



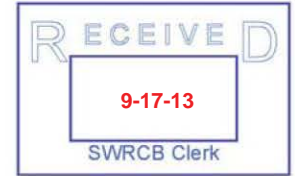
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#10

19 September 2013

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



Subject: Comments and Recommendations regarding the fourth draft of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activities (NPDES NO. CAS000001)

Dear Ms. Townsend:

Thank you for the opportunity to submit comments on the Draft General Permit for Storm Water Discharges Associated with Industrial Activities. BNSF Railway (BNSF) appreciates that staff has worked many hours developing this draft and would like to take this opportunity to acknowledge the many improvements made over previous drafts. It is obvious that staff intended to incorporate common-sense improvements while maintaining protection of the environment as its paramount task.

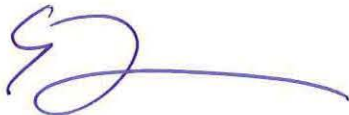
BNSF's history dates back more than 160 years to 1849, when the 12-mile Aurora Branch Railroad was founded in Illinois. Today, BNSF maintains over 32,000 miles of railroad in 28 states and two Canadian Provinces and operates over 6,900 locomotives, with over 6,000 miles of railroad and more than 36 facilities in California alone. BNSF employs over 40,000 people and generated over \$19.5 Billion in operating revenue in 2012. BNSF annually ships over 9.5 million customer loads, including more than one million car loads of agricultural products (enough to supply over 900 million people with a year's supply of bread), 4.7 million car loads of consumer products (each intermodal train removes 280 trucks from America's highways), and 1.7 million car loads of industrial products including asphalt, steel, lumber, chemicals, and energy commodities. BNSF can haul a ton of freight 500 miles on one gallon of diesel. BNSF remains committed to complying with all applicable laws, regulations, and codes and protecting the environment.

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During the permit development process, staff has repeatedly indicated that the intent of the permit revisions is not to expand the scope of the State's authority beyond what is provided for under applicable Federal law. Accordingly, many of BNSF's comments speak to areas where we believe the permit may be inconsistent with this intent. BNSF provides comments and recommendations that are both general and specific in nature in Attachment 1 to this letter. Where appropriate, these comments and recommendations have been grouped together by similar theme.

Thank you for the opportunity to provide comments. Please contact me at (909) 386-4082 if you have any questions or need additional information.

Regards,

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

Edward Phillips
BNSF, Manager Environmental Operations

Attachment as noted

Attachment 1

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
Definition of Transportation Facilities and Storm water Discharges Associated with Industrial Activities (IGP)	Attachment A Item 8, Attachment C,	<p><u>Transportation Facilities</u> <i>“Facilities with SICs 40XX through 45XX (except 4221-25) and 5171 with vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or other operations identified under this Permit as associated with industrial activity.” This definition is quite clear and includes those non-transient activities that routinely or regularly occur at a transportation facility.¹</i></p> <p>Furthermore, the language “...or other operations identified under this Permit as associated with industrial activity” is no less clear, one must only look to the language found in the definition of Storm Water Discharges Associated with Industrial Activities:</p> <p><u>Storm Water Discharge Associated with Industrial Activity</u> <i>“The discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant as identified in Attachment A of this General Permit. The term does not include discharges from facilities or activities excluded from the NPDES program.² The term includes, but is not limited to, storm water discharges from industrial plant yards, immediate access roads and rail lines used or traveled by carriers of raw materials; manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process wastewaters (as defined at 40 CFR Section 401); sites used for the storage and maintenance of material handling equipment;</i></p>

¹ The language “non-transient” is taken from the USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

² Italics added.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
	1	<p>sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials and intermediate and finished <i>products</i>³; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The term does not include discharges from facilities or activities excluded from the NPDES program under 40 CFR Section 122.</p> <p>Material handling activities include the: storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by-product, or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federal, state, or municipally owned or operated that meet the description of the facilities listed in this paragraph) include those facilities designated under 40 CFR Section 122.26 (a) (1) (v)."</p> <p>It is significant to note here that for the purposes of this definition, BNSF Railway (BNSF) rail facilities are not industrial plants, except to the extent that they may conduct fueling and vehicle maintenance activities as described in Attachment A. As clearly stated in the U.S. Environmental Protection Agency (U.S. EPA) Environmental Appeals Board Decision, only those portions of the facility involved in non-transient industrial activities are required to obtain coverage under the National Pollutant Discharge Elimination System (NPDES) program.</p>

³ Italics added.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
Definition of Transportation Facilities	IGP Finding 17, Section II (B)(2); Section XVII; Section 6 of Appendix 2, Instructions for No Exposure Certification (NEC) 2	<p>This permit requires that the discharger file Permit Registration Documents (PRDs) for both Notice of Intent (NOI) and NEC coverage. Specifically, this permit departs from past permits in that it requires all dischargers to file either the NOI or the NEC.⁴</p> <p>This requirement is outside of the scope of the language defining which industrial activities occurring at a Transportation Facility are required to obtain NPDES permit coverage, and therefore essentially expands the coverage requirement beyond the federal definition and requirements found in both the NPDES regulations and the definitions found in this General Permit. Not all BNSF rail facilities conduct "...vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication)..." and therefore are not required to obtain coverage under the NPDES program or this General Permit.⁵</p> <p>BNSF recommends the State Water Resources Control Board (State Board) include language in Appendix 2 to clarify that Transportation Facilities that do not conduct "...vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication)..." are not subject to the IGP and, as such, are not required to file an NOI or NEC.</p>
Definition of Storm Water Discharges	Attachment C	Storm Water Discharges Associated with Industrial Activity is defined in Attachment C as "The discharge from any conveyance which is used for collecting and conveying storm

⁴ Finding 17 in the General Permit; General Permit Section II (B) (2); General Permit Section XVII; Section 6 of Appendix 2, Instructions for No Exposure Certification.

⁵ Attachment A, Facilities Covered by NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit), Number 8; Attachment C - Glossary. USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
Associated with Industrial Activities	3	<p>water..." Also found in Attachment C is the definition of sheet flow, "Flow of water that occurs overland in areas where there are no defined channels and where the water spreads out over a large area at a uniform depth."</p> <p>BNSF recommends that the SWRCB include a statement in the definition of sheet flow to reflect whether or not it is included in the definition of "Storm Water Associated with Industrial Activity".</p> <p>Requiring sampling of sheet flow would mean that entire yards would need to be redesigned to capture and collect sheet flow in order to sample. This is not practical given the fact that this would take significant engineering and, in many cases, additional permitting. This is a significant undertaking with no demonstrated environmental benefit. Furthermore, in some instances, "this may conflict with local ordinances that prohibit such practices as they can cause damage or erosion to down gradient property owners, or cause other environmental problems (Fact sheet D. 4.(c)."</p>
Definition of Significant Quantities	X.G.(d)(iv) 4	<p>"Ensure the SWPPP includes a list of any industrial materials that have spilled or leaked in significant quantities and had the potential to be discharged from the facility's storm water conveyance system within the previous five-year period."</p> <p>BNSF recommends the SWRCB include a definition of the term "significant quantities" in Attachment C to assist the discharger in addressing this Storm Water Pollution Prevention Plan (SWPPP) requirement.</p>

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
No Exposure Certification	Appendix 2 Item 5	<p>“...Industrial facilities are also responsible for storm water discharges that contain pollutants resulting from the leaching effect of acidic water on metal building structures. Therefore, operators must be aware when certifying a condition of “no exposure” of the existence of structural elements that could be soluble as a result of contact with acidic precipitation (e.g., uncoated copper roofs). If the dissolved metals or other contaminants could cause or contribute to a water quality violation, a condition of “no exposure” cannot be certified. ”</p> <p>5 If in fact a condition of “no exposure” cannot be certified due to pollutants resulting from the leaching effect of acidic water on building structures, and additional implemented BMPs (ie., painting structure) are not adequately addressing the resulting pollutant, it is likely a Discharger would be pushed into a Level 2 status and potentially required to implement treatment controls to address a Discharge that is not directly associated with industrial activity. Furthermore, other contributors to said pollutants that are not required to obtain coverage under the IGP are likely significant sources of these types of resulting pollutants. As such, requiring a subset of industrial facilities to address these types of resulting pollutants would be a significant undertaking with no demonstrated environmental benefit.</p> <p>Lastly, the State Board specifically lists “metal building structures” and later in the paragraph lists “structural elements”. BNSF recommends the SWRCB strike the term “structural elements” and replace with “metal building structures”, if that is the intention of this requirement.</p>

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
NEC	Appendix 2, Section B (4)(e) (ii) 7	<p>"Stockpiled train rails" are listed as a final product not qualifying for a certification of "No Exposure".</p> <p>The inclusion of "stockpiled train rails" in Appendix 2 effectively expands the definition of Storm Water Discharges Associated with Industrial Activities found in Attachment A, Appendix C, and further clarified in the U.S. EPA Environmental Appeals Board decision in San Pedro Forklift, "...Only those portions of the facility involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication)...".⁸</p> <p>If Congress intended to include in the definition of Storm Water Discharges Associated with Industrial Activity stockpiled train rails or any other materials that are in storage but not processed by a facility, the term "materials" would be listed separately in the definition in contrast to either raw materials or finished products. Substituting products as a synonym for materials effectively expands the definition of Storm Water Discharge Associated with Industrial Activity, and is not included in the definition found in Attachment A, Appendix C, or in the U.S. EPA Environmental Appeals Board decision in San Pedro Forklift.</p> <p>As such, BNSF recommends the State Board strike the term "stockpiled train rails" from the specified section.</p>

⁸ Attachment A, Facilities Covered by NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit), Number 8; Attachment C - Glossary. USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
NEC	XVII E (1) and Appendix 2 (B)(2)	<p data-bbox="722 415 1780 448">"NEC coverage is available on a facility-wide basis only, not for individual outfalls."⁹</p> <p data-bbox="722 493 1856 672">This sentence effectively expands the definition of Storm Water Discharges Associated with Industrial Activities occurring at Transportation Facilities that are required to obtain NPDES permit coverage beyond the definitions found in Attachment A, Appendix C, and further clarified in the U.S. EPA Environmental Appeals Board decision in San Pedro Forklift.¹⁰</p> <p data-bbox="669 704 1835 805">8 As such, BNSF recommends that the State Board replaces the sentence, "NEC Coverage is available on a facility-wide basis only, not for individual outfalls" with the following language:</p> <p data-bbox="722 867 1787 976">"NEC coverage is available for any facility where the Discharger certifies that their discharge is entirely composed of storm water that has not been exposed to industrial activities as defined in Attachment A and Appendix C of this General Permit".</p>
NEC	I.A.15. and Appendix 2, Section 8	<p data-bbox="722 1057 1856 1166">"...the State Water Board finds that discharges in compliance with this General Permit will not result in the lowering of water quality to a level that does not achieve water quality objectives and protect beneficial uses..."</p>

⁹ Section XVII, E (1) of the General Permit; Appendix 2, Instructions for NEC, Section B (2).

¹⁰ Attachment A, Facilities Covered by NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit), Number 8; Attachment C - Glossary. USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
	9	<p>Section 8 of the Instructions for NEC contradicts this finding by stating “Operators who certify that their facilities qualify for NEC coverage, may, nonetheless, be required by the Regional Water Board to obtain NOI coverage if the Regional Water Board determines that the facility’s discharge has the potential to cause or contribute to an exceedance of applicable water quality objectives/standards or determines that exposure exists at the facility...”</p> <p>This contradictory language also effectively expands the requirements to obtain coverage under the NPDES program in spite of the definition of Storm Water Discharges Associated with Industrial Activity and the requirements for Transportation Facilities found in Attachment A, Appendix C, and the U.S. EPA Environmental Appeals Board decision in San Pedro Forklift.¹¹</p> <p>As such, BNSF recommends the State Board replace the aforementioned language with the following:</p> <p>“Operators who certify that their facilities qualify for NEC coverage, may, nonetheless, be required by the Regional Water Board to obtain NOI coverage if the Regional Water Board determines that the facility’s discharge is associated with industrial activities as defined in Attachment A and Appendix C of this General Permit.”</p>

¹¹ Attachment A, Facilities Covered by NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit), Number 8; Attachment C - Glossary. USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
Exceedance Response Action (ERA)	XII.A.1. 10	<p>The General Permit requires an ERA report be submitted by 1 January of the following year, if required as a result of changing Baseline status. For the first year of the effective date of this permit, the year will end on 30 June, only allowing the discharger to collect a half year of samples. Facilities participating in Compliance Groups could conceivably have only one sample collected during this period. If any parameters analyzed in this one sample exceeded the respective numeric action levels (NAL), an ERA would need to be submitted by 1 January of the following year. This requirement to submit an ERA would not be based upon the average of all samples taken in the prior year as stated in the IGP.</p> <p>As such, BNSF recommends delaying the effective date of the permit until 1 July 2015 to give all dischargers a full year of sampling data.</p>
ERA	XII.D. 11	<p>The IGP specifies that "...Dischargers with Level 2 status shall submit a Level 2 ERA Technical Report that includes one or more of the following demonstrations: a. Industrial Activity BMPs Demonstration; b. Non-industrial Pollutant Source Demonstration; and/or c. Natural Background Pollutants Source Demonstration."</p> <p>Considering non-industrial sources are common storm water pollutants and often significant, BNSF recommends that, in circumstances where the industrial discharger has strong evidence to indicate on-site industrial activities are not responsible for NAL exceedances, the discharger may submit the relevant Technical Report(s) as part of Level 1 status.</p>
ERA	XII.	<p>"The IGP establishes design storm standards for all treatment control BMPs. ...These design standards are generally expected to be consistent with BAT/BCT, to be protective of water quality, and to be effective for most pollutants..."</p>

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
	12	<p>BNSF recommends that the State Board include language in the IGP that clearly states that only data collected from storm events that do not exceed the Design Storm Event should be included in the evaluation of NAL exceedances. Without this clarification, there will be a disparity between the event magnitude required for treatment controls and that required to assess the need for additional controls in the ERA process.</p>
Pre-production Plastic	XVIII.A. 13	<p>“.....Any Discharger facility handling these types of plastics will be referred to as Plastics Facilities in this General Permit. Any Plastics Facility covered under this General Permit that manufactures, transports, stores, or consumes these materials shall submit information to the State Water Board in their PRDs, including the type and form of plastics, and which BMPs are implemented at the facility to prevent illicit discharges...”</p> <p>This language effectively expands the definition of Storm Water Discharges Associated with Industrial Activity by inserting the term, “handling” instead of the phrase, “The discharge...which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant as identified in Attachment A of this General Permit.” which is taken directly from the definition included in Appendix C of this permit.</p> <p>Unless it is the intent of the State Board to require all facilities that transport pre-production plastics to be referred to as Plastics Facilities, e.g. Freight Railroads, the State Board should clarify this language to be consistent with the definition of Storm Water Associated with Industrial Activities and the requirements for Transportation Facilities found in Appendix</p>

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
		<p>C, Attachment A, and the U.S. EPA Environmental Appeals Board decision in San Pedro Forklift.¹²</p> <p>As such, BNSF recommends that the State Board clarify this language by modifying it to state:</p> <p>“ Any Discharger facility whose discharge is directly related to manufacturing, processing, or raw materials storage areas of pre-production plastics at an industrial plant as identified in Attachment A of this General Permit will be referred to as Plastics Facilities in this General Permit. Any Plastics Facility covered under this General Permit that manufactures, uses, stores, or consumes these materials shall submit information to the State Water Board in their PRDs, including the type and form of plastics, and which BMPs are implemented at the facility to prevent illicit discharges.”</p>
Pre-production Plastic	<p>XVII.A.(1)(a-g)</p> <p>14</p>	<p>Section XVIII A (1) (a-g) specifies minimum best management practices (BMPs) for Plastics Facilities. Subsection b states that “When a containment system is infeasible, or poses the potential to cause an illicit discharge, the facility may propose a technically feasible alternative BMP or suite of BMPs.”</p> <p>There is no description of the process to propose an alternative to a containment system, and the other requirements included in this section may also be infeasible at unpaved locations where the discharge of plastic pellets is unlikely given the density of the pellets; they simply do not float. Paving these locations to comply with the requirements specified</p>

¹² Attachment A, Facilities Covered by NPDES General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit), Number 8; Attachment C - Glossary. USEPA Environmental Appeals Board decision in the San Pedro Forklift, Inc. Docket No. CWA-09-2009-0006 case decided 22 April 2013, CWA Appeal No. 12-02.

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
		<p>in Section XVIII A (1) (a-g) may actually increase the likelihood of discharging plastic pellets.</p> <p>As such, BNSF recommends that the State Board modify this section to state:</p> <p>“Any Discharger facility whose discharge is directly related to manufacturing, processing, or raw materials storage areas of pre-production plastics at an industrial plant as identified in Attachment A of this General Permit will be referred to as Plastics Facilities in this General Permit. Any Plastics Facility covered under this General Permit that manufactures, uses, stores, or consumes these materials on surfaces that are likely to result in an illicit discharge of spilled plastics to the storm drain system or Waters of the U.S. shall submit information to the State Water Board in their PRDs, including the type and form of plastics, and which BMPs are implemented at the facility to prevent illicit discharges. Plastics facilities that operate entirely on unpaved surfaces that are graded in such a manner or are contained by structures occurring on the facility so as to prevent the discharge of these types of plastics are exempt from the requirements of this section.”</p>
Regional Water Board Authorities	XIX.C.	<p>“As appropriate, the Regional Water Boards may issue NPDES storm water general or individual permits to a Discharger, categories of Dischargers, or Dischargers within a watershed or geographic area. Upon issuance of such NPDES permits, this General Permit shall no longer regulate the affected Discharger (s).”</p> <p>This language does not include any metric or standard by which the Regional Water Boards shall determine what is “appropriate”. Furthermore, the language “...within a watershed or geographic area...” may create a situation where individual Regional Water Boards issue permits to the same Discharger at separate facilities owned by the Discharger throughout the state, with each permit having different requirements. From a Discharger’s standpoint,</p>

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	15	<p>creating the potential for this type of "patchwork" permitting is intolerable.</p> <p>BNSF recommends that the State Board modify this section to state, "The Regional Water Boards may issue NPDES storm water general or individual permits to a Discharger, or category of Dischargers, pursuant to Section XX, Subsection B, Water Quality Based Corrective Actions, of this General Permit. For Dischargers that operate facilities subject to this General Permit that are located in different watersheds and/or geographic areas, the State Board shall issue the NPDES storm water general or individual permit instead of the Regional Water Boards, pursuant to Section XX, Subsection B of this General Permit. The Regional Water Board and/or the State Water Board must demonstrate that the Discharger cannot meet the Receiving Water Limitations, WQS, or TMDL through compliance with Section XX, Subsection B of this permit, prior to taking such action."</p>

Permit Issue- Concern	Location in Draft Industrial General and (Order 2013-XXXX- DWQ)	Comment
Standard Conditions	XXI.I. 17	<p>BNSF recommends that the State Board modify IGP Section XXI.(I) as follows to allow inspections to be conducted in a safe and compliant manner:</p> <p>Dischargers shall allow the Water Boards, USEPA, and local MS4 (including any authorized contractor acting as their representative), upon contacting appropriate Discharger facility personnel and announcing the inspection, and if so required, to be escorted during the inspection for reasons of safety, to:</p> <ol style="list-style-type: none"> 1. Enter upon the premises at reasonable times where a regulated industrial activity is being conducted or where records are kept under the conditions of this General Permit; 2. Access and copy at reasonable times any records that must be kept under the conditions of this General Permit; 3. Inspect the facility at reasonable times; and 4. Sample or monitor at reasonable times for the purpose of ensuring General Permit compliance.

