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Travis Porter
Washington State Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

Re: Comments on Washington's Draft National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for Stormwater Discharges Associated with Industrial Activities

Dear Mr. Porter:

The purpose of this letter is to provide comments on Washington's draft NPDES Industrial Stormwater General Permit (Permit, ISGP) released May 1, 2019.

BNSF Railway Company (BNSF) is committed to protection of the environment as it relates to stormwater discharges associated with industrial activities through implementation of a comprehensive program of Best Management Practices (BMPs). We appreciate the opportunity to provide comments on the draft ISGP. BNSF supports the efforts to improve stormwater quality put forth in the draft ISGP and appreciates that this draft maintains important water quality benchmarks and includes new language including:

- additional details provided on the Conditional No Exposure Exemption,
- clarification of multiple sampling events per day and per quarter, and
- addition of the electronic SWPPP option to provide public availability.

BNSF does not support expansion of required permit coverage beyond the existing framework of the National Pollutant Discharge Elimination System (NPDES) program. Ecology's proposed expansions include requiring permit coverage for businesses without industrial activity as defined per 40 CFR 122.26, adding discharges to groundwater as covered activities, and adding a first flush sampling event in September. These changes carry significant operational and economic impacts to transportation sector businesses with no clear benefit or improvement to water quality.

Additionally, BNSF supports and asks that Ecology carefully consider the joint comment letter by the Association of Washington Business and other trade and business associations. The joint

comment letter raises many critical issues for the regulated community and includes suggestions that will benefit water quality and provide needed clarity, certainty, and predictability for facilities regulated under the permit.

Specific comments that BNSF has regarding the draft Permit include:

Comment 1 – Transportation Sector Facility Area of Coverage

Permit Reference: S.1, pages 1-3. Table 1 and Definition for Industrial Activity

Industrial Activities	NAICS Groups
Transportation facilities which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations. <ul style="list-style-type: none"> • Railroad Transportation • Transit and Ground Passenger Transportation • Truck Transportation • Postal Service • Water Transportation • Air Transportation • Petroleum Bulk Stations and Terminals 	482xxx, 488210 485xxx, 488490, 487110 484xxx 491xxx 483xxx, 487210, 4883xx, 532411 481xxx, 487990 4247xx

Comment:

For the purposes of coverage under the NPDES permit program, 40 CFR 122.26(b)(14)(viii) defines industrial activity for transportation facilities as: “Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;”. Clarifying language should be added to this permit to be consistent with 40 CFR 122.26.

Suggested Revision:

Language or a footnote should be added to Table 1 stating that “only those portions of transportation sector facilities that are either involved in vehicle maintenance, equipment cleaning operations, or airport deicing operations are covered under this permit.”

Industrial Activities	NAICS Groups
<p>Those portions of transportation facilities¹ which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations.</p> <ul style="list-style-type: none"> • Railroad Transportation • Transit and Ground Passenger Transportation • Truck Transportation • Postal Service • Water Transportation • Air Transportation • Petroleum Bulk Stations and Terminals 	<p>482xxx, 488210</p> <p>485xxx, 488490, 487110</p> <p>484xxx</p> <p>491xxx</p> <p>483xxx, 487210, 4883xx, 532411</p> <p>481xxx, 487990</p> <p>4247xx</p>
<p>¹ Only those portions of transportation sector facilities that are either involved in vehicle maintenance, equipment cleaning operations, or airport deicing operations are covered under this permit.</p>	

Comment 2 – Requiring ISGP Coverage for Discharges to Groundwater that Ecology Considers to be a Significant Contributor of Pollutants

**Permit Reference: S1.C.3, Facilities Not Required to Obtain Coverage. Page 3
S1.B.1, Significant Contributor of Pollutants. page 3**

S1.C.3: Industrial facilities that discharge stormwater only to groundwater (e.g., on-site infiltration) with no discharge to surface waters of the State under any condition, provided the facility doesn't meet the requirements of S1.B.1.

S1.B: Ecology may require a facility to obtain coverage under this permit if Ecology determines the facility:

1. Is a significant contributor of pollutants to waters of the State, including groundwater.

Comment:

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters¹. The United States Environmental Protection Agency (USEPA) recently issued an interpretive statement concluding that releases of pollutants to groundwater are categorically excluded from the CWA's permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to USEPA under other statutory authorities. Based on the USEPA's analysis and careful consideration of public input, USEPA concluded that releases of pollutants to groundwater are excluded from the CWA's permitting requirements, regardless of whether that groundwater is hydrologically connected to a surface

¹ <https://www.epa.gov/laws-regulations/summary-clean-water-act>

water². Discharges to groundwater are more appropriately regulated through the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As such, the CWA NPDES permit program does not apply to discharges to groundwater.

Beyond the departure from the language of and guidance under the CWA, BNSF has substantive concerns with Ecology's proposed expansion here. How would Ecology determine whether a facility is a significant contributor of pollutants to groundwater? Fact Sheet page 25 briefly summarizes what Ecology would consider when making a determination on whether a facility is a *significant contributor of pollutants* to groundwater but does not identify or define a specific process that would be followed, including how a facility would challenge a *significant contributor of pollutants* determination by Ecology.

Suggested Revision:

The language in S1.C.3 referring to significant contributor of pollutants under S1.B.1 and the language referring to groundwater under S1.B.1 should be removed from the final version of the ISGP.

S1.C.3: Industrial facilities that discharge stormwater only to groundwater (e.g., on-site infiltration) with no discharge to surface waters of the State under any condition.

S1.B: Ecology may require a facility to obtain coverage under this permit if Ecology determines the facility:

1. Is a significant contributor of pollutants to waters of the State.

Comment 3 – Requiring ISGP Coverage for Discharge Points to Groundwater

Permit Reference: S1.E.1, Discharges to Ground, page 5

S1.E Discharges to Ground

1. For sites with a discharge point to groundwater, the terms and conditions of this permit shall apply.

Comment:

As described above, the Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters³. As discussed above, the CWA NPDES permit program does not apply to discharges to groundwater, and specifically to releases of a pollutant from a discharge point or point source to groundwater. Ecology should consider developing a sister program to the

² <https://www.epa.gov/npdes/releases-point-source-groundwater>

³ <https://www.epa.gov/laws-regulations/summary-clean-water-act>

Underground Injection Control (UIC) Program under the authority of the SDWA to address point source discharges to groundwater that could impact drinking water sources.

Suggested Revision:

The language in S1.E.1 should be deleted in the final version of the ISGP.

S1.E Discharges to Ground

1. Facilities with a discharge point to groundwater through an underground injection control well shall comply with any applicable requirements of the Underground Injection Control (UIC) regulations, Chapter 173-218 WAC.

Comment 4 – Consistent Attainment Annual Sample

Permit Reference: S4.B.7, Sampling Requirement. page 19

7. The Permittee can reduce monitoring to once a year for a period of three years (12 quarters) based on consistent attainment of benchmark values when:

c. The annual sample must be taken during the 4th quarter. A facility may average the annual sample with any other samples taken over the course of the 4th quarter.

d. A Permittee whose annual sample exceeds the benchmark during consistent attainment is no longer allowed to claim consistent attainment. The Permittee must begin sampling in accordance with S4.B.

Comment:

Ecology should clarify that the consistent attainment annual sample does not include the first fall sample to remove any confusion about sampling requirements for those who have achieved consistent attainment.

Suggested Revision:

c. The annual sample must be taken during the 4th quarter. A facility may average the annual sample with any other samples taken over the course of the 4th quarter. The annual sample does not include sampling the first fall storm event.

Comment 5 – First Fall Storm Event Sampling and Discharge Monitoring Report (DMR)

**Permit Reference: S4.B.1.a and S4.B.1.b, Sampling Requirements. pages 17
S5.A.3, Benchmarks and Sampling Requirements. page 20**

Comment:

In draft 2020 ISGP listening sessions, Ecology proposed to require a separate DMR for the “first fall storm event” and to move the timing from October 1st on or after September 1st, so that Ecology can improve its data collection. The change in timing of the “first fall storm event” to potentially encompass two sampling quarters creates significant difficulties for Permittees to collect samples representative of quarterly discharges from a facility, and limits Permittees’ ability to average samples based on timing of the “first fall storm event” and representative benchmark samples. The benefits of such a change are not identified by Ecology and complications with this change are readily apparent. Ecology’s 2009 ISGP Fact Sheet included references to the 6415 Data Analysis Report, which “describes the data for most parameters as exhibiting a distinctly right-skewed distribution, due to the presence of numerous outliers in the upper end of the data range. This distribution is commonly observed in water quality data that are collected during stormwater sampling, due to the influence of sporadic, ‘first flush’ events that are associated with high pollutant concentrations. After the ‘first flush’, discharges typically have lower pollutant concentrations.” Hence, the “first fall storm event” is not representative of quarterly facility stormwater discharges.

BNSF suggests that the “first fall storm event” be a stand-alone report-only sample event and not part of benchmark sampling. Part S4.B.1 should then be revised as suggested below.

Suggested Revision:**B. Sampling Requirements****1. Quarterly Benchmark and First Fall Storm Event Sample Timing and Frequency**

- a. The Permittee shall sample the *discharge* from each designated location at least once per quarter for comparison to benchmarks as described in Part S5.A.3:

1st Quarter = January, February, and March
2nd Quarter = April, May, and June
3rd Quarter = July, August, and September
4th Quarter = October, November, and December

- b. In addition to the benchmark sampling required at S4.B.1.a, Permittees shall sample the *stormwater discharge* from the *first fall storm event* each year. “First fall storm event” means the first time on or after September 1st of each year that precipitation occurs and results in a *stormwater discharge* from a *facility*. Results of the *first fall storm event* sampling shall be reported on a separate DMR for report-only purposes. Only if the Permittee is not able to collect a benchmark sample during the quarter in which the *first fall storm event* sample is collected, then the *first fall storm event* sample analysis result will then also be used for the benchmark sample DMR for that quarter.

Similar changes should be made in Part S5.A.3 to make clear that first fall storm event sample analysis results will be report-only and not used as part of quarterly benchmark DMR submittals unless a Permittee has no other samples in that quarter.

Comment 6 – Corrective Action Timeline for Level 3 Corrective Actions

Permit Reference: S8.D.5, Level 3 Corrective Actions – Treatment BMPs. pages 36

5. Level 3 Deadline: The Permittee shall sign/certify and fully implement the revised SWPPP according to Permit Condition S3 and the applicable Stormwater Management Manual as soon as possible, but no later than September 30th of the following year.

Comment:

BNSF experience implementing the ISGP and level 3 corrective actions has shown that the timeline provided in the ISGP for approval of the engineering report, collecting necessary design data, and completing design, procurement, and construction is not feasible. Additionally, like most large organizations, BNSF has a comprehensive stepwise capital program that includes budgeting and approval processes and detailed procurement procedures that, for large and/or complex projects, require more than one year to obtain project approvals, secure funding, and procure a contractor. Large facilities require more time to effectively implement appropriate level 3 corrective actions.

Suggested Revision:

5. Level 3 Deadline: The Permittee shall sign/certify and fully implement the revised SWPPP according to Permit Condition S3 and the applicable Stormwater Management Manual as soon as possible, but no later than September 30th of the following year for permitted facilities 10 acres and fewer, and no later than September 30th two years after triggering the requirement for permitted facilities greater than 10 acres or incurring a design and construction cost greater than \$1,000,000. For facilities treating more than 10 acres or incurring design and construction cost greater than \$1,000,000 with a two-year timeframe for treatment system installation, the permittee shall institute an aggressive operational BMP program to minimize impacts to water quality until such time as the treatment system is operational.

a. If the engineering report is not approved by Ecology on or before June 1 prior to the Level 3 deadline, then the Level 3 deadline shall be automatically extended to be set to four months from the date the Engineering Report is approved by Ecology.

Comment 7 – Timely Response to Engineering Reports and Extension Requests**Permit Reference: S8.C.4, Level 2 Corrective Actions – Structural Source Control BMPs; S8.D.3, and S8.D.5, Level 3 Corrective Actions – Treatment BMPs. pages 35-36****Comment:**

In addition to providing insufficient time to adequately implement corrective actions, the timing and duration of extension request and engineering report submittal and approval conflicts with the preferred construction period for stormwater treatment projects. The timing and duration of review for engineering reports and extension requests leaves Permittees hamstrung. Uncertainties associated with extension requests and the timing of project approvals make the process overly cumbersome and unwieldy for Permittees. The language in the draft Permit suggests that a Permittee must proceed with design/construction of a complex treatment system before having certainty that Ecology has approved of the design approach.

For example, the draft permit provides Ecology 60 days to approve/decline a level 2 extension request, and then, if declined, provides only 45 days for the Permittee to implement the level 2 corrective action. Similarly, with the level 3 extension letter, Ecology has 60 days to approve/decline and then, if declined, provides only 75 days for the Permittee to design and construct a complete treatment system.

Ideally, the submittal/approval process would happen earlier in the year so that design can be completed in winter/spring, and construction start no later than June 1st. This would require shifting the ISGP reporting year by one quarter: October 1—September 30. If this is not possible, extension requests and engineering reports should be reviewed and approved/declined by Ecology in no more than 30 days to maximize Permittees design and construction window and provide certainty to the process. These submittals/approvals should be automatically approved after 30 days similar to the Notice of Intent process.

Suggested Revision:**Level Two Corrective Actions – Structural Source Control BMPs****S8.C.4.c:**

To request a time extension or waiver, a Permittee shall submit a detailed explanation of why it is making the request (technical basis), and a Modification of Coverage form to Ecology in accordance with Condition S2.B, by May 15th prior to Level 2 Deadline. Ecology will approve or deny the request within 30 days of receipt of a complete Modification of Coverage request. After 30 days, the request will be automatically approved if no response is received by the Permittee.

Level Three Corrective Actions – Treatment BMPs**S8.D.3.b**

The engineering report shall be submitted no later than the May 15th prior to the Level 3 deadline, unless an alternate due date is specified in an order. Ecology will approve or deny the engineering report within 30 days of receipt of the engineering report. After 30 days, the engineering report will be automatically approved if no response is received by the Permittee.

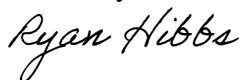
S8.D.5.c

To request a time extension or waiver, a Permittee shall submit a detailed explanation of why it is making the request (technical basis), and a Modification of Coverage form to Ecology in accordance with Condition S2.B, by May 15th prior to Level 2 Deadline. Ecology will approve or deny the request within 30 days of receipt of a complete Modification of Coverage request. After 30 days, the request will be automatically approved if no response is received by the Permittee.

Thank you in advance for your consideration of our comments. We believe the state can continue a strong stormwater regulatory framework to improve water quality without expanding the ISGP to areas that could negatively impact the state economy.

Thank you for this opportunity to comment on the draft Permit Modifications. If you have any questions concerning the contents of this letter, please contact me at (253) 591-3072.

Sincerely,



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