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Subject: Comment Letter – Phase II Small MS4 General Permit

This letter contains the comments of the San Francisco Bay Area Rapid Transit District (BART) to the State Water Resources Control Board (State Board) regarding its Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s).

Comment 1

The Draft General Permit identifies “Transit Agencies (Heavy Rail)” as a new category of “non-traditional” small MS4 permittee. The permit (p. 7) states that only “regulated small MS4s” are required to obtain NPDES permit coverage. BART and a number of other transit agencies were designated as regulated small MS4s in the version of Attachment C “List of New Non-Traditional MS4 Permittees” released with the Draft General Permit on June 7, 2011. In the revised Attachment C issued on July 8, 2011, BART and other transit agencies were removed from the list, while the category of “Transit Agencies (Heavy Rail)” remains in the permit itself. As we understand it, this change means that the State Board no longer proposes to designate transit agencies as regulated MS4s at this time and that BART will not be required to file a Notice of Intent upon adoption of the final General Permit, but that the State Board or the San Francisco Regional Water Quality Control Board (Regional Board) may so designate BART at any time during the General Permit term.

However, Attachment N, setting compliance reporting deadlines for non-traditional MS4 categories, still includes deadlines for the “Transit Agencies (Heavy Rail)” category beginning in September 2013. Since no transit agency is listed on the revised Attachment C, the transit agency deadlines should be removed from Attachment N. If BART or any other transit agency is designated as regulated during the permit term, it will be subject to a compliance reporting schedule running from that time, not to the Attachment N deadlines.

Comment 2

BART is very concerned by the characterization, for the first time, of “Transit Agencies (Heavy Rail)” as a form of non-traditional MS4 in the Draft General Permit. Currently, BART is subject to the State Board’s Construction General Permit, which applies to all storm water discharges from BART construction, and Industrial General Permit, which applies to storm water discharges from BART’s maintenance facilities. However, the new MS4 General Permit appears to apply to the existing stations, structures and trackway of the entire BART system. The BART system currently consists of 44 stations and approximately 104 miles of track, including surface, elevated and subway stations and track, much of which was constructed over 40 years ago. To retroactively implement the best management practices (BMPs) which today are considered appropriate to control storm water discharges from new construction (and which BART implements in its own new construction), throughout the existing BART system, would be an extremely difficult and costly undertaking. Yet the Draft General Permit and Fact Sheet cite no evidence that doing so would accomplish any improvement to water quality commensurate with the burden, which ultimately must be borne by the public. Moreover, the Fact Sheet analysis of compliance costs (pp. 9-12) is based solely on traditional MS4s and does not purport to evaluate such costs for transit agencies, which face very different issues in retrofitting and implementing BMPs in existing systems.

Comment 3

The definition of MS4 in 40 C.F.R. section 122.26(b)(8) includes systems owned and operated by public agencies “having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity. . . .” Although BART is a special district created by state law, it is a transit district, not a “similar entity” compared to these examples whose primary purpose is water management. Small MS4s also include “systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares” but not “separate storm sewers in very discrete areas such as individual buildings.” 40 C.F.R. section 122.26(b)(16)(iii). The inclusion of “highways and other thoroughfares” reflected the persistent problem of highway runoff contaminated by motor vehicle emissions and contributing to water quality issues. However, electric-powered transit systems such as BART do not pose the same problem of emission-contaminated runoff. Storm drainage systems for BART stations and parking facilities, the only locations where the public has access to the system, are more like those in discrete areas such as individual buildings. Nor, for that matter, does the Fact Sheet explain why heavy rail was singled out, as opposed to light rail or non-rail transit (which may utilize diesel as well as, or instead of, electric vehicles). Accordingly, we question the appropriateness of identifying

BART and other heavy rail transit agencies as a category subject to the extensive new requirements of the Draft General Permit.

Comment 4

If “Transit Agencies (Heavy Rail)” is retained as a non-traditional MS4 category in the General Permit, the permit must treat this new category reasonably. The State Water Board’s permit jurisdiction under the Clean Water Act and Water Code is limited to discharges of the permittee to waters of the United States or the state. Accordingly, permit requirements applicable to BART must have a direct nexus to controlling actual discharges of storm water from BART’s facilities. A traditional MS4 is a storm water receiving system which collects, conveys and discharges storm water that other facilities and the public discharge into the MS4. This fact justifies the indirect permit requirements intended to influence the behavior of others who discharge into traditional MS4s, reducing the introduction of contaminants from industrial facilities, residential landscaping, car-washing, etc. By contrast, most “non-traditional” categories such as prisons, schools and transit agencies collect and discharge storm water from their own facilities, not introduced from other sources.

The Fact Sheet, pp. 43-44, explains that the varied range of non-traditional MS4s implies that their different activities should be subject to different requirements. For example, transit agencies do not oversee industrial and commercial facilities operated by others and so are not subject to the outreach and inspection obligations imposed on traditional and some non-traditional MS4s (e.g., ports). However, the requirements relating to such facilities are the *only* requirements from which the transit agency category is exempt according to the Draft General Permit, Table 1. Except for the limited case of encouraging passengers not to throw trash on the tracks (as discussed below under “Public Outreach”), we believe that none of the indirect requirements intended to influence the behavior of others are applicable to BART and other transit agencies.

Moreover, while the State Board acknowledges the inapplicability of traditional MS4 requirements in the Fact Sheet discussion of non-traditional MS4s (Fact Sheet, pp. 43-47), this distinction is not reflected in the Draft General Permit itself. The operative provisions of the General Permit should expressly provide the flexibility to modify requirements specifically for transit agencies and other non-traditional MS4s during the development of compliance plans. The Fact Sheet explanation has no regulatory effect and, while it sets forth the State Board’s interpretive views, does not preclude citizen suits for violation of requirements contained in the permit language itself that are more relevant to traditional than non-traditional MS4s.

Comment 5

BART supports the comments on the Draft General Permit being submitted by the California Stormwater Quality Association (CASQA), to the extent applicable to non-traditional MS4s such as transit agencies. CASQA represents a group of large and small, traditional and non-traditional MS4s and has considerable experience with MS4 permit requirements. As CASQA explains, the new program requirements proposed for small MS4 categories in the Draft General Permit are extremely burdensome, going beyond the requirements of the federal Clean Water Act for small MS4s and, in some cases, beyond even those applicable to large Phase I MS4s. We concur with the specific suggestions offered in the CASQA comments for more reasonable regulation of storm water discharges from small and non-traditional MS4s.

Comment 6

BART supports CASQA's comment that the extensive prescriptive requirements in the Draft General Permit – especially as applied to new non-traditional categories – goes beyond the federal Clean Water Act's "maximum extent practicable" standard for pollution control by MS4s and is inconsistent with the California Water Code.

Clean Water Act section 402(p)(3)(iii) requires NPDES permittees to implement controls to reduce discharge of pollutants from MS4s to the "maximum extent practicable" (MEP), an inherently flexible standard. Indeed, the Draft General Permit itself states (p. 11) that the "MEP standard is an ever-evolving, flexible, and advancing concept, which considers technical and economic feasibility." As noted by the U.S. Environmental Protection Agency (EPA), "Congress recognized that permit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." 55 Fed. Reg. 43038. This flexibility is not evident in the Draft General Permit's lengthy list of highly detailed obligations which do not allow flexibility on an MS4 category-specific, much less site-specific, basis. As noted above, except in the unenforceable Fact Sheet, the Draft General Permit does not even recognize the inapplicability of its many prescriptions to non-traditional MS4s. Moreover, the permit's mandatory requirements go far beyond minimum control measures appropriate for small MS4s. As CASQA notes, EPA guidance in 40 CFR Section 122.34(e)(2) states:

"EPA strongly recommends that. . . no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4, except where an approved

Total Maximum Daily Load (TMDL) or equivalent analysis provides adequate information to develop more specific measures to protect water quality.”¹

In addition, Water Code section 13360(a) provides: “No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.”

BART agrees with CASQA’s suggestion that, consistent with EPA guidance and the Water Code, permittees – especially in new non-traditional categories – in be granted greater flexibility to comply in “any lawful manner” by structuring and prioritizing individual storm water programs, rather than being subjected to the laundry list of largely inappropriate prescriptions in the Draft General Permit.

Comment 7

Assuming that the compliance reporting schedule for transit agencies would follow a comparable timeline from their designation as a regulated MS4 (see Comment 1 above), the deadlines proposed by the State Board are wholly unreasonable and should be significantly extended. The Fact Sheet (p. 6) describes how the State and Regional Boards gradually developed experience with the MS4 categories regulated under the previous MS4 General Permit, leading to the approach taken in the current Draft General Permit. As explained in CASQA’s comments, large Phase I MS4s were given three to four permit terms (15-20 years) to develop their compliance programs. Yet the Draft General Permit requires newly regulated categories of small non-traditional MS4s, from a standing start and with far less expertise and more limited resources, to do so in a single permit term. Securing the funding and staffing to develop and implement such programs will be a significant undertaking for public transit and other agencies during an economic downturn.

BART urges the State Board to significantly extend the reporting deadlines to allow non-traditional MS4s more reasonable time to comply with costly and novel requirements. As suggested by CASQA, these requirements should be prioritized and phased in over several permit terms. Transit agencies and other non-traditional categories newly covered by this permit, should be given more time to comply than traditional small MS4s, not to mention Phase I large MS4s.

¹ BART is not subject to any TMDL-related requirements in Draft General Permit Appendix G.

Comment 8

The recent Ninth Circuit decision in *Natural Resources Defense Council v. County of Los Angeles* (No. 10-56017), 2011 U.S. App. LEXIS 14443 at *1 (amended opinion filed July 13, 2011) holds that the “iterative process” contained in the Draft General Permit – in which, if the permittee’s BMPs prove insufficient to achieve compliance, the permittee must improve its BMPs – does not provide a “safe harbor” against enforcement or citizen suit. The court reached that conclusion by textual analysis of the “plain language” in the MS4 permit at issue, finding that its general discharge prohibition and iterative BMP procedure were separate permit provisions, separately enforceable. Nevertheless, while the court found that a Regional Board had discretion not to include a safe harbor provision in an MS4 permit, nothing in the opinion casts doubt on the discretion to include one.

BART urges the State Board to revise the discharge prohibition and receiving water limitation language in the Draft General Permit to provide that a permittee is not in violation if it reports noncompliance and undertakes the iterative BMP improvement process. Throughout its MS4 storm water permits, the State Board has consistently utilized the iterative process as a means of compliance with the “maximum extent practicable” standard. Accordingly, we urge the State Board to provide the plain safe harbor language that the court did not find in *NRDC v. LA*.

Comment 9

The Draft General Permit (pp. 19-20) requires that permittees certify that they have legal authority to prohibit activities by others that result in pollution discharges to the MS4. Evidently the State Board’s intent is to require municipalities to adopt ordinances to regulate the behavior of their citizens. However, BART does not have the control over its patrons that traditional MS4s have over residents and businesses within their jurisdictions. These requirements are inapplicable to BART and similarly-situated non-traditional MS4s. Yet the Draft General Permit’s express language (Section E.4.a(ii)) requires that “[a]t a minimum, the Permittee shall have adequate legal authority” to prohibit non-stormwater discharges, eliminate illegal connections, impose civil and criminal sanctions, etc. The General Permit does not create new legal authority. As with other overly prescriptive elements, the permit language should not flatly require a long list of legal authority elements inapplicable to many non-traditional MS4s, but should provide greater flexibility, requiring certification of legal authority over others only where their behavior is properly under the permittee’s control (such as prohibiting littering in BART stations and parking lots; see next comment).

Comment 10

An Enforcement Response Plan for BART could reasonably include, for example, enforcement of a littering ban. Beyond that, however, the Draft General Permit (pp. 21-22) again mandates a specific series of elements, including stop work orders and withholding approvals and enforcement referral. Evidently these items are aimed at construction projects or industrial operations by others within the jurisdiction of traditional MS4s. Again, the permit language itself does not allow any flexibility where traditional MS4 requirements are not applicable to non-traditional categories, and should be revised to do so. Compliance monitoring for BART's own construction and operations are covered under the Pollution Prevention/Good Housekeeping element; moreover, new BART construction remains regulated under the State Board's Construction Stormwater General Permit.

Comment 11

The "Public Outreach and Education" requirements would require BART to conduct a program to educate the public about storm water issues. Draft Permit, pp. 26-28. BART acknowledges that its passengers throw trash on the tracks in stations, or on the ground in parking lots or garages, where it can be washed into the storm drainage system. An outreach and education program tailored to address this behavior could include, for example, providing posters or brochures in stations, seeking to educate patrons and change their behavior. Outside stations and associated parking, however, the public does not have access to BART's storm drainage facilities. BART cars are closed and BART facilities outside the stations are not open to the public. Members of the public do not connect, legally or illicitly, to BART's storm drainage.

The Draft General Permit (p. 25) and Fact Sheet (pp. 43-45) suggest that non-traditional MS4s which do not have their own education programs should contribute financially to countywide or regional general public education on issues such as water-efficient landscaping, car washing and proper application of pesticides and herbicides to reduce contaminated runoff. However, none of those activities contribute to contamination in discharges from BART's drainage system, which is the basis for the State Board's NPDES authority over BART. Requiring BART to contribute to a general education program by other agencies is not a reasonable solution.

Comment 12

While some form of public involvement in the storm water program may be appropriate, the mandatory requirements are again inapplicable and should be made more flexible in the permit language itself. For example, BART's storm drainage serves the BART system, not residents and business owners, so the

requirement that they be represented in a citizen advisory group is inapplicable (Draft General Permit, p. 33).

Comment 13

The Illicit Discharge Detection and Elimination Program appears to be directed primarily at unauthorized connections and illegal dumping to municipal MS4s. As noted above, the public has no access to and does not connect to BART storm drainage facilities. While illegal dumping into storm drains at station parking lots is a theoretical possibility, BART is not aware of any such incidents and the remote prospect is not sufficient to justify the burden of the elaborate investigation program required by the Draft General Permit.

Moreover, since BART's storm drainage is associated with its structures and trackways, the mapping exercise required by the illicit discharge identification and prioritization elements could disclose details of the system that are not generally made publicly available. This is an important security issue, in that transit infrastructure is recognized as a potential terrorism target. Again, in the absence of any realistic prospect of illicit discharges, this requirement seems excessive and inappropriate, and the permit language should allow greater flexibility.

Comment 14

The Construction Site Runoff Control Program, Draft General Permit pp. 38-45, appears to be entirely aimed and construction by others within the MS4's jurisdiction. Again, BART's own new construction activities are covered by the State Board's Construction General Permit. Rather than making this program mandatory for all small MS4s, the Draft General Permit should allow the flexibility to require it only for those traditional and non-traditional MS4s that oversee construction by others.

Comment 15

Unlike many other components of the Draft General Permit, the Pollution Prevention and Good Housekeeping Program for the permittee's own operations is appropriately applicable to BART. However, even here, some of the permit's prescriptive elements do not apply. E.g., agencies which do not have flood management projects cannot implement Section E.9.i.ii: "The Permittee shall implement changes or additions to two flood management projects per year to enhance water quality and habitat functions. . . ." Such requirements should not be mandatory in the permit language; again, as discussed above, the permit should allow flexibility to tailor them to the permittee's circumstances.

In addition, though maintenance yards indeed may be pollutant "hotspots", (Draft General Permit, p. 47), BART's maintenance yards are already covered by the

State Board's Industrial General Permit and should not be subject to redundant regulation under this permit. Moreover, weekly inspection of hotspots (p. 49) appears excessive when, again, BART's system is not accessible to others.

Comment 16

As noted above, BART agrees that the Industrial/Commercial Facility Runoff Control Program does not apply to the Transit Agency category of non-traditional MS4s, as indicated in the Draft General Permit, Table 1.

Comment 17

Like the Industrial/Commercial Facility Runoff Control Program, which does not apply to transit agencies that do not oversee such facilities within their jurisdiction, the Post-Construction Storm Water Management for New Development and Redevelopment also does not apply, since transit agencies do not oversee development projects by others. BART's own new construction is covered by the Construction General Permit and is subject to post-construction requirements in that permit. Thus, there are no "regulated projects" for BART to regulate as contemplated by the Draft General Permit, pp. 66-76. Moreover, the watershed baseline characterization, sediment budgeting and watershed analysis and management required under this permit element would be extremely burdensome yet pointless, in the absence of projects regulated by BART.²

Table 1 should be revised to indicate that the Post-Construction Storm Water Management element is inapplicable to transit agencies.

Comment 18

Under the Draft General Permit's compliance tier scheme, we understand that the receiving water monitoring and TMDL-based requirements do not apply to BART. BART is not listed in Appendix G and, as far as we can determine, the BART system does not comprise more than 10% of urban land uses within any Hydrologic Unit Code 12 watershed unit.

Comment 19

The Program Effectiveness Assessment and Improvement Plan and the online annual reporting requirements are applicable to BART. Indeed, monitoring effectiveness is appropriate and essential to implement the iterative BMP process. Nevertheless, the Program Effectiveness and reporting requirements impose an administratively burdensome new program which should be tailored to the specific circumstances of the permittee – again, to a greater degree than

² BART operates in four counties and many municipalities, placing it within the areas of multiple large and small MS4s, so the provisions for permittees located within Phase I and Phase II MS4 permit areas would be unworkable, if this section is retained.

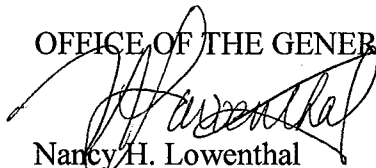
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contemplated in the prescriptive language of the Draft General Permit. In particular, the effectiveness to be assessed and reported must be limited to applicable permit program, e.g., public outreach and education regarding littering and the Pollution Prevention and Good Housekeeping Program for BART's own operations. Moreover, BART is not a municipality and the municipal watershed pollutant load quantification provisions (Draft General Permit, pp. 89-90) do not apply.

Thank you for considering BART's comments. Please contact me if you have any questions or wish any further information regarding our comments.

Sincerely,

OFFICE OF THE GENERAL COUNSEL



Nancy H. Lowenthal
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