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POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

BNSF RAILWAY COMPANY,  
 Appellant,  
 v.  
 STATE OF WASHINGTON,  
 DEPARTMENT OF ECOLOGY,  
 Respondent.

PCHB No.  
NOTICE OF APPEAL

Pursuant to Chapter 43.21B RCW, Chapter 34.05 RCW, and Chapters 371-08 WAC, BNSF Railway Company ("BNSF"), by and through its attorneys K&L Gates LLP, hereby appeals the modifications to the 2010 Industrial Stormwater General Permit ("ISGP") issued by the Washington State Department of Ecology's ("Ecology") on May 16, 2012.

I. APPEALING PARTY

1.1 BNSF Railway Company:  
 Jennifer Wiener  
 Manager, Environmental Operations  
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1 facilities which have vehicle maintenance *activity*.” Exhibit 3 at 7 (emphasis added). By  
2 eliminating the need for a “shop,” Ecology greatly expanded the scope of ISGP coverage  
3 to include facilities which do not have a fixed shop structure and may have only  
4 infrequent, low-impact, or geographically limited vehicle maintenance activity.

5 5.6 The final MISGP also added language to Condition S8.D to require  
6 permittees who plan to install site-specific treatment technologies to submit an  
7 engineering report, plans and specifications, and an operations and maintenance manual to  
8 Ecology. Exhibit 3 at 36–37. The draft MISGP and accompanying Fact Sheet did not  
9 include this language or any reference to it.

10 5.7 In these respects, the final MISGP is a significant departure from the draft  
11 MISGP that was released to the public for comment. These modifications, which  
12 appeared for the first time in the final MISGP, occurred without notice and opportunity to  
13 comment as required by federal and state law including 40 C.F.R. § 124.5, RCW  
14 34.05.320, RCW 34.05.325, and WAC 173-220-190.

15 5.8 In general, both federal and state law require an agency to provide public  
16 notice of a proposed action, a statement of the reasons supporting the agency action, and a  
17 short explanation of the proposal’s anticipated effects, RCW 34.05.320, and to act on the  
18 proposal presented. 40 C.F.R. § 124.5 (“In a permit modification under this section, only  
19 those conditions to be modified shall be reopened when a new draft permit is prepared.”).  
20 Similarly, RCW 34.05.325 requires the agency to make a good faith effort to insure that  
21 the information on the proposed rule accurately reflects the rule to be presented and  
22 considered in oral hearings for the rule. By failing to discuss these modifications in the  
23 draft MISGP and public notice documents (i.e., the Fact Sheet and Response to  
24 Comments), Ecology violated state and federal law governing modification of permits like  
25 the ISGP.

1           5.9 Ecology's modifications of Condition S1 and S8 were also arbitrary,  
2 capricious, and imposed an unreasonable burden on facilities. With regard to Condition  
3 S1, at no point has Ecology explained why a facility with no vehicle maintenance shop  
4 that would ordinarily be excluded from coverage by the federal regulations should  
5 suddenly trigger regulation under the ISGP. Because the record includes no evidence  
6 regarding whether regulation of this previously exempt category of facilities will reduce  
7 stormwater pollution, this revision is arbitrary, capricious, and imposes an unreasonable  
8 burden on the regulated community.

9           5.10 Similarly, the revision to Condition S8 imposes an unreasonably  
10 burdensome, one-size fits-all requirement without providing the regulated community  
11 with an opportunity to comment or an explanation of why such a requirement is necessary  
12 or what purpose it will serve.

13           5.11 Also arbitrary, capricious, and unreasonably burdensome is Ecology's  
14 revision to Condition S2. In the 2010 ISGP, Conditions S8.C and S8.D require permittees  
15 requesting a time extension or waiver of measures prompted by corrective action  
16 responses to submit an application for "modification of coverage." Condition S2 in the  
17 2010 ISGP provides that "permit coverage or modification of coverage automatically  
18 commences on [after a certain amount of time elapses]."

19           5.12 With respect to permit modifications, Ecology deleted the automatic  
20 approval provision from Condition S2 in the draft and final MISGP. Because third parties  
21 can sue to enforce the ISGP under the Clean Water Act, 22 U.S.C. § 1365(a) (2006), and  
22 failure to implement certain measures can trigger daily penalties of \$37,500 per day, 33  
23 U.S.C. § 1319(d), this revision makes permittees vulnerable to unfair enforcement and  
24 substantial penalties. In exchange, the ISGP as revised does not guarantee a timely  
25 response from Ecology (or any relief from citizen suits while the permittee waits for

1 Ecology's response). Because the effect of this modification is to impose unreasonable  
2 and potentially unachievable obligations on the regulated community, the Board should  
3 invalidate this revision of Condition S2.

4 5.13 Finally, Ecology refused to define "owner" and "operator," Exh. 5 at 8-9,  
5 and provided no rationale for this decision. Exh. 5 at 9. Federal regulations implementing  
6 the Clean Water Act require that where the "owner" and "operator" are different entities,  
7 only the "operator" needs to acquire permit coverage. 40 C.F.R. § 122.21(b). The federal  
8 equivalent of the ISGP—the Multi-Sector General Permit—defines both terms, Exh. 6 at A-  
9 4, as do previous iterations of the ISGP, *e.g.*, Exh. 7 at 9 (2002 ISGP). It is arbitrary and  
10 capricious for Ecology to issue an ISGP in which an entity's status as an "operator"  
11 triggers obligations, *see, e.g.*, Exh. 3 at 59 (defining "discharger" as "the owner or  
12 operator of a facility..."), and subjects the entity (which may have extremely limited  
13 control over the pollution-causing activities) to penalties of \$37,500 per day without  
14 providing any criteria to help that entity determine whether it needs permit coverage.

## 15 VI. RELIEF SOUGHT

16 Wherefore, Appellant respectfully requests that the Board grant the following  
17 relief:

- 18 1. A declaratory ruling pursuant to RCW 34.05.240 and WAC 371-08-355  
19 that Ecology's modifications to Conditions S1 and S8 were unlawful  
20 permit modifications for failing to follow the notice and comment  
21 procedures imposed by 40 C.F.R. § 124.5, RCW 34.05.320, RCW  
22 34.05.325, and WAC 173-220-190.
- 23 2. A declaratory ruling pursuant to RCW 34.05.240 and WAC 371-08-355  
24 that Ecology's revision to Condition S2 was an arbitrary, capricious and  
25 unreasonably burdensome agency action.

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- 3. A declaratory ruling pursuant to RCW 34.05.240 and WAC 371-08-355 that Ecology's refusal to define the term "operator" was arbitrary and capricious.
- 4. An order invalidating the modifications to Condition S1, S2 and S8 set forth above.
- 5. Such other relief as the Board deems appropriate.

Respectfully submitted this 14<sup>th</sup> day of June, 2012.

K&L GATES LLP

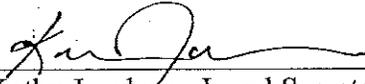
By:   
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Marie E. Quasius, WSBA No. 42285  
Attorney for Appellant  
BNSF Railway Company

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on June 14, 2012, I caused a true and correct copy of the foregoing document, with its exhibits, to be served on the following by first-class mail, United States postage prepaid:

Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia, WA 98504-7608

  
Kathy Jacobson, Legal Secretary  
June 14, 2012 at Seattle, Washington