate exercise of the Board's permitting authority. (See 40 C.F.R. §§
21 122.44(i), 122.48.)

22 Post-Construction Requirement

23 Under the CGP, construction projects must use storm water management measures to
24 reduce run-off from project sites after project completion. Projects must install BMPs and
25 establish a long-term maintenance plan to match the volume of post-construction run-off with the
26 volume of pre-construction run-off up to the 85th percentile storm. (AR 1776, 1800-1801,
27 2111.) Projects must also implement post-construction BMPs to reduce pollutants in storm
28 water discharges that are reasonably foreseeable after all construction has been completed at the

1 site. (AR 1782,1800, 1955-1956, 2111-2119.) Termination of CGP coverage and requirements
2 is conditioned on a construction project's compliance with these post-construction requirements.
3 (AR 1782.)

4 Petitioners contend that the CGP's post-construction requirements exceed the scope
5 of the Board's permitting authority under the CWA. This authority, according to petitioners, is
6 limited to the permitting of discharges from construction sites during construction and ends upon
7 the completion of construction and termination of permit coverage.

8 Alternatively, petitioners contend that, because the post-construction requirements
9 exceed the scope of the Board's permitting authority under the CWA, the requirements are more
10 stringent than CWA requirements and must be evaluated under Porter-Cologne in accordance
11 with the factors in Water Code section 13421. Absent such an evaluation, in petitioners' view,
12 the Board's adoption of the post-construction requirements violates Porter-Cologne.

13 Neither of these alternative contentions has merit. The installation of post-
14 construction storm water management measures and the establishment of a long-term
15 maintenance plan to reduce post-construction storm water run-off from the construction site
16 occur prior to the completion of construction and the termination of permit coverage. The prior
17 CGP adopted by the Board required similar post-construction BMPs during the period of
18 coverage (AR 77, 2112), and the EPA's NPDES General Permit for Stormwater Discharges from
19 Construction Activities contains such a requirement. (Exhibit 1 to Request for Judicial Notice in
20 Support of Petitioners' Opening Brief, p. 10.) As explained in the Fact Sheet for the EPA's
21 permit: "The permit addresses only the installation of these [post-construction storm water
22 management] measures; not the ongoing operation and maintenance of them after cessation of
23 construction activities and final stabilization." (Exhibit 2 to Request for Judicial Notice in
24 Support of Petitioners' Opening Brief, pp. 30-32.)

25 The post-construction requirement of the CGP clearly falls within the purview of
26 NPDES permitting authority under the CWA and is not more stringent than federal standards.
27 Evaluation of the post-construction requirement in accordance with the factors in Water Code
28 section 13241 is not applicable.

1 Procedural Fairness

2 Petitioners contend that the Board adopted the CGP without complying with the
3 rulemaking procedures of the Administrative Procedure Act (“APA”; Gov. Code § 11340 et
4 seq.), specifically the public participation requirements of the CWA incorporated into the APA
5 by Government Code section 11353, subdivision (b)(4). (See 33 U.S.C. § 1342(a)(1); 40 C.F.R.
6 §§ 124.10, 124.11, 124.12, 124.17.) Petitioners claim that the public participation requirements
7 were violated a number of times: when they were prevented from commenting on data added by
8 Board staff to the statistical analysis supporting the NEL for turbidity in the Fact Sheet for the
9 CGP after the period for public comment on the CGP had closed; when they were prevented
10 from commenting on changes to the CGP recommended by Board staff and incorporated into the
11 CGP after the conclusion of testimony at the last public hearing on the CGP (AR 2008-2044);
12 when the Board failed to respond to their comments that the Board staff’s analysis and
13 calculation of the numeric TBELS for turbidity and pH contain errors (AR 7559ff., 8291ff.); and
14 when Board staff developed the numeric TBELs using information and data not provided to the
15 public for comment.

16 Contrary to petitioners’ contention, the APA rulemaking procedures do not apply to
17 the Board’s adoption of the CGP. The CGP is a quasi-adjudicatory permit reviewable by the
18 court under Water Code section 13330 and Code of Civil Procedure section 1094.5, not a quasi-
19 legislative regulation like a water quality control plan to which the APA applies. (See *State*
20 *Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 701-702.)

21 Public participation requirements of the CWA are applicable to the adoption of the
22 CGP. (See 40 C.F.R. §§ 125.25, 124.10-124.12, 124.14, 124.17.) Clearly aware of their
23 applicability (see, e.g., AR 2076), the Board properly invited, heard, considered and revised
24 provisions of the CGP in response to public comments received during each succeeding iteration
25 of the CGP between 2006 and 2009. (See AR 485-487, 641, 779-781, 830-832, 833-1055, 1408-
26 1410, 1436-1535, 1651-1762, 2122-2371, 8162.) Contrary to petitioners’ contention, their
27 comments on Change Sheet #1 were heard and considered at length by the Board at the public
28 meeting on September 2, 2009, prior to the Board’s adoption of the draft CGP. (AR 2245-2280.)

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RULING

The petition is granted in part. A peremptory writ of mandate shall issue from this court requiring the Board to (1) set aside that portion of its CGP imposing a turbidity NEL and a pH NEL on Risk Level 3 construction project sites; (2) refrain from enforcing any turbidity or pH NEL unless and until the Board adopts a turbidity NEL and/or a pH NEL developed on the basis of specified BCT assessed in accordance with the factors specified in Section 304(b)(4)(B) of the Clean Water Act (33 U.S.C. § 1314(b)(4)(B)), and (3) upon such adoption of a turbidity NEL and/or a pH NEL, determine the appropriate size of a Compliance Storm Event exemption, if any, from the NELs. In all other respects, the petition is denied, and the CGP is effective and enforceable.

Counsel for petitioners is requested to prepare a proposed order and a proposed writ of mandate consistent with this ruling.

Dated: December 2, 2011



Lloyd G. Connelly

LLOYD G. CONNELLY
JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the **RULING ON SUBMITTED MATTER** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:


LISABETH D. ROTHMAN
BRADLEY J. HERREMA
KARI NIEBLAS VOZENILEK
BROWNSTEIN HYATT FARBER
2029 CENTURY PARK EAST #2100
LOS ANGELES, CA 90067-3007

RUSSELL B. HILDRETH
ATTORNEY GENERAL
PO BOX 944255
SACRAMENTO, CA 94244-2550

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: December 5, 2011

By: C. BEEBOUT, 
Deputy Clerk