



JENNIFER L. ANDERSON
Manager Environmental Operations

BNSF Railway

2454 Occidental Avenue South,
Suite 1-A
Seattle, WA 98134-1451
Phone: (206) 625-6034
Fax: (206) 625-6007
E-mail: Jennifer.Anderson@bnsf.com

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**SENT VIA E-MAIL TO:
industrialstormwatercomments@ecy.wa.gov**

Re: Comments on Department of Ecology Draft Industrial Stormwater General Permit

Dear Mr. La Spina:

We have reviewed the Department of Ecology's Draft Industrial Stormwater General Permit ("Draft ISWGP") under the state's delegated authority to implement the Clean Water Act, and submit the following written comments on behalf of BNSF Railway Company ("BNSF"). These comments focus primarily on some ambiguities and inconsistencies in the apparent scope of the Draft ISWGP coverage for railroad transportation facilities. As explained below, we believe that revisions are necessary to avoid misinterpretation by agency staff and concerned citizens regarding the reach of the State's stormwater program relative to EPA's stormwater regulations.

A. Limit permit coverage to stormwater "associated with industrial activity."

Consistent with both the Existing ISWGP (January 14, 2005) and federal stormwater regulations (40 CFR part 122, Subpart B), the Draft ISWGP expressly applies to railroad transportation facilities that have vehicle maintenance shops or equipment cleaning operations. Unlike both the Existing ISWGP and EPA's stormwater regulations, however, the Draft ISWGP does not expressly limit its application within those facilities to only those portions associated with vehicle maintenance and equipment cleaning activities.

The Existing ISWGP states that "[o]nly those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling and lubrication), equipment cleaning operations ... or which are otherwise identified under one of the other 11 categories of industrial activities listed in this appendix" are "associated with industrial activity" at transportation facilities. Existing ISWGP, at App. 1, p. 60. This language tracks EPA's identical description of transportation facilities associated with industrial activity, and is consistent with EPA's definition generally for "stormwater discharge associated with an industrial activity," which is limited to discharges that are directly related to the manufacturing, processing, or raw materials storage areas at an industrial plant. See 40 CFR 122.26(b)(14).

The Draft ISWGP, however, omits the language in the Existing ISWGP that limits coverage to stormwater from “only those portions” of a facility that involve vehicle maintenance, equipment cleaning, or another enumerated industrial activity. The accompanying “Fact Sheet” (Feb. 20, 2007) exacerbates this omission by referring broadly to stormwater at railroad transportation facilities that is not “associated with industrial activity,” such as railroad bed, railroad ties, human waste, litter, metals roofs and vegetation management. We are very concerned that the Draft ISWGP could be misinterpreted as extending to stormwater not “associated with industrial activity” at BNSF’s railroad transportation facilities. This would be in direct conflict with EPA’s interpretation of what the Clean Water Act requires with respect to stormwater. It may also be inconsistent with the Interstate Commerce Commission Termination Act (ICCTA). The ICCTA expressly grants exclusive jurisdiction over transportation by rail carriers to the Surface Transportation Board. 49 USC § 10501(b)(1)-(2). The ICCTA states that the remedies it provides with respect to regulation of rail transportation facilities are “exclusive and preempt the remedies provided under Federal or State law.” *Id.* The Ninth Circuit Court of Appeals has squarely addressed the preemptive effect of the ICCTA and held that it should be broadly interpreted, and that the ICCTA preemption applies to environmental regulation. *Auburn v. United States*, 154 F.3d 1025, 1030-1031 (9th Cir. 1998). See also, *Green Mountain Railroad Corp v. Vermont*, 404 F.3d 638 (2nd Cir. 2005). While Congress clearly intended the States to have a major role in implementing the Clean Water Act and Congress generally reserved Ecology’s authority to go beyond the Clean Water Act by relying on State law rather than federal law, where that reserved authority unreasonably interferes with interstate railroad activities the specific, preemptive effect of the ICCTA begins to take hold.

Besides the confusing language, we are not aware of any data that would justify expanding permit coverage to stormwater not “associated with industrial activities” as defined in EPA’s regulations. The stormwater data used by Ecology in developing the Draft ISWGP, much of which was provided by BNSF, only reflects stormwater from those portions in railroad facilities involved in equipment maintenance and cleaning. See, Appendix I to *Evaluation of Washington’s Industrial Stormwater Permit* (EnviroVision and Herrera, November 2006). The stormwater data EPA used in support of the federal stormwater regulations, much of which was provided by the railroad industry, was also limited to these particular industrial activities at railroad facilities. See, 60 Fed. Reg. 50979 (Sept. 29, 1995).

The scope of the Existing ISWGP appropriately characterizes coverage of the permit for as only those portions of a railroad transportation facility involved in specific, enumerated, industrial activities. BNSF requests that Ecology continue to define industrial activities associated with a transportation facility as equipment maintenance, equipment cleaning, or the other expressly enumerated industrial activity.

B. Applications for multiple industrial activities at a single facility

The Draft ISWGP emphasizes that a facility must obtain permit coverage for “any and all” of the industrial activities listed in Table 1, but does not explain whether a facility can do so through a single permit application. BNSF requests that Ecology clarify whether this approach is intended to require a single permit application for a railroad facility, or, to the extent that a facility engages in multiple industrial activities, multiple applications corresponding to each

industrial activity. In accordance with the general permit's goal of decreasing the administrative burden, BNSF urges Ecology to allow one permit application for multiple industrial activities that may be occurring at a single railroad transportation facility.

C. Benchmarks and Action Levels

The Draft ISWGP lowers benchmarks and action levels to levels that cannot be achieved by most Permittees. The Draft ISWGP presents water quality-based benchmarks and action levels. When sampling results fall outside of these levels, Permittees will be required to implement corrective actions in an effort to reduce pollutant concentrations to below benchmark values. This approach is reaching beyond what is required by state law. The recent legislation under ESSB 6415 provides for the presumption of compliance with water quality standards for industrial and construction stormwater discharges where a Permittee complies with permit conditions. The language of RCW 90.48.555(6) states:

“Compliance with water quality standards shall be presumed, unless discharge monitoring data or other site specific information demonstrates that a discharge causes or contributes to violation of water quality standards, when the Permittee is:

- a) In full compliance with all permit conditions, including planning, sampling, monitoring, reporting, and recordkeeping conditions; and
- b) Fully implementing stormwater BMPs contained in the stormwater technical manuals approved by Ecology.....”.

The above language would indicate that, when a Permittee is preparing a stormwater pollution prevent plan, implementing all appropriate BMPs in the appropriate Ecology Manual, and collecting and reporting data, then the Permittee is presumed to be in compliance with water quality standards.

D. Corrective Actions

Level Four Corrective Action requirements need clarification. Ecology's Stormwater Management Manual for Western Washington (SWMM) states that compliance with the SWMM represents AKART; therefore any additional AKART evaluation and implementation under Level Four would seem unnecessary because AKART has already been specified in the SWMM.

Also, Ecology needs to understand the implications of establishing action levels that require implementation of stormwater treatment beyond what is considered AKART. Available data suggest most Permittees discharge zinc and copper concentrations above the proposed benchmarks and action levels. In addition, it is well known that, for many facilities, treatment BMP implementation cannot reduce pollutant concentrations to below proposed action levels or benchmarks. The volume of stormwater discharges associated with industrial activities is extremely small compared to municipal stormwater systems. Treatment of stormwater from industrial sites will be very expensive, putting business in Washington at a competitive disadvantage. In addition, there will be no measurable environmental benefit since the discharge volumes are so small compared with other stormwater sources.

Benchmarks should be established as a way to monitor the site-specific effectiveness of BMPs. As discussed in the ESSB 6415 Report, BMP effectiveness will be different for different industries. Therefore, benchmarks should be industry specific, or should be developed so as not to penalize any one particular industry. Rather than prescribing specific corrective actions, the Permittee should be responsible for evaluating sources, implementing BMPs in the SWMM (which represents AKART), and making changes to improve BMP performance, as necessary.

Ecology also needs to consider the highly variable nature of stormwater discharge quality. Results from a single sample are not necessarily an indicator of BMP effectiveness. A single result may be less related to BMP performance and more determined by such factors as storm event intensity, time lapse between storm events, time of sampling, etc. Any corrective action requirements should be based on an average of several data points.

SPECIFIC COMMENTS

The following are our specific comments on the Draft ISWGP:

Page 5, Table 1 – The language indicates that permit coverage is required for railroad Transportation Facilities that have road maintenance shops, equipment cleaning, or deicing operations. We do not understand the clarifying phrase “and vehicle maintenance shops” after “Railroad Transportation” in the Table. We also do not understand why the word “vehicle” is in italics. It would seem that the phrase “and vehicle maintenance shops” (including the parenthetical following) would be better included in the heading to this section of the Table.

Page 8, Condition S1.E – Please clarify that discharges to the ground do not require monitoring and sampling. The requirements of the permit applicable to discharges to the ground should be clearly specified. The proposed regulation of stormwater discharges to the ground at railroad transportation facilities, rather than to surface water, may also be preempted by ICCTA.

Page 22, Condition S3.B (iii) – The Draft Permit states that “the Permittee shall complete construction/installation of treatment BMPs when operational and source control BMPs do not adequately reduce pollutants below the benchmark.” Please revise this language to clarify that treatment BMPs are not required until implementation of a Level Three Corrective Action. A Level Three Corrective Action is not required unless action levels cannot be achieved. Otherwise, the language could be misinterpreted as requiring treatment if benchmarks cannot be achieved.

Page 29, Table 2 – Permittees should be allowed to collect dissolved metals and hardness data to calculate a site specific benchmark and/or action level value.

Page 42, Condition S8.B - Please clarify that treatment BMPs are not required to be implemented as part of a Level Two Corrective Action. We also believe that six months is not enough time to implement capital BMPs. In many cases, procurement and permitting requirements extend the

time necessary to implement capital improvements. A twelve-month timeline would be more appropriate.

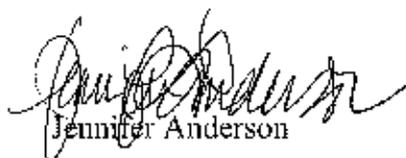
Page 43 and 44, Condition S8.C and D – More data is required in order to evaluate BMP effectiveness prior to implementing additional corrective actions. Two sample points is inadequate to determine a trend; stormwater quality may be impacted by other factors such as rainfall intensity, antecedent dry period, and seasonal effects. Four sampling points would provide better confidence regarding whether a Permittee needs to implement additional corrective actions.

Page 44, Condition S8.D – The Permit should clarify that Level Four Corrective Action is not required until after completing the activities required under the Level Three Corrective Action.

Page 44, Condition S8.D – It will be impossible to complete a water quality study and prepare an engineering report in the six month timeframe proposed under the Level Four Corrective Action. Sampling will need to consider storm and seasonal variability of stormwater quality. The engineering report cannot be prepared without considering this variability. At least 12 months would be required to complete this effort.

Please contact me if you have questions or require clarification.

Sincerely,
BNSF Railway Company



Jennifer Anderson

cc: Melvin Burda, BNSF Environmental Operations
Pamela Nehring, BNSF Law Department
Andrew Johnsen, BNSF Government Affairs
Nathan Graves, Kennedy/Jenks Consultants
Craig Trueblood, K&L Gates