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Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



*Submitted via email to commentletters@waterboards.ca.gov
Email subject line: "Comment Letter – Phase II Small MS4 General Permit."*

Submittal of Comments on the Draft Tentative Order for the Phase II Small MS4 General Permit

Dear Ms. Townsend:

BNSF Railway is respectfully submitting comments with regard to the Notice of Opportunity for Public Comment specific to the Draft Tentative Order for "Draft General National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s)" (Draft General Permit). The regulations require the State Water Board to issue an NPDES permit for operators of Small MS4s. All information cited in relation to comments as they relate to the Draft General Permit (Fact Sheet, General Permit Order, Tables, and Attachments within General Permit) can be found at:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/phase_ii_municipal.shtml.

It is the policy of BNSF to operate so as to protect and enhance the environment, to protect the health and safety of employees and the communities in which BNSF operates, to comply with environmental laws and regulations, and to continuously improve BNSF environmental performance. BNSF is a leader in the rail industry for the protection of our air, land, and water. BNSF operates 30 facilities in California, 20 of which are covered under the Industrial General Permit. Additionally, BNSF owns numerous smaller facilities that are either leased to third parties or operated by BNSF, and which are covered as dischargers under the Phase II MS4 General Permit. As such, BNSF is a significant stakeholder for all proposed changes to environmental regulations in the state.

Background

California rail yards and rail facilities were created in the latter half of the 19th century, many being established in the period between 1885 and 1890. As common carriers, railroads are required under federal law to transport goods and materials delivered to the railroad by shippers between origination and destination points, similar to couriers. Railroads are regulated under federal and state Industrial General Permits as SIC Code 4011 or 4013, line-haul or switching operations, respectively, with permit coverage restricted to industrial activity associated with vehicle maintenance, including rehabilitation, mechanical repairs, painting, fueling, and lubrication, and other operations identified within the permit as associated with industrial activity. Industrial activity includes; rail lines used or traveled by carriers of raw materials, manufactured products, or waste material; sites used for the storage and maintenance of material handling equipment; shipping and receiving areas; and storage areas for raw materials, intermediate and finished products. Rail yards are also regulated under the statewide Construction General Permit for disturbances to soil greater than one acre.

Railroads are unique industries with unique facilities and operations. Rail yards can be characterized into two general types; classification yards and intermodal yards. Classification yards are typically unpaved yards, where the sorting of rail cars occurs to build trains for destination points. As most rail yards are, these yards have zero or nearly zero slopes, without any discharge “points”. Stormwater typically sheet flows across these types of yards, after having travelled across acres of unpaved soils until it finally flows offsite. These yards historically do not exceed EPA Benchmark values for any proposed action level or effluent limit, including conventional, nutrients, metals, and bacteria. This is most likely due to the fact that no manufacturing or transloading of materials occurs at these sites, along with infiltration and dilution of sheet flow.

Intermodal yards are typically paved facilities where the transfer of containers onto or off of trains and trucks occurs and trains are built, bound for destinations. These facilities also have zero or near zero slopes, and may have discreet stormwater inlets. Some of these facilities also have sheet flow. These yards historically do not exceed EPA Benchmark values for any proposed action level or effluent limit, including conventional, nutrients, metals, or bacteria. This is most likely due to the fact that no manufacturing or transloading of materials occurs at these sites, along with dilution of sheet flow.

Additionally, BNSF employs Best Management Practices where industrial activity is exposed to stormwater to reduce the discharge of pollutants.

The following sections clarify BNSF’s initial comments from the railroad industry perspective and identify issues that BNSF believes need to be addressed when designing the Phase II Small MS4 General Permit.

5.1 → **Issue # 1: The Proposed MS4 permit will create redundant regulations**

Rail yards that have industrial and construction activity disturbing greater than one acre of soil are already required to obtain permit coverage under the statewide Industrial General Permit or Construction General Permit, respectively. As previously cited, this includes industrial activity associated with vehicle maintenance, including rehabilitation, mechanical repairs, painting, fueling, and lubrication, and other operations identified within the permit as associated with industrial activity. Industrial activity includes; rail lines used or traveled by carriers of raw materials, manufactured products, or waste material; sites used for the storage and maintenance of material handling equipment; shipping and receiving areas; and storage areas for raw materials, intermediate and finished products. The proposed MS4 permit will only serve to create a redundant set of regulations for those rail yards already required to obtain coverage under the statewide Industrial General Permit or Construction General Permit. BNSF recommends that the state board clarify that if a facility is already covered under the statewide Industrial or Construction General Permit, it is exempt from regulation under the MS4 permit.

5.2 → **Issue # 2: The Proposed MS4 permit will capture facilities that do not have industrial activity**

As previously stated, those rail yards that have industrial activity are already required to obtain coverage under the statewide Industrial General Permit. The remainder of the rail yards in California are small in size, and typically do not have any industrial activity. The proposed MS4 permit would regulate stormwater discharges from these yards in the absence of any regulated industrial activity or scientific basis for such regulation as stated in Table 1, Specific Section E Provisions, Transit Agencies, Heavy Rail (personal communication, Christine Sotelo). BNSF Railway is not a transit agency, does not meet the definition under Finding #12 on page 6, and does not believe that a need exists to regulate its activities under the Proposed MS4 permit. BNSF recommends that the state board clarify the need to regulate facilities that do not have industrial activities or materials exposed to stormwater under the proposed MS4, and specifically, clarify the definition of transit agencies in the proposed permit to distinguish between freight railroads and mass transit agencies.

5.3

Issue # 3: The Proposed MS4 will create an overly burdensome regulatory landscape

As previously stated, BNSF Railway owns numerous small facilities throughout the state. Under the Proposed MS4 permit, the Regional Water Board Executive Officer can determine if the renewal MS4 Permittee's program is equally or more effective at meeting the MEP standard (Page 10). As such, MS4 permittees can establish different requirements across jurisdictions. This language in the proposed permit establishes a framework whereby a patchwork of minimum program requirements may vary, from MS4 to MS4, subjecting regulated industries to comply with a myriad of different requirements and enforcement schemes. Additionally, some facilities straddle jurisdictional boundaries. A patchwork of different standards under the MS4 permit creates an untenable situation whereby a facility that is situated in two different jurisdictions may have to comply with different requirements at the same facility. BNSF recommends that the state board establish consistent standards and requirements for all MS4 permittees to avoid creating a patchwork of regulation that is overly burdensome and confusing.

5.4

Issue # 4: Annually evolving requirements creates a "moving compliance target"

The Proposed MS4 permit contains Compliance Tiers with specific provisions to address differences between Traditional and Non-Traditional MS4s (Table 1). The Compliance Tiers are listed in the Proposed MS4 permit (pg. 18) and will have variable requirements depending upon the MS4 entity. BNSF facilities without industrial activities will be captured in the Proposed MS4 permit and its associated requirements as a discharger within the city/county limits for all permittees where it has facilities. As new local orders and their associated requirements are developed and as they are revised on an annual basis upon Regional Water Quality Control Board review of Annual Reports per the Draft General Permit (pg. 10), tracking of individual MS4's annually evolving requirements is overly burdensome and cost prohibitive in that annual changes to the MS4 will require compliance with a "moving target" of stormwater requirements across distinct MS4 entities, despite a lack of any scientific basis for the need to regulate rail yards that do not have industrial activity. Additionally, should rail yards be regulated under the Proposed MS4 as New, Non-traditional MS4s, they would be required to *develop* a program that included; overall program management, public outreach and education, construction outreach and education, public involvement and participation, illicit discharge detection and elimination, construction site stormwater runoff control, pollution prevention/good housekeeping, post-construction requirements, program effectiveness assessment, TMDL requirements, and annual reporting; as freight rail is not a public agency, this is a wholly unnecessary requirement. BNSF recommends that the state board establish consistent program elements and implementation standards across all MS4s, and clarify the need to designate freight rail as a New, Non-traditional MS4.

5.5 → **Issue # 5: Lack of Scientific Evidence to support regulating third-party activities**

BNSF Railway owns and leases small facilities where third-parties transload materials. The act of transloading materials is not, in and of itself, an industrial activity as defined in either 40 CFR 122.26 et seq¹, the Industrial General Permit, or the Proposed MS4 permit. The Proposed MS4 permit would attempt to regulate such activity, despite the lack of evidence that the transloading of materials poses a threat to water quality. BNSF recommends that the water board determine which transloading operations are covered under the Industrial General Permit, if any, determine which SIC codes trigger such a determination, and specify that those SIC codes that trigger a need for coverage under the Industrial General Permit are exempted from regulation under the Proposed MS4 permit.

5.6 → **Issue # 6: Post-Construction requirements are redundant**

Per the Proposed MS4 Permit, New Traditional and Renewal Traditional Small MS4 Permittees with a population of 25,000 or less shall require all projects that disturb one or more acres or are part of a larger plan of development to comply with the Post-Construction Requirements in 2009 – 0009 – DWQ (CGP). This is a redundant requirement that is already addressed in the existing CGP. In this instance, it is administratively burdensome and unnecessary to provide redundancy with regard to an existing permit. The desired outcome is protection of water quality and adding duplicative language will not change behavior or overall outcome. BNSF recommends that the state board remove this requirement entirely.

5.7 → **Issue # 7: Industrial/Commercial Inspection Program is redundant (Proposed MS4 Permit, pg. 55-64):**

The goal of the industrial and commercial inspection program is to ensure that the water bodies within the MS4 areas are protected from industrial or commercial activities. New Traditional Small MS4 Permittees with a population greater than and less than 5,000 shall

¹ 40 CFR 122.26 (b) (14) (viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

comply with specified requirements in Section E.11 and Table 1 of the Proposed MS4 Permit requiring the Permittee to prepare an inspection plan to facilitate frequency of inspections. During these inspections, the Permittee will be required to inspect discharger site locations with regard to industrial and commercial facilities in order to enforce storm water requirements and to ensure minimum control measures are consistent with the Industrial General Permit and any local requirements. Any such requirement should be limited to those facilities that require coverage under the referenced Industrial General Permit, and should not extend to include facilities that do not have industrial activities as defined in the IGP. BNSF recommends that the state board clarify which facilities would be subject to the inspection program included in the Proposed MS4 Permit.

5.8 → **Issue #8: Redundancy of Post-Construction and Hydromodification Requirements (Proposed MS4 Permit, pg 64-76)**

After adoption of the Proposed MS4 Permit and until May 15, 2014, the Permittee will be required to develop and implement Interim Hydromodification Management Procedures to address a watershed based approach to post-construction storm water management. Hydromodification Management Projects are Regulated Projects that create and/or replace one acre or more of impervious surface. A project that does not increase impervious surface area over the pre-project condition is not a hydromodification management project. Implementing post construction standards within the California Statewide Construction General Permit (CGP) accomplishes the same desired outcome. In this instance, it is administratively burdensome and unnecessary to provide redundancy with regard to an existing permit. The desired outcome is protection of water quality and adding duplicative language will not change behavior or overall outcome. BNSF recommends the state board remove this redundant requirement in the Proposed MS4 Permit.

5.9 → **Issue # 9: Redundancy of numeric criteria on new and redevelopment projects and Operations & Maintenance Verification**

By May 15, 2016, the Permittee is required to develop and implement numeric criteria to protect watershed processes affected by storm water on all applicable new and redevelopment projects. In addition, by May 15, 2017, Permittee is required to adopt enforceable mechanisms for implementing numeric criteria to protect watershed processes affected by storm water on all new and redevelopment project (Proposed MS4 Permit, pg. 72-73). This requirement is redundant considering that the numeric requirements in the CGP accomplish the same outcome. For construction sites with storm water treatment systems, the Permittee is required to implement an Operations & Maintenance (O&M) verification program (Proposed MS4 Permit, Pg. 73-74). This requirement is also redundant with regard to construction sites with active treatment systems. Active treatment system (ATS) requirements present in the CGP effectively

accomplish the same outcome. In these instances, it is administratively burdensome and unnecessary to provide redundancy with regard to an existing permit. The desired outcome is protection of water quality and adding duplicative language will not change behavior. BNSF recommends that the state board remove these redundant requirements.

5.10 → **Issue # 10: Total Maximum Daily Load (TMDL) implementation requirements**

The Permittee is required to comply with all applicable TMDLs identified in Attachment G of the Proposed MS4 Permit. The Permittee is required to report the status of their implementation of the specific TMDL implementation requirements via the SMARTS online system. Information that the Permittee will need to report includes a description of BMPs implemented, including types, number, and locations; an assessment of the effectiveness of implemented BMPs; all monitoring data; and finally, based on the results of the effectiveness assessment and monitoring; a description of additional BMPs that will be implemented to attain wasteload allocations within the TMDLs specified timeframes. It is not clear from the Draft General Permit language, whether or not the Permittee will incorporate discharger requirements into local requirements to assist with TMDL implementation (Proposed MS4 Permit, page 91-92). BNSF recommends that the state board clarify whether or not TMDL requirements will be developed for industry in the Proposed MS4 Permit, so that industry can respond appropriately.

5.11 → **Issue # 11: Water quality monitoring and BMP assessment**

Per the General Permit, the Permittee is required to develop and implement a Water Quality Monitoring Plan. Permittees may collaborate together. Where all or a majority of the Permittees collaborate to conduct water quality monitoring, this will be considered a regional monitoring collaborative. In addition, Permittees are provided specific instances when monitoring must be conducted by the Permittee (Proposed MS4 Permit, pg. 77). It is not clear from the language whether or not the Permittee will incorporate discharger requirements into local requirements to assist with receiving water monitoring (Draft General Permit, pg. 76-79). BNSF recommends that the state board clarify this issue so that industry can respond appropriately.

5.12 → **Issue #12: Redundancy with regard to new Trash reduction program**

A Trash reduction ordinance and trash abatement plan, including facilities with trash capture devices, will be developed by the Permittee. This requirement is redundant considering the requirements in the Statewide Construction General Permit and Statewide Industrial Permit requirements as they relate to good housekeeping best management practice (BMP) requirements. The solution in this regard is not to supply additional layers of duplicative regulations, rather the solution is to ensure the implementation of existing regulations. BNSF recommends that the state board remove this redundant requirement.

On behalf of BNSF, I would like to thank you for the opportunity to provide input regarding the Proposed MS4 Permit. BNSF is very interested in being an active stakeholder in the development and implementation of storm water requirements within California. BNSF is committed to doing our part to protect California's water bodies and hope that our input will help SWRCB maximize the value of storm water regulations as they are developed. Please contact me if you would like to discuss these comments in more detail.

Sincerely,

A handwritten signature in dark ink, appearing to be 'E. Phillips', with a long horizontal line extending to the right.

Edward Phillips
Manager Environmental Operations
California Division