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FILED
ALAMEDA COUNTY

JUL 10 2015
CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

15 **CALIFORNIA COASTKEEPER**
16 **ALLIANCE, a California non-profit**
17 **corporation,**

Petitioner,

v.

20 **STATE WATER RESOURCES CONTROL**
21 **BOARD, a California State Agency,**

Respondent.

23 **CALIFORNIA METALS COALITION;**
24 **CALIFORNIA CONSTRUCTION AND**
25 **INDUSTRIAL MATERIALS**
26 **ASSOCIATION; CALIFORNIA LEAGUE**
OF FOOD PROCESSORS; AND
CALIFORNIA MANUFACTURERS AND
TECHNOLOGY ASSOCIATION,

Intervenors.

Case No. RG14724505

[PROPOSED] JUDGMENT

Judge: Hon. George C. Hernandez, Jr.

Dept.: 17

Action Filed: May 8, 2014

1 This matter came on for hearing on May 7, 2015 before the Honorable George C.
2 Hernandez, Jr., Judge of the Superior Court, Alameda County. Drevet Hunt and Caroline Koch
3 appeared for Petitioner California Coastkeeper Alliance. Deputy Attorney General Daniel S.
4 Harris and Deputy Attorney General Anita E. Ruud appeared for Respondent California State
5 Water Resources Control Board. William W. Funderburk, Jr. and Katharine E. Wagner appeared
6 for Intervenors California Metals Coalition, et al.

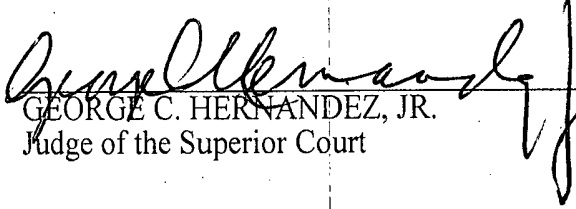
7 Upon briefing by the parties and the arguments of counsel at the hearing, the matter was
8 submitted for decision by the Court. The Court issued an Order Denying Petition for Writ of
9 Mandate on June 3, 2015. This Order contained a proposed Statement of Decision that has been
10 modified after the Court held a hearing on July 7, 2015 on the parties' comments to the proposed
11 Statement of Decision.

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

13 1. Judgment is rendered on the terms set forth in the Court's Statement of Decision filed on
14 July 10 2015 denying the Petition for Writ of Mandate, which is attached hereto and incorporated
15 herein.

16 2. Respondent to recover its costs, if any, to the extent permitted by law in an amount to be
17 determined by the usual and appropriate procedural requirements.

18
19 DATED: *July 10, 2015*


20 GEORGE C. HERNANDEZ, JR.
21 Judge of the Superior Court

22
23 SF2014902386
24 Coastkeeper - Proposed Judgment -07-09-15.doc
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26
27
28

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing JUDGMENT to be served and mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Drevet Hunt
Lawyers for Clean Water, Inc.
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Los Angeles Waterkeeper
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Santa Monica, CA 90401

I declare under penalty of perjury that the same is true and correct.
Executed on July 15, 2015.

By: 

Yolanda Estrada, Deputy Clerk
Department 17



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FILED
ALAMEDA COUNTY

JUL 10 2015

CLERK OF THE SUPERIOR COURT

By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CALIFORNIA COASTKEEPER ALLIANCE,

Petitioner,

v.

STATE WATER RESOURCES CONTROL
BOARD,

Respondent.

Case No. RG14-724505

STATEMENT OF DECISION

The petition of California Coastkeeper Alliance (“Petitioner”) came on for hearing on May 7, 2015, in Department 17 of this Court, the Honorable George C. Hernandez presiding. On June 3, 2015, the Court issued an order and proposed statement of decision. The parties thereafter submitted comments on the proposed statement of decision.

STATEMENT OF DECISION

The petition for a writ of mandate directing the State Water Resources Control Board (the “Board”) to vacate the National Pollutant Discharge Elimination System General Permit for

1 Storm Water Discharges Associated with Industrial Activity Order No. 2014-0057 (the “2014
2 General Permit”) is DENIED.

3
4 EVIDENCE.

5 The court has reviewed the Declaration of Drevet Hunt and related exhibits filed
6 12/16/14 and the Second Declaration of Drevet Hunt and related exhibits filed 3/13/15. The
7 court GRANTS the implied motions to supplement the record and implied requests for judicial
8 notice.

9
10 At the hearing on 5/7/15, counsel for the Board requested judicial notice of Board Order
11 WQ 2010-0012-EXEC, which voided Board Order WQ 2009-0008. The court GRANTS the
12 request for judicial notice. The Court ORDERS the Board to file Board Order WQ 2010-0012-
13 EXEC in a separate filing.

14
15 FACTUAL BACKGROUND.

16 In 1990, the US EPA, acting under the Clean Water Act, promulgated regulations that
17 prohibited discharges of storm water without a National Pollutant Discharge Elimination System
18 (“NPDES”) permit. (33 USC 402(p); 40 CFR 122.26.) The Clean Water Act requires that a
19 state board renew its permits every five years. (33 USC 1342(b)(1)(B).)
20

21 In 1990, the Board adopted its first General Permit for the discharge of storm water
22 related to industrial activity.

23 In 1997, the Board adopted a new General Permit for the discharge of storm water
24 related to industrial activity. (the “1997 Permit”). (AR6157-6235.)
25
26

1 In the early 2000s, the Board began the process of preparing a new General Permit. (AR
2 5862.)

3 On 9/29/08 the US EPA issued the Multi-Sector General Permit for Stormwater
4 Associated with Industrial Discharges (the "MSGP") (AR 9631-9784 [fact sheet]; AR 9785-
5 10031 [MSGP].)

6 In 2011, 2012, 2013, and 2014, the Board circulated drafts of a proposed General Permit.
7 Each time the Board circulated a draft it informed the public of the draft and permitted the public
8 to comment.

9 On 4/1/14, the Board adopted the 2014 General Permit. (AR 5949.) The Board notified
10 the US EPA of the proposed state action and the US EPA had the opportunity to comment on or
11 object to the proposal. (33 USC 1342(d)(1) and (2); *Historic Green Springs, Inc. v. U.S. E.P.A.*
12 (W.D. Va., 2010) 742 F.Supp.2d 837, 852-853.) The EPA did not object to the proposed 2014
13 General Permit.
14

15 The 2014 General Permit limits Storm Water Discharges Associated with Industrial
16 Activity in relevant part through the following means:

- 17 • Section V (Effluent Limitations) (5970-5971) requires dischargers to implement Best
18 Management Practices (BMPs) that comply with the Best Available Technology
19 Economically Achievable (BAT) and Best Conventional Pollutant Control Technology
20 (BCT) requirements of the General Permit.
21
- 22 • Section VI (Receiving Water Limitations) (AR5971) requires dischargers to ensure that
23 industrial storm water discharges do not cause or contribute to an exceedance of any
24 applicable water quality standards in any affected receiving water. If a discharger or a
25 Regional Water Board discovers that discharges are in violation of Receiving Water
26

1 Limitations, then the discharger must conduct an investigation, assess the facility's Storm
2 Water Pollution Prevention Plan (SWPPP) and its implementation to determine whether
3 additional measures are necessary to reduce or prevent pollutants, and report the results.
4 (AR 6017-6018 [General Permit]; 6048 [fact sheet].) The US EPA's MSGP uses similar
5 limitations and corrective measures. (AR 9748 [fact sheet]; AR 9805-9808 [MSGP].)

- 6 • Section VII (Total Maximum Daily Loads (TMDLs)) (AR 5971-5972) states that the
7 Board shall reopen and amend this General Permit, ... in order to incorporate TMDL-
8 specific permit requirements. The Permit states that the State and Regional Water Board
9 staff will develop TMDL-specific permit requirements for public comment by July 1,
10 2016. (AR 5957, 6051.) The US EPA's MSGP similarly states that the EPA can grant a
11 permit under the MSGP and at a later date inform dischargers of any additional limits or
12 controls that are necessary for the discharge to be consistent with any TMDL. (AR 9638,
13 9658-9659[fact sheet]; AR 9806 [MSGP].)

- 14 • Section X (Storm Water Pollution Prevention Plan (SWPPP)) (AR5974-5983) requires
15 dischargers to develop and implement a site-specific SWPPP for each industrial facility
16 covered by the General Permit. Section X describes the Best Management Practices
17 (BMPs) that must be implemented. (AR5980-5986.) 40 CFR 122.44(k)(2) permits the
18 use of BMPs instead of numeric effluent limitations for storm water discharges. The US
19 EPA's MSGP also uses BMPs as a standard. (AR 9672-9685 [fact sheet]; AR 9802-9805
20 [MSGP])

- 21 • Section XI (Monitoring) (AR5987-5998) requires dischargers to (1) visually observe
22 drainage areas both monthly and after Qualifying Storm Events and (2) collect samples
23
24
25
26

1 from drainage areas after 4 Qualifying Storm Events.¹ The US EPA's MSGP has similar
2 monitoring requirements. (AR 9721-9752, especially 9748 [fact sheet]; 9809-9811,
3 9822-9829 [MSGP]).

- 4 • Section XII (Exceedance Response Actions) (AR 5998-6005) states that dischargers must
5 compare their sampling results to the stated Numeric Action levels (NALs) and then take
6 certain corrective actions if the samples exceed the NALs. The US EPA's MSGP has a
7 similar procedure. (AR9824-9827.)
8
9

10 STANDARD OF REVIEW

11 The Board issued a general permit under Water Code 13377. (AR 6040.) Petitioner filed
12 this action under Water Code 13330(a). The petition is not under CEQA, as the Board's
13 decision to adopt a NPDES General Permit is exempt from CEQA. (Water Code 13389.) Water
14 Code 13330(e) states:

15 (e) Except as otherwise provided herein, Section 1094.5 of the Code of Civil
16 Procedure shall govern proceedings for which petitions are filed pursuant to this
17 section.

18 The court will follow the plain text of the statute and review the petition under CCP 1094.5.²

19 The court notes that the General Permit appears to be substantially more like a quasi-
20 legislative regulation than the quasi-judicial application of a rule to a specific set of existing

21 ¹ As part of a SWPPP, a discharger must maintain a Monitoring Implementation Plan.
(AR 5987.)

22 ² The second sentence of Water Code 13330(e) states: "For the purposes of subdivision
23 (c) of Section 1094.5 of the Code of Civil Procedure, the court shall exercise its independent
24 judgment on the evidence in any case involving the judicial review of a decision or order of the
25 state board issued under Section 13320, or a decision or order of a regional board for which the
26 state board denies review under Section 13320, other than a decision or order issued under
Section 13323." The Board did not issue the General Permit under section 13320, so this
sentence does not apply in this case and the court does not exercise its independent judgment
when reviewing the evidence.

1 facts. Therefore, in the absence of specific legislative direction the court would have concluded
2 that the writ should be under CCP 1085. (*California Water Impact Network v. Newhall County*
3 *Water Dist.* (2008) 161 Cal.App.4th 1464, 1482; *Joint Council of Interns & Residents v. Board*
4 *of Supervisors* (1989) 210 Cal.App.3d 1202, 1209-1210.) The court will, however, follow the
5 specific legislative direction in Water Code 13330(e).
6

7 BACKGROUND LAW.

8 *Communities for a Better Environment*, 109 Cal.App.4th at 1092-1096 sets out much of
9 the statutory and regulatory background for this case. *Communities for a Better Environment*,
10 states:
11

12 In 1972, Congress enacted the Federal Water Pollution Control Act ..., commonly
13 known as the Clean Water Act (CWA). ... The goal of the CWA is “to restore and
maintain the chemical, physical, and biological integrity of the Nation's waters.”

14 Generally, the CWA “prohibits the discharge of any pollutant except in
15 compliance with one of several statutory exceptions. [Citation.]” ... The most
16 important of those exceptions is pollution discharge under a valid NPDES permit,
17 which can be issued either by the Environmental Protection Agency (EPA), or by
an EPA-approved state permit program such as California's. ... NPDES permits
are valid for five years. ...

18 Under the CWA's NPDES permit system, the states are required to develop *water*
19 *quality standards*. ... A water quality standard “establish[es] the desired condition
20 of a waterway.” ... A water quality standard for any given waterway, or “water
body,” has two components: (1) the designated beneficial uses of the water body
and (2) the *water quality criteria* sufficient to protect those uses. ...

21 NPDES permits establish effluent limitations for the polluter. ... CWA's NPDES
22 permit system provides for a two-step process for the establishing of effluent
23 limitations. First, the polluter must comply with *technology-based effluent*
24 *limitations*, which are limitations based on the best available or practical
technology for the reduction of water pollution. ...

25 Second, the polluter must also comply with more stringent *water quality-based*
26 *effluent limitations* (WQBEL's) where applicable. In the CWA, Congress
“supplemented the 'technology-based' effluent limitations with 'water quality-

1 based' limitations 'so that numerous point sources, despite individual compliance
2 with effluent limitations, may be further regulated to prevent water quality from
falling below acceptable levels.' ” ...

3 Water quality standards do more than provide the basis for deriving effluent
4 limits. The standards also are instrumental in identifying bodies of water which
5 are impaired by the cumulative discharges of pollutants. The CWA requires the
6 states to identify all bodies of water for which technologically-based effluent
limitations are insufficient to maintain water quality standards. (33 U.S.C. §
1313(d)(1)(A); see 40 C.F.R. § 130.7 (2002).)

7 For all such identified water bodies, and for all appropriate pollutants discharged
8 therein, the state must establish a *total maximum daily load* (TMDL), which
9 defines the maximum amount of the pollutant which can be discharged-or
10 “loaded”-into the body of water from all combined pollution sources. (40 C.F.R. §
11 130.2(i) (2002); see *Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57
F.3d 1517, 1520.) A TMDL is “a written, quantitative plan and analysis for
attaining and maintaining water quality standards in all seasons for a specific
waterbody and pollutant.” (40 C.F.R. § 130.2(h) (2002).)

12 A TMDL must be “established at a level necessary to implement the applicable
13 water quality standards” (33 U.S.C. § 1313(d)(1)(C).) A TMDL assigns a
14 *waste load allocation* (WLA) to each point source, which is that portion of the
15 TMDL's total pollutant load, which is allocated to a point source for which an
16 NPDES permit is required. (40 C.F.R. § 130.2(g) (2002).) Once a TMDL is
developed, effluent limitations in NPDES permits must be consistent with the
WLA's in the TMDL. (§ 122.44(d)(1)(vii)(B).) In fact, a WLA in a completed
TMDL is a type of WQBEL. (40 C.F.R. § 130.2(h) (2002).)

17 CLAIMS ASSERTED

18 Petitioner makes six distinct arguments:

- 19
- 20 I. Petitioner asserts as a matter of law that the Clean Water Act requires a permit to include
21 limits on the amount of a pollutant that can be discharged into waterways consistent with
22 any applicable TMDL waste load allocation for the waterway. (33 USC 1342(b)(1);
23 122.44(d)(1).) (See also *Communities for a Better Environment v. State Water Resources*
24 *Control Bd.* (2003) 109 Cal.App.4th 1089, 1095-1096.)
- 25
26

1 2. Petitioner asserts as a matter of fact that the 2014 General Permit fails to include required
2 limits on the amount of a pollutant that can be discharged into waterways consistent with
3 any applicable TMDL.

4 3. Petitioner asserts as a matter of fact that the 2014 General Permit does not have findings
5 that support and explain the Board's decision that the 2014 General Permit would not
6 include limits on the amount of a pollutant that can be discharged into waterways
7 consistent with any applicable TMDL waste load allocation. (*Topanga Assn. for a Scenic*
8 *Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-522.)

9 4. Petitioner asserts as a matter of law that the CWA requires the General Permit to include
10 monitoring provisions sufficient to determine compliance with all the terms of the permit.
11 (40 CFR 122.44(i)(1) and 122.48(b)) (See also *Natural Resources Defense Council, Inc.*
12 *v. County of Los Angeles* (9th Cir., 2013) 725 F.3d 1194, 1207.)

13 5. Petitioner asserts as a matter of fact that the 2015 General Permit does not include the
14 required monitoring provisions.

15 6. Petitioner asserts that the General Permit does not have findings that support and explain
16 that the monitoring provisions are sufficient to determine compliance with the terms of
17 the Permit. (*Topanga Assn.*, 11 Cal.3d at 514-522.)
18
19
20

21 CLAIM #1 – DOES THE LAW REQUIRE A PERMIT TO SET EFFLUENT LIMITS
22 CONSISTENT WITH AVAILABLE WASTE LOAD ALLOCATIONS?

23 The court holds as a matter of law that when the Board issues a general permit under 40
24 CFR 122.28 that 40 CFR 122.44(d)(1) allows the Board to defer setting effluent limits consistent
25
26

1 with available waste load allocations. This is a legal question, so the court applies its
2 independent judgment.

3 *Communities for a Better Environment*, 109 Cal.App.4th at 1092-1096, explains that a
4 TMDL “defines the maximum amount of the pollutant which can be discharged-or “loaded”-into
5 the body of water from all combined pollution sources” and then states, “A TMDL assigns a
6 *waste load allocation* (WLA) to each point source, which is that portion of the TMDL's total
7 pollutant load, which is allocated to a point source for which an NPDES permit is required.”

8 Similarly, *Sierra Club v. Hankinson* (11th Cir., 2003) 351 F.3d 1358, 13591360, explains:
9

10 Under the CWA, every state must categorize the designated uses of each body of
11 water in its territory and set appropriate water quality standards based upon those
12 uses. 33 U.S.C. § 1313(a)-(c). In addition, every discharger of a pollutant from a
13 discrete, “point” source must obtain a National Pollutant Discharge Elimination
14 System (NPDES) permit from the EPA (or an approved state agency) that
15 specifies the exact level of discharge permitted. *Id.* at § 1342. ... States are
16 expected to implement TMDLs through a combination of appropriately stringent
17 point source permits and other measures aimed at non-point sources.

18 The purpose of establishing TMDLs and WLAs is to regulate individual dischargers
19 (point sources of pollution). 40 CFR 130.2(h) and (i) state:

20 (h) Wasteload allocation (WLA). The portion of a receiving water's loading
21 capacity that is allocated to one of its existing or future point sources of pollution.
22 WLAs constitute a type of water quality-based effluent limitation.

23 (i) Total maximum daily load (TMDL). The sum of the individual WLAs for
24 point sources and LAs for nonpoint sources and natural background. If a receiving
25 water has only one point source discharger, the TMDL is the sum of that point
26 source WLA plus the LAs for any nonpoint sources of pollution and natural
background sources, tributaries, or adjacent segments.

27 Petitioner argues that if there is an existing TMDL with an existing WLA and if the
28 Board issues a NPDES permit, then the Board must include effluent limitations consistent with

1 any existing WLA in any such permit. The Board argues that the regulations allow it to defer
2 setting effluent limits consistent with available waste load allocations.

3 The court starts with the text of the regulation. 40 CFR 122.44(d)(1)(vii)(B) states, with
4 emphasis added:

5 In addition to the conditions established under § 122.43(a), *each NPDES permit*
6 *shall include conditions meeting the following requirements when applicable. ...*

7 (d) Water quality standards and State requirements: any requirements in addition
8 to or more stringent than promulgated effluent limitations guidelines or standards
under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

9 (1) Achieve water quality standards established under section 303 of the CWA,
10 including State narrative criteria for water quality. ...

11 (vii) *When developing water quality-based effluent limits under this paragraph*
12 *the permitting authority shall ensure that: ...*

13 (B) *Effluent limits* developed to protect a narrative water quality criterion, a
14 numeric water quality criterion, or both, *are consistent with the assumptions and*
requirements of any available wasteload allocation for the discharge prepared by
the State and approved by EPA pursuant to 40 CFR 130.7 [TMDLs].

15 The plain text of the regulation states that each NPDES permit must, when developing water
16 quality-based effluent limits, include effluent limits that are consistent with the assumptions and
17 requirements of any available WLA approved by EPA pursuant to a TMDL. The plain text of
18 the regulation does not, however, address the issue of timing or otherwise require that each
19 NPDES permit must at the time the permit is issued include effluent limits that are consistent
20 with any available WLA.
21

22 The court then considers case law. Case law states generally that where there is an
23 existing and available TMDL with a waste load allocation (“WLA”), any new NPDES permit
24 must be consistent with the WLA. *Communities for a Better Environment*, 109 Cal.App.4th at
25 1096, states, “Once a TMDL is developed, effluent limitations in NPDES permits must be
26

1 consistent with the WLA's in the TMDL.” Similarly, *Dioxin/Organochlorine Center v. Clarke*
2 (9th Cir. 1995) 57 F.3d 1517, 1520, states, “When a TMDL and specific wasteload allocations for
3 point sources have been established, any NPDES permits issued to a point source must be
4 consistent with the terms of the TMDL and WLA.” These cases did not, however, consider or
5 address the issue before this court regarding deferral of factual investigation, consideration of
6 any WLA, and imposition of more stringent requirements as necessary to comply with the WLA.

7 *Assateague Coastkeeper v. Maryland Dept. of Environment* (Md. App., 2011) 200
8 Md.App. 665, 719-721, 28 A.3d 178, 210-212, is factually similar to this case and suggests that a
9 water board can issue a NPDES general permit and at later dates conduct a more thorough
10 investigation of individual dischargers to determine their compliance with a WLA and require
11 more specific conditions. In *Assateague Coastkeeper* the court held that 40 CFR 122.44(d) did
12 not require a general permit to include site specific Nutrient Management Plans where the Final
13 Decision Maker at the Maryland Department of the Environment stated that “the imposition of
14 WQBELs is likely to be quite site-specific and therefore may be more appropriately imposed
15 through the NOI process” and concluded that the general permit “adequately ensure[d] that
16 discharges do not cause or contribute to a violation of water quality standards.”
17

18
19 The court considers the EPA’s interpretation of 40 CFR 122.44(d)(1)(vii)(B). It is well
20 established that the court will defer to an agency’s interpretation of its own regulations. (*Decker*
21 *v. Northwest Environmental Defense Center* (2013) 133 S.Ct. 1326, 1337.)³ The MSGP states
22 that the EPA will notify dischargers if they might be subject to individual permits based on the
23 TMDL of a waterway and the waste load attributable to the discharger. The MSGP states:
24

25 ³ (See also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir.,
26 2013) 725 F.3d 1194, 1207 [deferring to Regional Board when determining legality of permit
issued to county entities].)

1 Existing Discharge to an Impaired Water with an EPA Approved or Established
2 TMDL. If you discharge to an impaired water with an EPA approved or
3 established TMDL, EPA will inform you if any additional limits or controls are
4 necessary for your discharge to be consistent with the assumptions of any
5 available wasteload allocation in the TMDL, or if coverage under an individual
6 permit is necessary in accordance with Part 1.6.1.

7 (AR 9806 [MSGP].) The MSGP fact sheet explained the reasoning as follows:

8 *Wasteload Allocations.* The eligibility provisions do not include language from
9 the proposal relating to wasteload allocations (WLAs), which would have made
10 an operator ineligible from coverage under the MSGP when a TMDL applies to
11 the operator and specifically articulates a WLA requiring more stringent controls
12 than required by this permit, or applies a WLA of zero (0) to its discharge.

13 *Changes from Proposed Permit:* The proposed eligibility condition was deleted.
14 ... EPA also believes that it is inappropriate to expect an operator to obtain a copy
15 of an applicable TMDL document and then determine, based on the operator's
16 reading of that TMDL, what additional control measures are necessary to be
17 consistent with the assumptions of that TMDL. EPA has concluded that omitting
18 this condition is justified in light of permit language in the NOI and Part 2.2.2 that
19 now requires the operator to identify whether or not it discharges to a waterbody
20 with a TMDL and then placing the burden on EPA to assess whether any more
21 stringent requirements are necessary to comply with the WLA, or whether an
22 individual permit may be necessary.

23 (AR 9658 [fact sheet].) Therefore, the US EPA determined that it could issue NPDES permits
24 under the MSGP and defer to a later date whether more stringent requirements were necessary to
25 comply with a WLA. The EPA said that it would, if necessary, inform persons that they needed
26 an individual permit. This strongly suggests that US EPA's interpretation of the regulations is
that a permit need not immediately direct dischargers to comply with available WLAs and can
instead defer individualized examination of dischargers to a later date.

Considering the text of the regulation, the case law, and the EPA's interpretation of its
own regulations, the court holds that 40 CFR 122.44(d)(1)(vii)(B) permits a water board to issue
a general permit that allows it to defer the examination of individual dischargers to determine
whether their effluents are consistent with available WLAs and, if appropriate, to impose more

1 stringent requirements as might be necessary to comply with the WLA. The text of the
2 regulation does not directly address the issue before the court. The case law is inconsistent, but
3 *Assateague Coastkeeper* most directly considers the issue before this court and it suggests that a
4 water board can defer an examination of compliance with WLAs. The EPA's interpretation of
5 its own regulations is ultimately the most persuasive tool in interpreting the regulations. "[T]he
6 agency's interpretation must be given " 'controlling weight unless it is plainly erroneous or
7 inconsistent with the regulation.' " ... This broad deference is all the more warranted when, as
8 here, the regulation concerns "a complex and highly technical regulatory program," in which the
9 identification and classification of relevant "criteria necessarily require significant expertise and
10 entail the exercise of judgment grounded in policy concerns." (*Thomas Jefferson University v.*
11 *Shalala* (1994) 512 U.S. 504, 512.) (See also *Southern California Cement Masons Joint*
12 *Apprenticeship Committee v. California Apprenticeship Council* (2013) 213 Cal.App.4th 1531,
13 1541-1542.)
14

15
16 CLAIM #2 – DOES THE GENERAL PERMIT COMPLY WITH THE LAW REGARDING
17 LIMITING POLLUTANTS TO COMPLY WITH TMDLs?

18 The court finds that the 2014 General Permit does not violate the law. The 2014 General
19 Permit's compliance with 40 C.F.R. § 122.44 (d)(1)(vii) is a legal question, so the court applies
20 its independent judgment.
21

22 The 2014 General Permit does not require that individual dischargers limit their effluent
23 to be consistent with available WLAs. Instead, the 2014 General Permit states that the State and
24 Regional Water Board staff will develop TMDL-specific permit requirements for public
25 comment by July 1, 2016. (AR 5957, 6051.)
26

1 This is lawful because, as held above, 40 CFR 122.44(d)(1)(vii)(B) permits a water board
2 to defer the examination of individual dischargers, the determination of whether their effluents
3 are consistent with available WLAs and, if appropriate, the imposition of such requirements as
4 might be necessary to comply with the WLA. The Board's 2014 General Permit at paragraph 40
5 is "[c]onsistent with the 2008 MSGP." (AR 5957.) Giving deference to the US EPA's
6 interpretation of its own regulations and the Board's decision to follow the approach taken by the
7 US EPA, the court finds that the Board did not violate 40 C.F.R. § 122.44 (d)(1)(vii) when the
8 Board deferred setting TMDL-specific permit requirements.

9
10 Petitioner argues that the above analysis is flawed because of a material factual difference
11 between the General Permit and both the MSGP and the general permit approved by the court in
12 the *Assateague* case. The alleged difference is that under General Permit a discharger can get a
13 NPDES permit that is not consistent with an existing WLA whereas under the MSGP and the
14 general permit approved by the court in the *Assateague* case a discharger's NPDES permit can
15 be delayed until the agency has determined whether there is an applicable WLA and set
16 conditions to meet the goals of any applicable WLA.

17
18 General Permit. Under the General Permit, a Discharger can apply for Notice of Intent
19 (NOI) coverage or No Exposure Certification (NEC) coverage by submitting Permit Registration
20 Documents to the Board. (AR 5964.) The Permit Registration Documents for NOI coverage
21 require the Discharger to state whether the Discharger's storm water flows directly or indirectly
22 to any water and to identify the name of any receiving water (AR 6112) as well as to provide
23 information on the locations of nearby water bodies and the locations of storm water conveyance
24 systems and the direction of flow (AR 6113). The Permit Registration Documents for NEC
25 coverage require the Discharger to provide information on the locations of nearby water bodies
26

1 and the locations of storm water conveyance systems and the direction of flow (AR 6117). The
2 Permit Registration Documents do not require a Discharger to undertake any analysis of whether
3 the Discharger is in compliance with any applicable WLA for any receiving water. The Board
4 can certify the Permit Registration Documents and issue the Discharger a Waste Discharger
5 Identification Number without undertaking the analysis of whether any additional permit
6 requirements are needed to comply with any applicable WLA for any receiving water.

7 The State and Regional Water Board staff will develop TMDL-specific permit
8 requirements for public comment by July 1, 2016. The General Permit states:

9
10 The proposed TMDL-specific permit requirements shall have no force or effect
11 until adopted, with or without modification, by the State Water Board. *Consistent*
12 *with the 2008 MSGP*, Dischargers are not required to take any additional actions
13 to comply with the TMDLs listed in Attachment E until the State Water Board
14 reopens this General Permit and includes TMDL-specific permit requirements,
15 unless notified otherwise by a Regional Water Board.

16 (AR 5957 [emphasis added].) (See also (AR 6048-6052 [Fact sheet]; See especially AR 6051
17 ["This approach is consistent with the 2008 MSGP."].) Under the General Permit it appears that
18 the State and Regional Water Board staff will develop TMDL-specific permit requirements by
19 July 1, 2016, but that the General Permit allows the Board to issue general NOI permits even
20 though the Board may at a later date obtain new information and issue more specific and
21 restrictive permit terms.

22 The MSGP. Under the MSGP, the EPA can issue a Notice of Intent (NOI) permit to a
23 discharger without undertaking the analysis of whether the discharger discharges to a waterway
24 with TMDL. (AR 9796-9797.) The EPA may delay any authorization for further review and
25 request additional information. (AR 9798 fn 1.) Regarding discharges to TMDL waterways, the
26 MSGP states:

1 EPA expects that compliance with the other conditions in this permit will control
2 discharges as necessary to meet applicable water quality standards. If at any time
3 you become aware, or EPA determines, that your discharge causes or contributes
4 to an exceedance of applicable water quality standards, you must take corrective
5 action as required in Part 3.1, document the corrective actions as required in Parts
6 3.4 and 5.4, and report the corrective actions to EPA as required in Part 7.2.

7 (AR 9805.) Under the MSGP it appears that the EPA will develop TMDL-specific permit
8 requirements as information comes to its attention, but that the MSGP allows the EPA to issue
9 general NOI permits even though the EPA may at a later date obtain new information and issue
10 more specific and restrictive permit terms.

11 Assateague Coastkeeper. In *Assateague Coastkeeper v. Maryland Dept. of Environment*
12 (Md. App., 2011) 200 Md.App. 665, 719-721, 28 A.3d 178, 210-212, the Maryland Department
13 of Environment issued a general permit. Under that general permit a discharger could file a
14 Notice of Intent (NOI) seeking a permit. The case suggests that the state agency could issue
15 general permits and then conduct further investigation to determine whether a WLA applied and,
16 if so, to impose further restrictions. The Final Decision Maker at the Maryland Department of
17 the Environment stated that “the imposition of WQBELs is likely to be quite site-specific and
18 therefore may be more appropriately imposed through the NOI process, including the approval of
19 the [Comprehensive Nutrient Management Plan]. The NOI process is a reasonable way to
20 identify facilities that could cause or contribute to water quality impairments and to require
21 additional WQBELs.” (*Id.*, 200 Md. App. at 731, 28 A.3d at 211.) This suggests that under the
22 general permit in *Assateague Coastkeeper* that the state entity could issue a NPDES permit to a
23 discharger without undertaking substantial analysis and at a later time address whether additional
24 requirements were needed to fully achieve the TMDL.

25 Based on the above, the court finds that the General Permit is certainly comparable to the
26 EPA’s MSGP and therefore lawful under the EPA’s regulations. In addition, it appears that the

1 General Permit is comparable to the general plan in *Assateague Coastkeeper* and lawful for that
2 reasoning as well. In the event the court is misreading *Assateague Coastkeeper*, the court would
3 find the analysis in that case less persuasive than the similarities between the MSGP and the
4 General Permit.

5
6 CLAIM #3 - DOES THE GENERAL PERMIT ADEQUATELY STATE ITS FACTUAL
7 BASIS AND EXPLAIN THE BOARD'S REASONING REGARDING LIMITING
8 POLLUTANTS TO COMPLY WITH TMDLS?
9

10 Petitioner asserts that the General Permit does not have the findings that support and
11 explain the Board's decision to defer setting discharger specific effluent limits to comply with
12 applicable WLAs. *Topanga*, 11 Cal.3d at 515, states:

13 [I]mplicit in section 1094.5 is a requirement that the agency which renders the
14 challenged decision must set forth findings to bridge the analytic gap between the
15 raw evidence and ultimate decision or order.... By focusing ... upon the
16 relationships between evidence and findings and between findings and ultimate
action, the Legislature sought to direct the reviewing court's attention to the
analytic route the administrative agency traveled from evidence to action.

17 (See also *Scott B. v. Board of Trustees of Orange County High School of Arts* (2013) 217
18 Cal.App.4th 117, 122; *Eureka Teachers Assn. v. Board of Education* (1988) 199 Cal.App.3d 353,
19 367-368.) The court finds that (1) substantial evidence supports the findings of the Board, (2)
20 the findings support the Board's action, and (3) the Board described the analytic route it traveled
21 from evidence to action.

22
23 In the public comment period, the Board set out the facts and explained its decision to
24 defer setting TMDL-specific permits for individual polluters. (AR 6048-6052.) In the 2014
25 General Permit, the Board stated in the "Findings" section that:
26

1 38. ... Discharges addressed by this General Permit are considered to
2 be point source discharges, and therefore must comply with effluent limitations
3 that are “consistent with the assumptions and requirements of any available waste
load allocation for the discharge prepared by the state and approved by U.S. EPA
pursuant to ... 40 C.F.R. § 122.44 (d)(1)(vii). ...

4 39. ... Due to the number and variety of Dischargers subject to a wide
5 range of TMDLs, development of TMDL-specific permit requirements for each
6 TMDL listed in Attachment E will severely delay the reissuance of this General
7 Permit. ...

8 40. State and Regional Water Board staff will develop proposed
9 TMDL-specific permit requirements (including monitoring and reporting
10 requirements) for each of the TMDLs listed in Attachment E. ... [T]he Regional
11 Water Boards will submit to the State Water Board proposed TMDL-specific
12 permit requirements for adoption by the State Water Board into this General
13 Permit by July 1, 2016.

14 (AR 5956-5957.) In the Fact Sheet, the Board again explained its reasoning. (AR 6048-6052.)

15 The General Permit was factually supported and reasonable given the goal of issuing a
16 general permit promptly and the possibility that there might be a protracted process of
17 investigating how the effluent from individual dischargers affects waterways with TMDLs and
18 developing individual effluent limitations for individual dischargers to comply with the
19 applicable WLAs. (*Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.* (1st Cir.,
20 2012) 690 F.3d 9, 14 fn 8 [“TMDLs take time and resources to develop and have proven to be
21 difficult to get just right”]; 43 Fed.Reg. 60,662, 60,665 (Dec. 28, 1978) [“EPA recognizes that
22 State development of TMDL's and wasteload allocations for all water quality limited segments
23 will be a lengthy process”].)

24 CLAIM #4 – WHAT DOES THE LAW REQUIRE REGARDING MONITORING
25 PROVISIONS?
26

27 Petitioner asserts that as a matter of law the CWA requires the General Permit to include
28 monitoring provisions sufficient to assure compliance with permit limitations. (33 USC
29 1342(a)(2); 40 CFR 122.44(i)(1).) Petitioner further clarified in its Reply Brief at 2:24-25 and at
30

1 the hearing that Petitioner's argument is not that the regulations require a discharger to monitor
2 the receiving water but that the Board has the discretion in determining how dischargers must
3 monitor the receiving water.

4 *Natural Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir., 2013) 725
5 F.3d 1194, 1207, explains the statutory and regulatory background:

6 [T]he Clean Water Act *requires* every NPDES permittee to monitor its discharges
7 into the navigable waters of the United States in a manner sufficient to determine
8 whether it is in compliance with the relevant NPDES permit. 33 U.S.C. §
9 1342(a)(2); 40 C.F.R. § 122.44(i)(1) (“[E]ach NPDES permit shall include
10 conditions meeting the following ... monitoring requirements ... to assure
11 compliance with permit limitations.”). That is, an NPDES permit is unlawful if a
12 permittee is not required to effectively monitor its permit compliance.

13 ... As we have previously recognized, “[t]he NPDES program fundamentally
14 relies on self-monitoring.” [] *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d
15 1480, 1491 (9th Cir.1987), *vacated and remanded on other grounds*, 485 U.S.
16 931, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *and reinstated and amended by* 853
17 F.2d 667 (9th Cir.1988). Congress' purpose in adopting this self-monitoring
18 mechanism was to promote straightforward enforcement of the Act. *See id.* at
19 1492 (noting that Congress wished to “avoid the necessity of lengthy fact finding,
20 investigations, and negotiations at the time of enforcement. Enforcement of
21 violations of requirements under this Act should be based on relatively narrow
22 fact situations requiring a minimum of discretionary decision making or delay”)
23 (quoting S.Rep. No. 92-414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972
24 U.S.Code Cong. & Ad. News 3668, 3730).

25 The Clean Water Act gives the EPA substantial discretion in issuing regulations
26 regarding what monitoring requirements must be in permits. The Clean Water Act's section on
the NPDES, (33 USC 1342(a)(2), states that the US EPA “shall prescribe conditions for such
permits ..., including conditions on data and information collection, reporting, and such other
requirements *as he deems appropriate*.” (Emphasis added.) Similarly, the Clean Water Act's
section on records and reports, (33 USC 1318)(a)(A) states that “[w]hen required to carry out
the objective of this chapter” ... “(A) the Administrator shall require the owner or operator of

1 any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install,
2 use, and maintain such monitoring equipment or methods ..., (iv) sample such effluents ..., and
3 (v) provide such other information *as he may reasonably require.*" (Emphasis added.) Therefore,
4 in the context of issuing NPDES permits and collecting records and reports Congress stated that
5 the EPA was required to impose "data and information collection" and "reporting" requirements
6 only "as [the EPA] deems appropriate" and was required to require records and reports only "as
7 [the EPA] may reasonably require."

8 The EPA's regulations state that when monitoring is applicable that permits must include
9 some monitoring provisions. 40 CFR 122.43(a), 122.44(i), and 122.48(b) govern what
10 monitoring regulations must be in permits. 40 CFR 122.43(a) states, with emphasis added:
11

12 [T]he Director *shall establish conditions*, as required on a case-by-case basis, to
13 provide for *and assure compliance* with all applicable requirements of CWA and
14 regulations. These shall include conditions under ... 122.48 (monitoring),

15 40 CFR 122.44(i)(1) states, with emphasis added:

16 In addition to the conditions established under § 122.43(a), each NPDES permit
17 *shall include conditions* meeting the following requirements *when applicable*. ...

18 (i) Monitoring requirements. In addition to § 122.48, the following monitoring
19 requirements:

20 (1) *To assure compliance with permit limitations*, requirements to monitor:

21 (i) The mass (or other measurement specified in the permit) for each pollutant
22 limited in the permit;

23 (ii) The volume of effluent discharged from each outfall;

24 (iii) Other measurements as appropriate including pollutants in internal waste
25 streams under § 122.45(i); pollutants in intake water for net limitations under §
26 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under §
122.45(e); pollutants subject to notification requirements under § 122.42(a); and
pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503;
or as determined to be necessary on a case-by-case basis pursuant to section
405(d)(4) of the CWA.

1 (iv) According to sufficiently sensitive test procedures (i.e., methods) approved
2 under 40 CFR part 136 for the analysis of pollutants or pollutant parameters or
3 required under 40 CFR chapter I, subchapter N or O.

4 40 CFR 122.48(b)states:

5 All permits shall specify: ... (b) Required monitoring including type, intervals, and
6 frequency sufficient to yield data which are representative of the monitored
7 activity including, when appropriate, continuous monitoring;

8 The court must give effect to all the words in the regulations. Petitioner focuses on the
9 words “shall” and the phrase “assure compliance” and reasons that a permit both (1) “shall” have
10 some means of measuring compliance with each requirement in the permit and (2) that the means
11 of measuring compliance must be sufficient to “assure compliance.” Petitioner equates “assure
12 compliance” with “ensure compliance” and argues that the monitoring requirements in a permit
13 must ensure strict compliance with the permit limitations.

14 The court holds that the phrases “shall establish conditions” and “shall include
15 conditions” both compel the conclusion that a permitting agency is required to include some
16 means of measuring compliance with each requirement in the permit. This is consistent with the
17 common meaning of “shall.” (*Plata v. Brown* (9th Cir., 2014) 754 F.3d 1070, 1081 [“shall”
18 indicates a mandatory command].) The plain language of the words “shall” as applied in these
19 regulations is also consistent with the observation in *Natural Resources Defense Council*, 725
20 F.3d at 1207, that the NPDES program relies on self monitoring.

21 The court holds that use of the phrase “assure compliance” in the regulations does
22 not mean that any permit issued under the regulations must have monitoring requirements
23 that will ensure strict compliance with the permit limitations. The court holds that the
24 monitoring conditions must be designed to monitor compliance effectively and as
25 implemented must monitor compliance effectively.
26

1 The court starts with the text of 40 CFR 122.43(a) and 122.44(i)(1). The context
2 of the phrases “to provide for *and assure compliance*” and “To assure compliance with
3 permit limitations” suggests that they both are prefatory statements of purpose rather than
4 requirements. In *District of Columbia v. Heller* (2008) 554 U.S. 570, 577-578, the Court
5 addressed the import of the prefatory clause in the Second Amendment (“A well
6 regulated Militia, being necessary to the security of a free State”) and held that it did not
7 not limit or expand the scope of the operative clause (“the right of the people to keep and
8 bear Arms, shall not be infringed”). In another example, the preamble to the United
9 States Constitution states that it is “to ensure domestic tranquility,” but that is a statement
10 of purpose and does not limit or expand the following operative provisions. Just as the
11 preamble to the constitution does not control the interpretation of laws passed by the
12 Congress under Article I of the Constitution, the preamble to 40 CFR 122.44(i)(1) does
13 not control the interpretation of the requirements in the remainder of the regulation or the
14 terms of NPDES permits.
15

16 The phrase “assure compliance” in 40 CFR 122.43(a) and 40 CFR 122.44(i)(1)
17 appears to be drawn from 33 USC 1342(a)(2). Where a statute and its implementing
18 regulations use the same words, principles of consistent statutory and regulatory
19 interpretation suggests that they be given the same meaning. 33 USC 1342(a)(2) states:
20

21 The Administrator shall prescribe conditions for such permits *to assure*
22 *compliance* with the requirements of paragraph (1) of this subsection, including
23 conditions on data and information collection, reporting, and such other
24 requirements as he deems appropriate.

25 Interpreting this phrase, *Natural Resources Defense Council, Inc. v. County of Los*
26 *Angeles* (9th Cir. 2013) 725 F.3d 1194, 1207, stated, “an NPDES permit is unlawful if a

1 permittee is not required to effectively monitor its permit compliance.” This suggests
2 that the monitoring requirements in a permit meet the goal of “assuring compliance” if
3 they monitor compliance effectively.

4 The specific word “assure” means to state something with confidence or to
5 remove doubt about the matter at issue. Petitioner argues that the phrase “To assure
6 compliance with permit limitations” means that the regulations as applied must ensure
7 compliance with permit limitations. There is, however, a difference between assure and
8 ensure. “Assure” is an expression of confident intent, whereas “ensure” means to
9 guaranty or to make certain. In the context of the regulations, the word “assure” or, more
10 specifically, the phrase “to assure,” means that the goal of the regulations is to provide
11 confidence that any permit will monitor compliance effectively.
12

13 The text of 40 CFR 122.44(i) as a whole also suggests that the phrase “assure
14 compliance” does not require all NPDES permits to ensure compliance with receiving
15 water limitations. The monitoring requirements identified in 40 CFR 122.44(i)(1) and 40
16 CFR 122.44(i)(4) all concern either measurements in an industrial facility or at an outfall.
17 This suggests that the regulations anticipated that permits would require monitoring of a
18 similar nature.
19

20 The court will give substantial deference to the EPA’s interpretation of its own
21 regulations, so the court considers how the EPA interpreted and applied 40 CFR 122.44(i) when
22 the EPA adopted the MSGP. (*Thomas Jefferson University*, 512 U.S. at, 512; *Southern*
23 *California Cement Masons*, 213 Cal.App.4th at 1541-1542.)

24 The US EPA’s MSGP starts by noting that there is more to “monitoring” than the actions
25 that are in the “Monitoring” section. The MSGP states:
26

1 EPA modified the organization of this permit to separate monitoring (Part 6) from
2 reporting and recordkeeping requirements (Part 7). Also, inspections have been
3 relocated to Part 4 (Inspections). Also, corrective actions taken in response to
4 certain monitoring situations (e.g., benchmark monitoring exceedances) have
been moved to Part 3 (Corrective Actions) with the exception of follow-up
monitoring requirements resulting from any exceedance of an effluent limitation
contained in the permit.

5 (AR 9721.)

6 The MSGP addresses both outfalls and water quality in the receiving waters. The MSGP
7 states that dischargers must select, design, install, and implement control measures (including
8 best management practices) to restrict the effluent from outfalls (AR 9801-9805) and also states
9 that discharges must be controlled as necessary to meet applicable water quality standards (AR
10 9805). (See also Fact Sheet AR 9667-9688 [control measures]; AR9688-9690 [water quality
11 standards].)

12
13 Regarding the need for monitoring of the water quality in receiving waters, the MSGP
14 states:

15 EPA expects that compliance with the other conditions in this permit will control
16 discharges as necessary to meet applicable water quality standards.

17 Additionally, EPA may impose additional water quality-based limitations on a
18 site-specific basis, or require you to obtain coverage under an individual permit, if
19 information in your NOI, required reports, or from other sources indicates that
your discharges are not controlled as necessary to meet applicable water quality
standards.

20 (AR 9805-9806.) Regarding the possibility that a discharger has an existing discharge to an
21 impaired water with an EPA approved or established TMDL, the MSGP states:

22 If you discharge to an impaired water with an EPA approved or established
23 TMDL, EPA will inform you if any additional limits or controls are necessary for
24 your discharge to be consistent with the assumptions of any available wasteload
25 allocation in the TMDL, or if coverage under an individual permit is necessary in
26 accordance with Part 1.6.1.

(AR 9806.)

1 The monitoring requirements in the US EPA's MSGP require dischargers to test their
2 outfalls but do not require dischargers to monitor the quality of receiving waters. (AR 9722-
3 9723 [fact sheet; AR 9809-9811, 9822-9829 [MSGP].) The EPA's MSGP states:

4 Beginning in the first full quarter following April 1, 2009 or your date of
5 discharge authorization, whichever date comes later, you must monitor once per
6 year at each outfall (except substantially identical outfalls) discharging
stormwater to impaired waters without an EPA approved or established TMDL.

7 (AR 9828 [MSGP].) (See also AR 9748-9751 [fact sheet].) The EPA's MSGP places the
8 burden on the EPA to inform an operator that it must limit its discharges to comply with the
9 restrictions of a WLA. The EPA's fact sheet summarizes:

10 Each operator is required to indicate in his/her NOI whether the facility's
11 discharge is to an impaired water, and, if so, what are the pollutants identified as
12 causing the impairment. Following the submittal of the NOI, EPA will assess each
13 NOI to determine what, if any, monitoring requirements apply under Part 6.2.4.
14 Based on this examination, EPA will notify each permittee of their impaired
waters monitoring requirements.

15 (AR 9748 [fact sheet].)

16 The content of the MSGP strongly suggests that the US EPA interprets 40 CFR 122.43(a)
17 and 122.44(i) such that if a general permit requires a discharger to control discharge "as
18 necessary to meet applicable water quality standards," then the general permit can meet the
19 requirement for monitoring that will "assure compliance with permit limitations" by having a
20 combination of monitoring, recordkeeping, and inspection requirements related to the permit
21 conditions that the EPA expects will control discharges as necessary to meet applicable water
22 quality standards.

23 The court has considered the cases cited by the parties. *Natural Resources Defense*
24 *Council*, 725 F.3d at 1207, is relevant to the interpretation of the phrase "to assure compliance."
25 The others cases are not relevant to the statutory interpretation issues.
26

1 The court concludes that 40 CFR 122.43(a) and 122.44(i) require a permit to both (1)
2 include some means of measuring compliance with each requirement in the permit and (2) that
3 the monitoring, recordkeeping, and inspection requirements be designed to monitor compliance
4 effectively and as implemented must monitor compliance effectively.

5
6 CLAIM #5 - DOES THE GENERAL PERMIT COMPLY WITH THE LAW REGARDING
7 MONITORING PROVISIONS?

8 Petitioner asserts that the 2014 General Permit does not include the required monitoring
9 provisions. Petitioner's argument has three steps: (1) 2014 General Permit at Section VI (A) is a
10 limitation that requires dischargers to ensure that industrial storm water discharges do not cause
11 or contribute to an exceedance of any applicable water quality standards in any affected
12 receiving water (AR5971); (2) 40 CFR 122.44(i)(1) requires that a permit must include a
13 requirement to monitor that will assure compliance with the permit's limitations; and (3) the
14 2014 General permit does not include the monitoring required by 40 CFR 122.44(i)(1).
15

16 Petitioner is correct that the 2014 General Permit at Section VI(A) requires dischargers to
17 ensure that industrial storm water discharges do not cause or contribute to an exceedance of any
18 applicable water quality standards in any affected receiving water. (AR 5971.)
19

20 Petitioner is not correct in its proposed interpretation of the regulations. 40 CFR
21 122.43(a) and 122.44(i) do not require that permits include monitoring requirements that ensure
22 compliance with permit limitations. 40 CFR 122.43(a) and 122.44(i) require a permit to both (1)
23 include some means of measuring compliance with each requirement in the permit and (2) that
24 the monitoring, recordkeeping, and inspection requirements be designed to monitor compliance
25 effectively and as implemented must monitor compliance effectively.
26

1 Petitioner is not correct that the 2014 General Permit lacks any monitoring,
2 recordkeeping, and inspection requirements related to the receiving waters. The existence of
3 those requirements is a question of law that the court reviews de novo. The 2014 General Permit
4 includes monitoring conditions. Monitoring is not limited to actions identified as “monitoring”
5 and can include inspections, monitoring, and recordkeeping. (AR 9721.) The General Permit’s
6 central focus is Sections V (Effluent Limitations) and Section X (Storm Water Pollution
7 Prevention Plan (SWPPP), which require dischargers to use BMPs to reduce or remove
8 pollutants from the outflows that lead to receiving waters. (AR 5970-5971, 5974-5987.) The
9 required inspections, monitoring, and recordkeeping include:

- 11 • Section X (SWPPP), requires that SWPPPs have a Monitoring Implementation Plan.
12 (AR 5987.)
- 13 • Section XI (Monitoring) requires dischargers to monitor the discharges from their
14 outflows. The required monitoring is (1) to visually observe drainage areas both monthly
15 and after Qualifying Storm Events and (2) to collect samples from drainage areas after 4
16 Qualifying Storm Events. (AR 5987-5998.)
- 17 • Section XV (Annual Evaluation) requires dischargers to conduct an annual evaluation
18 that includes: (A) “A review of all sampling, visual observation, and inspection records
19 conducted during the previous reporting year” and (F) “A review and effectiveness
20 assessment of all BMPs for each area of industrial activity and associated potential
21 pollutant sources to determine if the BMPs are properly designed, implemented, and are
22 effective in reducing and preventing pollutants in industrial storm water discharges and
23 authorized NSWDS.”
24 authorized NSWDS.”

1 The General Permit Fact Sheet explains these requirements further. (AR 6055 [SWPPP and
2 inspections]; AR 6068-6081 [monitoring]; AR 6094 [Annual Evaluation/ Annual Report].)⁴

3 More specifically, the 2014 General Permit states that the monitoring conditions are
4 designed to monitor the water quality in the receiving waters. The Fact Sheet states:

5 J. Monitoring and Reporting Requirements

6 1. General Monitoring Provisions

7 This General Permit requires Dischargers to develop and implement a facility-
8 specific monitoring program. Monitoring is defined as visual observations,
9 sampling and analysis. The monitoring data will be used to determine:

- 10 a. Whether BMPs addressing pollutants in industrial storm water
11 discharges and authorized NSWDS are effective for compliance with
12 the effluent and receiving water limitations of this General Permit.

13 (AR 6069 [emphasis added.]

14 The General Permit states that the Board concluded that the visual observations, sampling
15 and analysis of the BMPs and outflows would permit the Board to evaluate whether the
16 limitations in the General Permit were effective for compliance with the receiving water
17 limitations of the General Permit. The Board therefore expected that the monitoring of the
18 outflow, although indirect, would monitor the water quality in the receiving waters.

19 Petitioner is not correct that the 2014 General Permit lacks monitoring, recordkeeping,
20 and inspection requirements that are designed to monitor compliance effectively and, when
21 implemented, can reasonably be expected to monitor compliance effectively. The adequacy of
22 the requirements in the General Permit is a fact question that is subject to the Board's discretion
23 and is reviewed under the substantial evidence standard. There is substantial evidence to support
24 a finding that the 2014 General Permit requires monitoring that is designed to monitor permit
25 compliance effectively.

26 ⁴ The monitoring required in the General Permit tracks the monitoring required by 40
CFR 122.44(i)(4): the discharger must annually inspect the facility for compliance with the
SWPPP and maintain records of compliance and any incidents of non-compliance.

1 First, the General Permit states expressly that the Board expected that the monitoring,
2 recordkeeping, and inspection requirements will be adequate to monitor compliance with the
3 receiving water limitations effectively. Addressing the topic of receiving waters in the Fact
4 Sheet, the 2014 General Permit states:

5 Pursuant to CWA section 301(b)(1)(C) and Water Code section 13377, this
6 General Permit requires compliance with receiving water limitations based on
7 water quality standards. The primary receiving water limitation requires that
8 industrial storm water discharges not cause or contribute to an exceedance of
9 applicable water quality standards. *Implementation of the BMPs as required by
10 the technology-based effluent limitation in Section V of this General Permit will
11 typically result in compliance with the receiving water limitations.*

12 (AR6048 [emphasis added].) The General Permit's statement that compliance with the
13 effluent limitations "will typically result in compliance with the receiving water
14 limitation," reflects the Board's evaluation and opinion that the monitoring directly
15 related to the effluent limitations is also sufficient monitoring for the receiving water
16 limitations. The court is not inclined to second-guess an agency's stated opinion on a
17 technical issue that is within the scope of an agency's expertise. (*Sonoma County Water
18 Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33, 41 and 52;
19 *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th
20 1018, 1042.)

21 Second, the monitoring, recordkeeping, and inspection requirements in the General
22 Permit are substantially similar to those in the EPA's MSGP. As with the General Permit, the
23 MSGP has effluent limitations and relies principally on the use of SWPPPs and BMPs to control
24 effluents. (AR 9801-9807, 9814-9821.) As with the General Permit, the MSGP requires that
25 dischargers not impair the receiving waters, stating, "Your discharge must be controlled as
26 necessary to meet applicable water quality standards." (AR 9805.) As with the General Permit,

1 the MSGP relies on inspections of facilities (AR 9809-9814), Monitoring of outfalls (AR 9818-
2 9819, 9822-9829), and Reporting and Recordkeeping (AR 9830-9835) to monitor directly the
3 effectiveness of the effluent limitations and to monitor indirectly the effectiveness of the
4 receiving water limitations. The fact sheet to the MSGP explains that at present the EPA does
5 not know which dischargers discharge to which waterbodies, so the EPA must collect
6 information through the permitting process before it can determine which dischargers discharge
7 into water bodies that have TMDLs and then determine which dischargers should be subject to
8 water quality based effluent limitations. (AR 9686-9687.) As with the General Permit, the
9 MSGP states that compliance with the SWPPPs and other conditions in the permit “will result in
10 discharges that are controlled as necessary to meet applicable water quality standards.” (AR
11 9688.)
12

13 The court will defer to an agency’s interpretation of its own regulations. (*Decker*, 133
14 S.Ct. at 1337.) The court presumes that the EPA decided that the EPA’s MSGP complied with
15 40 CFR 122.44(i). The Board’s General Permit includes inspection, monitoring, and
16 recordkeeping requirements that are similar to those in the MSGP, suggesting that the General
17 Permit similarly complies with 40 CFR 122.44(i).
18

19 Third, the court has independently considered that the General Permit is part of a
20 greater regulatory framework that includes the monitoring of receiving waters by state
21 and other entities. The Board’s responses to comments stated: “Additional surface water
22 monitoring that takes place under many other State Water Board programs will also help
23 to inform whether receiving water limitations are being attained.” (AR 5739.) (See also
24 AR 6812-6875 [Water Board’s “Surface Water Ambient Monitoring Program”].) The
25 record reflects that the Board has many means of monitoring the receiving waters and
26

1 suggests that the Board, in its discretion, decided that the General Permit did not need its
2 own separate and potentially duplicative regimen under which tens of thousands of
3 dischargers were each required to independently monitor the receiving waters. The
4 Board is apparently confident that as a result of the monitoring of the receiving waters
5 that exists independent of the General Permit it will have adequate information about the
6 health of the receiving waters to determine if and when to invoke the provisions of the
7 General Permit that permit the Board to require individual dischargers to undertake
8 additional measures to protect water quality.

9
10 The Board's access to other information about the quality of receiving waters is
11 particularly pertinent to Petitioner's implied argument that 40 CFR 122.44(i) requires not
12 just that permits must be designed to monitor permit compliance effectively but that they
13 must impose the burden of monitoring on the dischargers. If the Board determined that it
14 had access to adequate data about receiving waters through other sources (AR 5739,
15 6812-6875) and that it would not be efficient or effective to require dischargers to collect
16 data about receiving waters, then the Board could have reasonably decided that it was not
17 appropriate to require dischargers to monitor receiving waterways directly.

18
19 The court finds that there is substantial evidence to support the Board's
20 conclusion that the General Permit complies with the monitoring provisions in the Clean
21 Water Act and its implementing regulations.

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24 ///

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1 CLAIM #6 - DOES THE GENERAL PERMIT ADEQUATELY STATE ITS FACTUAL
2 BASIS AND EXPLAIN THE BOARD'S REASONING REGARDING MONITORING
3 REQUIREMENTS FOR RECEIVING WATERS?

4 Petitioner asserts that the General Permit does not have the findings that support and
5 explain that the monitoring provisions are sufficient to determine compliance with the terms of
6 the Permit. (*Topanga*. 11 Cal.3d at 510-515.) The court finds that (1) substantial evidence
7 supports the findings of the Board, (2) the findings support the Board's action, and (3) the Board
8 described the analytic route it traveled from evidence to action.

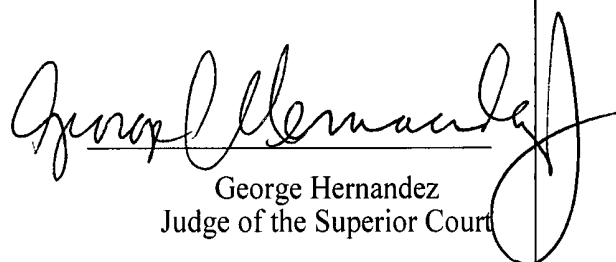
9
10 The General Permit and Fact Sheet explain what monitoring the General Permit
11 will require, that directly monitoring of the effluent limitations will determine compliance
12 with the receiving water limitations only indirectly (AR5955-5956), and that the Board
13 developed the proposed monitoring regimen as a means to methodically collect
14 information and to then impose additional requirements on individual dischargers as the
15 information may suggest (AR6017-6018). The administrative record also reflects that the
16 Board has other means to monitor the receiving waters. (AR 5739.)

17
18 Petitioner makes the implied argument that the monitoring would be more thorough and
19 effective if each discharger were required to monitor the receiving waters. That, however, is not
20 the issue. The court does not consider the effectiveness of the General Permit as long as it serves
21 the general purpose of and complies with the specific requirements of the pertinent statutes and
22 regulations. The Clean Water Act permitted the EPA to issue regulations based on what the EPA
23 considered to be "appropriate" or could be "reasonably require[d]" (33 USC 1342(a)(2); 33 USC
24 1318)(a)(A)), and the EPA's regulations permit the Board to balance various public policy
25 interests, such as protection of the environment, expense to the public of implementation, and
26

1 ease to the government of administration. A permit issued to protect clean water is not unlawful
2 or void because the Board does not require the maximum level of protection possible for clean
3 water without regard for expense or ease of administration.

4 Petitioner also makes the implied argument that the monitoring of the receiving water
5 limitations required by the General Permit are inadequate on their face because the General
6 Permit contains two admissions. The General Permit requires that dischargers monitor only their
7 effluent water quality characteristics and the General Permit acknowledges “compliance with the
8 receiving water limitations generally cannot be determined solely by the effluent water quality
9 characteristics.” (AR 5956) In addition, the General Permit states that the effluent limitations
10 “will typically result in compliance with the receiving water limitation” (AR6048), implicitly
11 acknowledging that the effluent limitations will not always result in compliance with the
12 receiving water limitation. These acknowledgments are not of any consequence. The Board
13 could reasonably conclude that occasional violations of water quality standards are permissible.
14 (*Anacostia Riverkeeper, Inc. v. Jackson* (D.D.C. 2011) 798 F.Supp.2d 210, 244-247.) The
15 General Permit’s discussion and acknowledgment of the factual, scientific, and economic issues
16 surrounding the permit and the resulting limitations on the effectiveness of the monitoring does
17 not demonstrate a deficiency in the General Permit. Rather, the discussion and the
18 acknowledgment of the limitations on the effectiveness of the monitoring is an example of
19 transparent and informed decision making by a public agency.
20
21

22
23 Dated: July 10, 2015

24 
25 George Hernandez
26 Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing STATEMENT OF DECISION to be served and mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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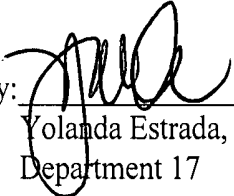
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I declare under penalty of perjury that the same is true and correct.
Executed on July 15, 2015.

By: _____


Yolanda Estrada, Deputy Clerk
Department 17