



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
 300 Lakeside Drive, P.O. Box 12688
 Oakland, CA 94604-2688
 (510) 464-6000

Public Comment
 Draft Phase II Small MS4 General Permit
 Deadline: 7/23/12 by 12 noon

2012

John McPartland
 PRESIDENT

Tom Radulovich
 VICE PRESIDENT

Grace Crunican
 GENERAL MANAGER



VIA EMAIL: COMMENTLETTERS@WATERBOARDS.CA.GOV

July 23, 2012

DIRECTORS

Gail Murray
 1ST DISTRICT

Joel Keller
 2ND DISTRICT

Bob Franklin
 3RD DISTRICT

Robert Raburn
 4TH DISTRICT

John McPartland
 5TH DISTRICT

Thomas M. Blalock, P.E.
 6TH DISTRICT

Lynette Sweet
 7TH DISTRICT

James Fang
 8TH DISTRICT

Tom Radulovich
 9TH DISTRICT

Ms. Jeanine Townsend
 Clerk to the Board
 State Water Resources Control Board
 1001 I Street, 24th Floor
 Sacramento, CA 95814

Subject: BART Comment Letter – 2nd Draft 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 the second draft National Pollutant Discharge Elimination System General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s), released on May 21, 2012 (Second Draft Permit).

Comment 1

The Second Draft Permit eliminates the “Transit Agencies (Heavy Rail)” category of non-traditional small MS4s. However, a Regional Water Quality Control Board (Regional Board) Executive Officer may designate permittees on a case-by-case basis, “based on the potential of a Small MS4’s discharges to result in exceedance of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.” Fact Sheet, p. 47; Response to Comment on June 2001 Draft, p. 114 (Response to Comments). BART is so listed by “Regional Board Designation”, but only because it is purportedly “within [an] urbanized area.” Attachment B; Fact Sheet, p. 49. BART is a regional system consisting of 44 stations and approximately 104 miles of track, partly within but also outside urbanized areas. Three additional transportation agencies are listed, but many others, some located entirely in urbanized areas and operating diesel buses that pose a greater risk to water quality

than electric BART trains, are not. BART should not be listed as designated in the permit itself, until properly so designated by the Executive Officer based on the listing criteria.

Comment 2

Clean Water Act section 402(p)(3)(iii) requires MS4 permittees to reduce stormwater pollutant discharges to the "maximum extent practicable" (MEP) and the Fact Sheet, p. 7, notes that the cost of compliance is a factor in determining MEP. Much of the BART system was constructed over 40 years ago. To implement the Second Draft Permit's requirements throughout the existing BART system, including surface, elevated and subway stations and track, would be an extremely costly and difficult undertaking, posing very different challenges than those for traditional small MS4s. Yet the Fact Sheet discusses cost considerations only for traditional small MS4s on pp. 7-12, providing no evaluation of costs for BART or other transit agencies. Until relevant compliance costs are evaluated, again, BART should not be listed as designated in the permit itself.

Comment 3

BART is currently subject to the State Board's Construction General Permit, which applies to all storm water discharges from BART construction, and the Industrial General Permit, which applies to storm water discharges from BART's five maintenance shops. A revised Industrial General Permit, currently out for public review, will include more stringent requirements applicable to the shops. The Second Draft Permit, pp. 77-78, states that permittees "may incorporate the required storm water provisions into already existing programs" and may submit equivalent or existing documents under existing programs. However, to avoid redundancy and conflict, the Second Draft Permit should more clearly state that facilities already covered by other stormwater permits are not within its scope.

Comment 4

The Second Draft Permit, Section F, improves on the previous draft permit by more clearly setting forth the more limited requirements that are appropriate requirements for non-traditional small MS4s. The educational and outreach program (which in this case would apply to BART riders), staff training, good housekeeping and Best Management Practices (BMPs), stormwater drainage system assessment and maintenance, post-construction requirements and program effectiveness assessment are all generally reasonable actions in the abstract. However, implementing these extensive requirements will take time, effort, staff and funding that BART and many other public agencies cannot easily provide with limited resources. In particular, new staff and funds will be needed for the initial, highly labor-intensive period in which permittees must identify responsibilities, map and evaluate facilities, propose BMPs and evaluate their effectiveness. New programs for staff training and public participation and outreach must also be created.

Although some of the compliance deadlines for non-traditional MS4s have been extended in the Second Draft Permit, much of the evaluation and results of the various assessments and BMPs will be due in the second and third year following the permit effective date. This is too short a time frame in which to secure new funding and staff, especially during an economic downturn, and to implement the assessment of so many facilities. BART urges the State Board to extend the reporting submittals currently due in years 2 and 3 for at least another two years, to allow reasonable time to implement the costly and novel requirements of this program.

Comment 5

Throughout its various stormwater permits, the State Board has consistently utilized the “iterative process” – in which, if the permittee’s BMPs prove insufficient to achieve compliance, the permittee must improve its BMPs – as a means of compliance with the MEP standard. The Ninth Circuit’s decision in *Natural Resources Defense Council v. County of Los Angeles*, 673 F. 3d 880 (2011), held that a permittee’s compliance with this iterative process did not provide a “safe harbor” against enforcement or citizen suit, based on analysis of the permit language. The court concluded that “no such ‘safe harbor’ is present in this Permit” (673 F. 3d at 897), finding instead that the permit contained a discharge prohibition that was separately enforceable, with “no textual support for the proposition that compliance with [the iterative process] provisions shall forgive non-compliance with the discharge prohibition.” *Id.* Since the court’s problem was with the permit text, BART and other commenters asked the State Board to modify the permit text, supplying the safe harbor that was lacking in *NRDC v. LA*. In response, staff suggests that the State Board lacks discretion to include safe harbor language in the permit. Response to Comments, p. 59. However, *NRDC v. LA* held that the Clean Water Act allows the State Board discretion over *whether or not* to include safe harbor language in a permit. Accordingly, we again request that the State Board revise the permit to expressly provide that compliance with the iterative process provisions shall constitute compliance with the discharge prohibition, thus restoring the usefulness of the longstanding iterative process.

Comment 6

The Second Draft Permit (pp. 78-79) requires non-traditional small MS4s to certify that they have legal authority to prohibit activities by others that result in pollution discharges to the MS4. However, in general, traditional MS4s such as municipalities have plenary police power over residents and businesses within their jurisdictions. This requirement is inapplicable to BART and similarly-situated non-traditional MS4s. Yet the Second Draft Permit, Section F.5.a(ii), still requires that permittees must have adequate legal authority to prohibit non-stormwater discharges, eliminate illegal connections, impose civil and criminal sanctions, etc. The State Board cannot require other agencies, created by statutes which determine the scope of their powers, to create new legal authorities that they do not have. This provision should be revised to require non-traditional MS4s to certify that they have implemented such legal authorities as are in their power to adopt.

Comment 7

The Public Outreach and Education requirements would require BART to conduct a program to educate the public about storm water issues. Second Draft Permit, pp. 79-82. BART acknowledges that its riders 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 cannot connect, legally or illicitly, to BART's storm drainage. Accordingly, this component of public outreach is not relevant to BART and should not be required.

Comment 8

The Illicit Discharge Detection and Elimination Program, Second Draft Permit pp. 84-87, 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 investigations required by the Second Draft Permit.

In particular, the outfall mapping and field sampling program appears to be directed at identifying illicit discharges. In the absence of any evidence of illicit discharges, the mapping and sampling program seems excessive and inappropriate, and the permit language should allow greater flexibility.

Comment 9

The Second Draft Permit, p. 77, provides that "Department of Defense and Department of Corrections and Rehabilitation Permittees are exempt from Annual Reporting of any provision in this section that could pose a security risk and/or compromise facility security." This exemption should be extended to transportation infrastructure which, since the September 11, 2001 attacks and the 2004 Madrid subway bombing, has been widely recognized as a potential terrorism target. Since BART's storm drainage is associated with its structures and trackways, the mapping exercise could reveal details of the system which BART does not generally disclose to the public. BART should not be required to disclose, through the stormwater program, this sensitive information that could affect its security.

Comment 10

The Program Effectiveness Assessment and Improvement Plan and the online annual reporting requirements are applicable to BART. Indeed, monitoring effectiveness is

Ms. Jeanine Townsend

July 23, 2012

Page 5

appropriate and essential to implement the iterative BMP process. Nevertheless, the Program Effectiveness and reporting requirements impose an administratively burdensome new program which must be tailored to the specific circumstances of the permittee. In particular, the effectiveness to be assessed and reported must be limited to the applicable permit program, e.g., public outreach and education regarding littering and the Pollution Prevention and Good Housekeeping Program for BART's own operations.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Grace Crunican".

Grace Crunican
General Manager