



April 2, 2024

**VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

BNSF Railway Company  
ATTN: Managing Agent  
740 E Carnegie Dr  
San Bernardino CA, 92408

BNSF Railway Company  
Jill Mulligan  
Chief Legal Officer  
2650 Lou Menk Drive,  
Fort Worth, TX, 76131

BNSF Railway Company  
CA Registered Corporate Agent  
330 N Brand Blvd,  
Glendale, CA, 91203

**Re: Clean Water Act Notice of Intent to Sue/60-Day Notice Letter**

To the Above-Listed Recipients:

Please accept this letter on behalf of the Coastal Environmental Rights Foundation (“CERF”) and San Diego Coastkeeper (“Coastkeeper”) regarding the BNSF Railway Company’s (“BNSF”) violations of the Clean Water Act (“CWA”).<sup>1</sup> The purpose of this letter is to put BNSF on notice of the violations of the CWA, for which CERF and Coastkeeper intend to file suit. As explained below, BNSF continues to discharge pollutants into a water of the United States (“WOTUS”) without a permit, in violation of the CWA.

Section 505(b) of the CWA requires that sixty (60) days prior to the initiation of a citizen’s civil lawsuit in Federal District Court under Section 505(a) of the Act, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency for the region in which the violations have occurred, the U.S. Attorney General, and the Chief Administrative Officer for the State in which the violations have occurred [33 U.S.C. § 1365(b)(1)(A)]. This notice letter (“Notice Letter”) is being sent to you as a Responsible Party for the unlawful discharges. This Notice Letter is issued pursuant to 33 U.S.C. §§ 1365(a) and (b) of the Clean Water Act as notice of CERF and Coastkeeper’s intention to file a federal enforcement action against the BNSF for violations of the Clean Water Act sixty (60) days from the date of this Notice Letter.

**1. Background**

**1.1 CERF and Coastkeeper**

CERF is a non-profit public benefit corporation organized under the laws of the State of California with its main office in Encinitas, CA. CERF is dedicated to the preservation, protection, and defense of the environment, the wildlife, and the natural resources of the California Coast.

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<sup>1</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*

CERF's mailing address is 1140 S. Coast Highway 101, Encinitas, CA 92024, and telephone number is 760-942-8505.

San Diego Coastkeeper is a non-profit public benefit corporation organized under the laws of the State of California with its office at 8305 Vickers Street, Suite 209, San Diego, CA 92111. Its telephone number is 619-609-0860. Founded in 1995, San Diego Coastkeeper is dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of San Diego County watersheds.

To further these goals, Coastkeeper and CERF actively seek federal and state agency implementation of the CWA, and, where necessary, directly initiate enforcement actions on behalf of themselves and their members.

CERF's and Coastkeeper's members live, work, recreate, and/or otherwise use and enjoy the areas in and around the waters into which BNSF discharges, including but not limited to, Buena Vista, Agua Hedionda, Batiquitos, San Elijo, San Dieguito, and Los Penasquitos Lagoons which empty into the Pacific Ocean (collectively "Receiving Waters"). Members of CERF and Coastkeeper use the Receiving Waters to swim, boat, kayak, surf, bird watch, view wildlife, fish, hike, bike, walk, run, general aesthetic enjoyment, and/or for educational opportunities or developing educational tools. Additionally, members of CERF and Coastkeeper use the Receiving Waters to engage in scientific study through pollution and habitat monitoring and restoration activities. The discharges of pollutants from BNSF impair each of these uses. Discharges of plastic nurdles from BNSF rolling stock are ongoing and continuous. Thus, the interests of CERF's and Coastkeeper's members have been, are being, and will continue to be adversely affected by the Responsible Party's failure to comply with the Clean Water Act.

## 1.2 BNSF

BNSF is a railway company headquartered at 2650 Lou Menk Drive, Fort Worth, TX, 76131. Within California, BNSF's main operations occur at 740 E Carnegie Dr., San Bernardino, California, 92408. BNSF has over 50 locations throughout California that engage in industrial activities related to the shipping and transportation of materials. In San Diego County, BNSF trains travel on tracks that cross Buena Vista, Agua Hedionda, San Elijo, Los Penasquitos, and Batiquitos Lagoons – often carrying nurdles.

Information available to CERF and Coastkeeper indicates BNSF is the sole transporter of nurdles along this rail corridor. BNSF specifically advertises its plastic transportation capacities.<sup>2</sup> BNSF transports plastic nurdles in private equipment, through transloaders, either in covered or uncovered hoppers. While uncovered hoppers are the most likely to spill nurdles from rolling

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<sup>2</sup> BNSF Website. <https://www.bnsf.com/ship-with-bnsf/industrial-products/plastics.html#subtabs-2>.

stock, experienced train operators routinely concede that covered hoppers also frequently leak small materials like plastic nurdles.<sup>3</sup>

The North County Transit District (“NCTD”) owns approximately 62 miles of mainline railroad track from the Orange County/San Diego County line to the Santa Fe Depot in downtown San Diego. These tracks bisect and cross over each of the Receiving Waters. BNSF operates freight shipping trains along these tracks pursuant to a shared use agreement. After nurdles were discovered along this rail corridor, NCTD assessed the nurdle spills and determined BNSF the responsible party. Paul Ballard, Executive Director of NCTD, wrote to Tracey Foster, Chief Development Officer for NCTD, on October 30, 2023, that “[t]his is a product that BNSF would transport. I don’t believe we carry them on the Coaster.” BNSF then assumed responsibility for the cleanup. Thomas Jones, Manager of Environmental Remediation for BNSF, emailed NCTD on December 4, 2023, claiming to tentatively schedule cleanup on December 5, 2023. However, as discussed *infra* section 1.4, CERF and Coastkeeper representatives continue to find nurdles along the tracks.

### 1.3 Plastic Nurdles and Impacts on Coastal Ecosystems

Plastic nurdles are small plastic pieces measuring 1-5mm in diameter. These nurdles are the raw materials used for manufacturing plastic bottles and other plastic items. Annually, over 230,000 tons of these nurdles enter the marine environment.<sup>4</sup> BNSF and other railroad companies discharge these nurdles into water bodies through hopper leaks, spills during loading and unloading, and train derailments. Nurdles routinely escape the plastic transport process, including spilling from cargo containers while being transported by trains and ships. When nurdles are being loaded into trains, for example, they are often blown into rail cars using large hoses.<sup>5</sup> The beads can leak around the edges of hoses at factories and out the sides of rail cars as they travel to distribution centers.<sup>6</sup> Researchers such as Mark Benfield, an oceanographer at Louisiana State University who studies microplastics, have found nurdles lining the sides of tracks used by nurdle-carrying trains.<sup>7</sup> The California State Water Resources Control Board’s (“State Board”) website for the Preproduction Plastic Debris Program includes a photographic example of “preproduction plastic pellets spilled during rail car loading.”<sup>8</sup> These spills have devastating effects on aquatic and marine environments.

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<sup>3</sup> See <https://www.foxnews.com/us/minnesota-railroad-track-corn-viral-spill-freight-train-canadian-pacific-railway>; <https://www.usatoday.com/story/news/nation/2023/05/23/explosive-chemical-missing-train-ammonium-nitrate/70246864007/>.

<sup>4</sup> [https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave\\_mainreport.pdf](https://www.pewtrusts.org/-/media/assets/2020/10/breakingtheplasticwave_mainreport.pdf); <https://www.euronews.com/green/2023/01/08/what-are-nurdles-and-how-are-they-devastating-the-environment#:~:text=Plastic%20pellets%20are%20causing%20environmental,end%20up%20in%20the%20environment>.

<sup>5</sup> <https://www.vox.com/recode/23056251/nurdles-plastic-pollution-ocean-microplastics>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> [https://www.waterboards.ca.gov/water\\_issues/programs/stormwater/plasticdebris\\_samples.shtml](https://www.waterboards.ca.gov/water_issues/programs/stormwater/plasticdebris_samples.shtml).

Once in the environment, nurdles’ “small size allows the material to widely disperse and become embedded in natural elements such as sediments and plant matter, making clean-up efforts costly and labor intensive.”<sup>9</sup> Like most plastics, nurdles do not biodegrade, but slowly deteriorate over decades or centuries, forming the second-largest source of ocean microplastics behind only tire dust.<sup>10</sup> Ocean currents, wind, waves, and sea life transport nurdles to ocean waters throughout the globe. Additionally, plastic harbors biofouling species. Thus, when nurdles disperse, they can introduce devastating invasive species to an ecosystem. There have been 32 reports of transporting 270 different species via plastic to new ecosystems.<sup>11</sup>

Nurdles also absorb toxic chemicals found in the ocean, like DDT, PCBs, and mercury, and therefore nurdles act as vectors for these toxic pollutants as they disperse throughout our oceans.<sup>12</sup> Plastic nurdles look like fish eggs, and thus sea turtles, fish, and birds often mistake nurdles for food.<sup>13</sup> As these animals cannot digest plastic, this results in digestive system blockages, starvation, and death. Less than five millimeters in diameter, plastic nurdles are also considered microplastics – the most consumed plastic by marine life.<sup>14</sup> Ingestion of microplastic particles also exposes organisms to the chemicals used to produce the plastic material itself, as well as persistent organic pollutants (“POPs”) in the environment that tend to accumulate on plastic particles.<sup>15</sup> Notably, scientists have documented plastic’s adverse impacts on at least 663 marine species.<sup>16</sup> For these reasons, California law specifically classifies nurdles as pollutants to be regulated under the Clean Water Act.<sup>17</sup>

Thus, discharging plastic nurdles into aquatic environments (1) devastates food webs through animal consumption; (2) threatens biodiversity through introducing invasive species; and (3) harms water quality and ecosystem health by spreading toxic chemicals. Therefore, such nurdle discharges harm the “chemical, physical, and biological integrity” of our waters, the precise harms the CWA was enacted to prevent.<sup>18</sup>

#### 1.4 Plastic Nurdles Discharged by BNSF Along Railroad Tracks and in the Receiving Waters

BNSF has discharged, and continues to discharge, plastic nurdles along the north San Diego County train tracks, which travel through and over Buena Vista, Agua Hedionda, Batiquitos

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<sup>9</sup> [https://www.waterboards.ca.gov/water\\_issues/programs/stormwater/plasticdebris.shtml](https://www.waterboards.ca.gov/water_issues/programs/stormwater/plasticdebris.shtml).

<sup>10</sup> [https://www.pewtrusts.org/-/media/assets/2020/07/breakingtheplasticwave\\_report.pdf](https://www.pewtrusts.org/-/media/assets/2020/07/breakingtheplasticwave_report.pdf).

<sup>11</sup> *Secretariate of the Convention on Biological Diversity and the Scientific and Technical Advisory panel-GEF. In: Impacts of Marine Debris on Biodiversity: Current Status and Potential Solutions*, Convention on Biological Diversity (CBD), Technical Series No. 67 (2012) [hereinafter CBD].

<sup>12</sup> <https://www.wired.com/story/little-plastic-nurdles-are-flooding-beaches-and-waterways/>.

<sup>13</sup> *Id.*

<sup>14</sup> Inês Sequeira et al., *Worldwide Contamination of Fish with Microplastics: A Brief Global Overview*, Marine Pollution Bulletin 160 (2020).

<sup>15</sup> <https://www.epa.gov/trash-free-waters/learn-about-aquatic-trash>.

<sup>16</sup> *Id.*

<sup>17</sup> Cal. Water Code § 13367 (West).

<sup>18</sup> CWA § 101.

San Elijo, San Dieguito, and Los Penasquitos Lagoons. When transported over water, nurdles have spilled and continue to spill from trains, and directly enter surface waters.

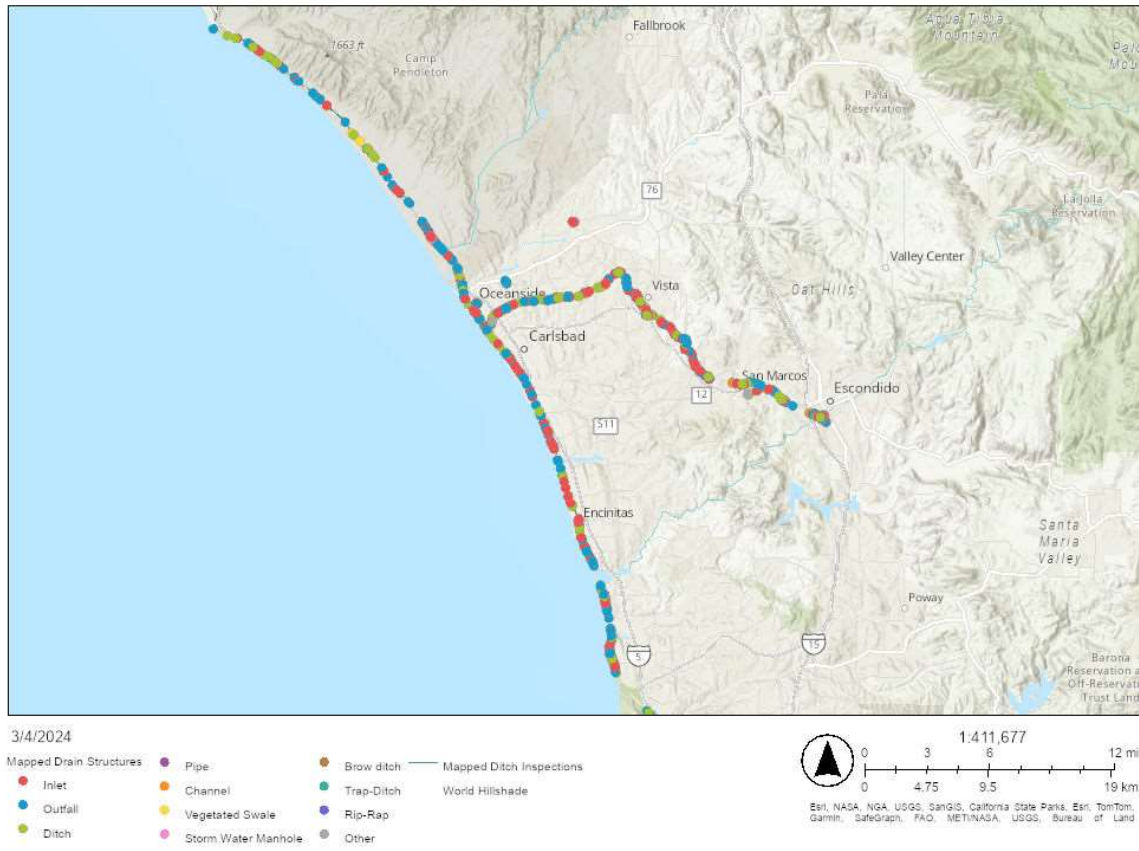
The train tracks from downtown San Diego to and through northern San Diego County travel directly over and across many lagoons and estuaries that empty into the ocean. Additionally, NCTD has replaced older railroad tracks that previously crossed berms, with bridges, such as the tracks over San Elijo Lagoon and Batiquitos.<sup>19</sup> Although better for the lagoons because of increased tidal flow, the bridges have the unintended consequence of also increasing direct nurdle deposition into the waters.

In addition to these direct deposits into the Receiving Water, the nurdles also enter the Receiving Waters through storm water conveyance structures that line the tracks. Map 1 below shows the numerous inlets, outfalls, drains, and channels that convey storm water from the railroad tracks into the Receiving Waters. When it rains, spilled nurdles are thus conveyed into the Receiving Waters through these structures. For example, Batiquitos Lagoon has two storm drains along the tracks that empty into the Lagoon. (*See* Map 2).

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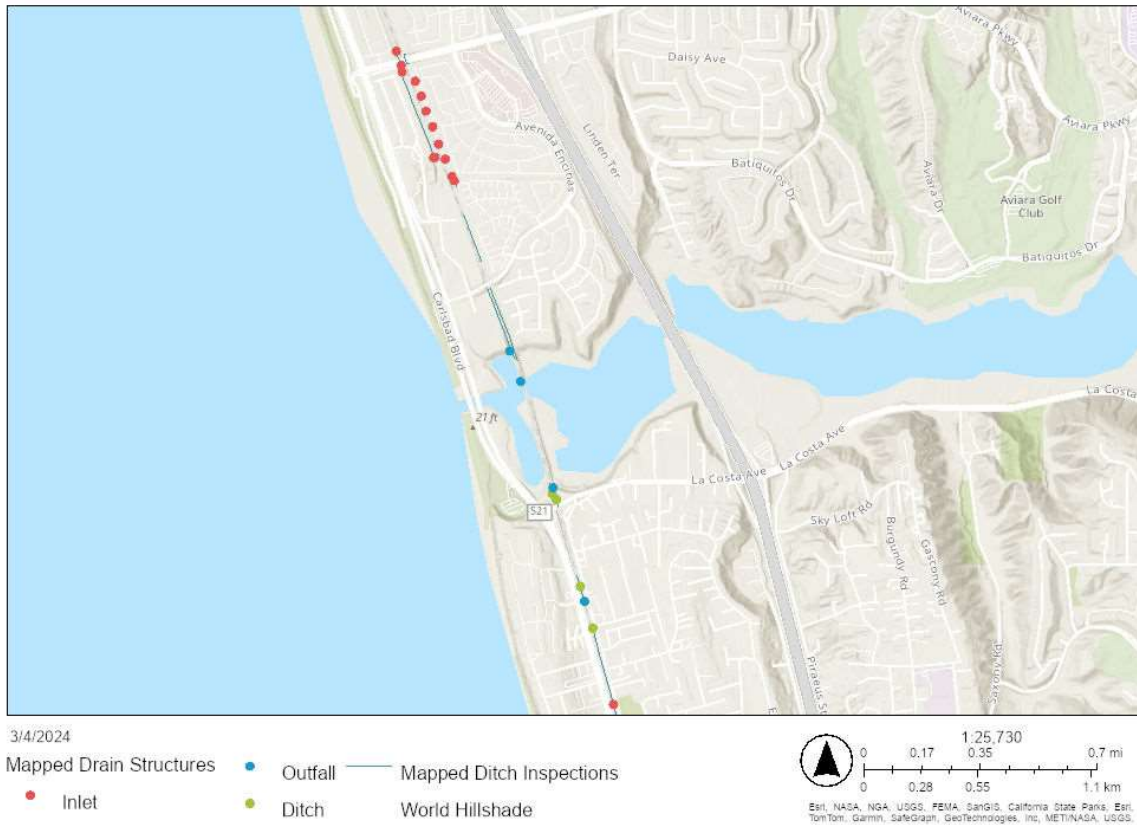
<sup>19</sup> <https://www.kpbs.org/news/2016/12/06/little-little-san-diegos-coastal-rail-line-double>.

### NCTD Stormwater Map



Map 1: Displays the drainage structures that convey stormwater from the railroad tracks into the Receiving Waters.

NCTD Stormwater Map



Map 2: Displays the storm drains along the tracks emptying into Batiquitos Lagoon.

CERF and Coastkeeper representatives have observed at least thousands, if not hundreds of thousands of plastic nurdles alongside the tracks and in and around the Receiving Waters. Further, CERF and Coastkeeper members have photographic and video evidence of such nurdle deposition *See Photographs 1-3 below*. CERF and Coastkeeper representatives have found nurdles in and along storm water conveyance infrastructure that discharges into Receiving Waters, strongly indicating that nurdles spilled onto land are conveyed via storm water into local waterbodies. Specifically, CERF and Coastkeeper have evidence of plastic nurdle spills that occurred on or shortly before: February 15, 2023; March 9 and 29, 2023; April 10, 18, and 27, 2023; May 7, 23, and 30, 2023; June 4, 17, and 29, 2023; July 9 and 28, 2023; August 14 and 27, 2023; September 1, 15, 19, and 28, 2023; October 23, 2023; November 4, 9, and 22, 2023; December 12, 21, and 29, 2023; and January 15, 18, 23, and 24; and February 12, 2024.



Photograph 1: Shows the stretch of train tracks over Batiquitos Lagoon, one location where spilled nurdles were discovered on multiple occasions. Taken on September 19, 2023.





Photograph 2: Shows a closeup image of spilled nurdles adjacent to Batiqitos Lagoon, in the same location as Photograph 1. Taken on February 12, 2024.



Photograph 3: Shows a nurdle floating in San Elijo Lagoon, one lagoon where BNSF discharges the nurdles. Taken on January 15, 2023.

### 1.5 The Receiving Waters and Their Beneficial Uses

The rail lines operated by BNSF bisect nearly every coastal wetland in San Diego County. Dynamic waterbodies adjacent to the ocean, coastal wetlands encompass an extraordinary range of habitats of critical importance. These waterbodies, and the ecosystems they support, provide an invaluable array of benefits including filtering pollution from urban runoff, buffering from storms and protecting infrastructure, habitats for birds, fish, invertebrates, and plants, carbon sequestration, and natural spaces for aesthetic and recreational enjoyment. Tragically, California has lost more than 95% of its coastal wetlands, further underscoring the importance of protecting these waterbodies and ecosystems from further degradation.<sup>20</sup> Accordingly, each of the Receiving Waters are protected with special status under California state law. Buena Vista,<sup>21</sup> Agua Hedionda,<sup>22</sup> Baticuitos,<sup>23</sup> San Elijo,<sup>24</sup> and San Dieguito<sup>25</sup> Lagoons are each State Ecological

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<sup>20</sup> California Wetland Program Plan 2023-2028 at 1.

<sup>21</sup> <https://wildlife.ca.gov/Lands/Places-to-Visit/Buena-Vista-Lagoon-ER>.

<sup>22</sup> <https://wildlife.ca.gov/Lands/Places-to-Visit/Agua-Hedionda-Lagoon-ER#:~:text=Description,its%20riparian%20and%20chaparral%20habitats>.

<sup>23</sup> <https://wildlife.ca.gov/Lands/Places-to-Visit/Baticuitos-Lagoon-ER>.

<sup>24</sup> <https://wildlife.ca.gov/Lands/Places-to-Visit/San-Elijo-Lagoon-ER>.

<sup>25</sup> <https://wildlife.ca.gov/Lands/Places-to-Visit/San-Dieguito-Lagoon-ER>.

Reserves. San Dieguito Lagoon is also a State Marine Conservation Area. Los Penasquitos Marsh is a Natural Preserve within Torrey Pines State Reserve.<sup>26</sup>

The *Water Quality Control Plan for the San Diego Basin* (“San Diego Basin Plan” or “Basin Plan”) identifies the “Beneficial Uses” of water bodies in the region. The Beneficial Uses for all Receiving Water Lagoons include contact water recreation; non-contact water recreation; preservation of biological habitats of special significance; estuarine habitat; wildlife habitat; rare, threatened, or endangered species; marine habitat; migration of aquatic organisms; and spawning, reproduction, and/or early development.<sup>27</sup> Agua Hedionda Lagoon also includes industrial service supply; commercial and sports fishing; aquaculture; and shellfish harvesting. Buena Vista Lagoon also includes warm-freshwater habitat. The Beneficial Uses for the Pacific Ocean include industrial service supply; navigation; contact water recreation; non-contact water recreation, commercial and sport fishing; wildlife habitat; preservation of biological habitats of special significance; marine habitat; migration of aquatic organism; spawning, reproduction, and/or early development; shell harvesting; aquaculture; and rare, threatened, or endangered species.<sup>28</sup>

According to the current 303(d) List of Impaired Water Bodies, South Carlsbad Beach State Park, adjacent to the mouth of Agua Hedionda Lagoon, is impaired for trash; the mouth of Agua Hedionda Lagoon is impaired for toxicity; Batiquitos Lagoon is impaired for toxicity; San Elijo Lagoon is impaired for eutrophic conditions, indicator bacteria, dissolved oxygen, phosphorous, sedimentation/siltation, toxicity, and turbidity; Buena Vista Lagoon is impaired for indicator bacteria, nutrients, sedimentation/siltation, and toxicity; Pacific Ocean Shoreline at the mouth of San Dieguito Lagoon is impaired for indicator bacteria; and Los Penasquitos Lagoon is impaired for sedimentation/siltation and toxicity.<sup>29</sup>

The discharges of pollutants from the BNSF railway and trains in violation of the CWA impairs each of the beneficial uses of the Receiving Waters. As discussed *supra* section 1.4, plastic is a floating material that causes a nuisance in each of the Receiving Waters. For example, Agua Hedionda Lagoon empties into the Pacific Ocean at the edge of Carlsbad Beach State Park at Tamarack Avenue. Thus, trash deposited into Agua Hedionda is of special concern because it empties into a beach impaired for trash. CERF and Coastkeeper representatives have swallowed nurdles while enjoying Carlsbad Beach State Park, emphasizing the pollution spill severity and beach impact.

The unpermitted discharges of nurdles from BNSF also harms the special aesthetic and recreational significance of the Receiving Waters, adversely impacting the public’s ability, as well

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<sup>26</sup> [https://www.parks.ca.gov/?page\\_id=657](https://www.parks.ca.gov/?page_id=657).

<sup>27</sup> Basin Plan, Table 2-2.

<sup>28</sup> *Id.*

<sup>29</sup> 2020/22 Integrated Report – All Assessed Waters, available at

[https://www.waterboards.ca.gov/water\\_issues/programs/water\\_quality\\_assessment/2020\\_2022\\_integrated\\_report.html](https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2020_2022_integrated_report.html)  
[https://www.waterboards.ca.gov/water\\_issues/programs/water\\_quality\\_assessment/2020\\_2022\\_integrated\\_report.html](https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2020_2022_integrated_report.html).

as that of Coastkeeper’s and CERF’s members, to use and enjoy these unique waterbodies. For example, at every one of the Receiving Waters there are trails and observation points, which are frequently used for jogging, hiking, birdwatching, photography, general aesthetic enjoyment, scientific study, and data collection, among other things. At the mouth of each of these lagoons are popular beaches, surfing, and swimming locations.

BNSF’s illicit discharges degrade the Receiving Waters. Public concern regarding elevated pollutant levels in the Receiving Waters, and damage to the surrounding natural habitats, and thus the flora and fauna within them, harms the ability of the public, including Coastkeeper’s and CERF’s members’ ability, to use and enjoy these unique recreational opportunities. Further, Coastkeeper’s and CERF’s members are less likely to recreate in and around such waters that are known to be polluted with plastics laden with toxic pollutants.

## **2. Violations of the Clean Water Act**

The CWA prohibits the "discharge of any pollutant," unless otherwise allowed by permit.<sup>30</sup> A National Pollutant Discharge Elimination System (“NPDES”) permit must be issued before any pollutant is discharged into Waters of the United States (“WOTUS”) from a point source.<sup>31</sup> “Any discharge of pollutants not allowed by a NPDES permit is illegal.”<sup>32</sup> Thus, under the Act, a NPDES permit is required when a discharger proposes to (1) discharge (2) a pollutant (3) to waters of the United States (4) from a point source.<sup>33</sup>

A central provision of the Clean Water Act is that NPDES permits be secured before pollutants are discharged from any point source into the navigable waters of the United States.<sup>34</sup> BNSF has violated and will continue to violate section 1342(1) of the Clean Water Act unless and until it obtains an NPDES permit for its rolling stock discharges. Because the Responsible Party’s railroad operations have been and will continue to be a point source of pollution to Receiving Waters and the Pacific Ocean, BNSF is required to obtain a NPDES permit pursuant to the CWA.<sup>35</sup>

### **2.1 BNSF is a person under the CWA and Plastic is a Pollutant.**

A person, which includes a corporation,<sup>36</sup> who is in control of the pollutant source is the Responsible Party within the meaning of the CWA.<sup>37</sup> Here, BNSF owns, operates, and otherwise controls the trains and rolling stocks that carry the plastic nurdles along the railroad tracks through southern California. Thus, BNSF is the Responsible Party for the plastic nurdle discharge.

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<sup>30</sup> 33 U.S.C. § 1311(a).

<sup>31</sup> 33 U.S.C. § 1342(1).

<sup>32</sup> *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002).

<sup>33</sup> 33 U.S.C. §§ 1311(a), 1342(a). *See also Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993).

<sup>34</sup> *Decker v. N.W. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013).

<sup>35</sup> 33 U.S.C. § 1342.

<sup>36</sup> 33 U.S.C. § 1362(5).

<sup>37</sup> *Puget Soundkeeper All. v. Cruise Terminals of Am., LLC*, 216 F. Supp. 3d 1198, 1213 (W.D. Wash. 2015).

The “discharge of a pollutant” means, among other things, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). “Pollutant” is defined in the CWA as:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water...<sup>38</sup>

“The discharge of a pollutant” and “pollutant” are “defined broadly.”<sup>39</sup> As a solid waste, garbage, and industrial waste, plastic is a pollutant under the CWA.<sup>40</sup>

California specifically classifies and regulates “preproduction plastic,” which includes “plastic resin pellets,” as a pollutant under the CWA.<sup>41</sup> Section 13367 of the California Water Code requires NPDES permit coverage for plastic manufacturing, handling, and transportation facilities, to ensure these facilities “implement best management practices to control discharges of preproduction plastics.”<sup>42</sup>

## 2.2 Addition of Pollutant from a Point Source

Discharge is defined in the Act as “any addition of any pollutant to navigable waters from any point source.” A permit is required “when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.”<sup>43</sup> A point source “means any discernible, confined and discrete conveyance, *including . . . rolling stock.*”<sup>44</sup> A point source discharge may include gravity and storm water conveyances.<sup>45</sup> Additionally, a point source

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<sup>38</sup> 33 U.S.C.A. § 1362(6).

<sup>39</sup> *Rapanos v. U.S.* 547 U.S. 715, 723 (2006).

<sup>40</sup> *See Coastal Env't Rts. Found. v. Naples Rest. Grp.*, 641 F. Supp. 3d 880, 886 (C.D. Cal. 2022) (describing plastic as a pollutant under the CWA).

<sup>41</sup> Cal. Water Code § 13367(a).

<sup>42</sup> *Id.* § 13367(d).

<sup>43</sup> *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020)

<sup>44</sup> 33 U.S.C. § 1362(14) (emphasis added)

<sup>45</sup> *See Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). (explaining that “[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the [discharger] at least initially collected or channeled the water and other materials.”). “A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials.” *Id.*

discharge occurs when a system designed to prevent pollutants from discharging fails, and storm water carries that pollutant into the receiving water.<sup>46</sup>

Furthermore, as “[s]tormwater discharges containing preproduction plastic are a significant contributor of pollutants to waters of the state,” the California legislature required the State Board to “designate, as appropriate, stormwater discharges of preproduction plastic from plastic manufacturing, **handling, and transportation** facilities as contributors of pollutants pursuant to Section 1342(p)(2)(E) of Title 33 of the United States Code of the federal Clean Water Act.”<sup>47</sup>

To determine whether a discharge is a “functional equivalent” to a point source discharge, the court will consider numerous factors.<sup>48</sup> Of those, transit time and distance traveled are the most cogent,<sup>49</sup> while the cardinal objective is “to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve.”<sup>50</sup> The Supreme Court in *County of Maui, Hawaii v. Hawaii Wildlife Fund* determined that “[w]here a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.”<sup>51</sup>

Accordingly, BNSF has discharged and continues to discharge plastic into the Receiving Waters through a point source or the functional equivalent of a direct discharge. BNSF has released plastic (a pollutant) from rolling stock into the receiving waters. Rolling stock is a discernable, confined, and discrete conveyance and is expressly enumerated in the CWA “point source” definition.

BNSF discharged plastic via either a malfunctioning covered hopper or an uncovered hopper. BNSF’s leaking hoppers discharge nurdles (1) directly into the Receiving Waters; (2) onto land and thereafter into Receiving Waters via discrete stormwater conveyance; and (3) and onto land up gradient and immediately adjacent to Receiving Waters, a mere few feet from the water. Whether via direct discharge or the functional equivalent, BNSF’s discharge of nurdles constitutes a CWA violation.

### 2.3 to the Waters of the United States

WOTUS are “[w]aters which are: (i) [c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” The definition also includes any tributaries of that water.<sup>52</sup>

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<sup>46</sup> *Cf. United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding that [d]espite the large capacity [of the system] we view this operation as a closed circulating system to serve the gold extraction process with no discharge. When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source.”)

<sup>47</sup> 2007 Cal. Legis. Serv. Ch. 735, Section 1(k) (A.B. 258).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1476-1477.

<sup>50</sup> *Id.*

<sup>51</sup> *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).

<sup>52</sup> *Id.*

All Receiving Water Lagoons are WOTUS. The Pacific Ocean is used for interstate and foreign commerce, and each of the aforementioned lagoons are tributaries of the Pacific Ocean and subject to the ebb and flow of the tide. Therefore, the Receiving Waters are WOTUS. The train tracks travel directly over the Receiving Waters. Information available to CERF and Coastkeeper indicates that BNSF rolling stock discharge nurdles directly into the Receiving Waters and onto land immediately adjacent to Receiving waters, which are thereafter mobilized by gravity and/or storm water into Receiving Waters constituting functional equivalent to a direct discharge. Thus, BNSF discharges pollutants into WOTUS.

2.4 BNSF is Subject to the CWA and Does Not Have a Permit for this Discharge.

There are no exceptions to the CWA applicable to BNSF.<sup>53</sup> BNSF has not obtained a permit for this discharge. Thus, BNSF has been in daily violation of the CWA since at least February 15, 2023. A discharger “that violates the Act by discharging without a permit...remains in a continuing state of violation until it either obtains a permit or no longer meets the definition of a point source.”<sup>54</sup> BNSF’s unlawful discharges of nurdles are ongoing and continuous, subjecting it to daily penalties since at least February 15, 2023.

**3. Relief Sought for Violations of the CWA**

In light of the Facility’s continuing, egregious CWA violations, CERF and Coastkeeper will seek injunctive relief preventing further violations pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, civil penalties, and such other relief as permitted by law. Pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), CERF and Coastkeeper will seek to recover their litigation costs, including attorneys’ and experts’ fees.

**4. Conclusion**

CERF and Coastkeeper are willing to discuss effective remedies for the violations described in this Notice Letter. However, upon expiration of the 60-day notice period, CERF and Coastkeeper intend to file a citizen suit under Section 505(a) of the Clean Water Act for BNSF’s violations of the CWA. CERF and Coastkeeper have retained legal counsel to represent them in this matter. Please direct all communications to CERF’s and Coastkeeper’s legal counsel:

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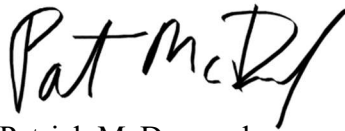
<sup>53</sup> Further, in *Sierra Club v. BNSF*, the Western District Court of Washington held that BNSF would be liable for coal discharged directly into navigable waters. *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 WL 6217108, at \*8 (W.D. Wash. Oct. 25, 2016).

<sup>54</sup> *Carr v. Alta Verde Industries, Inc.* (5th Cir. 1991) 931 F.2d 1055, 1063.

| <b>San Diego Coastkeeper</b>   | <b>Coastal Environmental Rights Foundation</b>   |
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If you wish to pursue settlement discussions in the absence of litigation, please contact Coast Law Group LLP immediately.

Sincerely,



Patrick McDonough  
 Attorney for San Diego Coastkeeper



Marco Gonzalez  
 Livia Borak Beaudin  
 Natalie Clagett  
 Attorneys for Coastal Environmental  
 Rights Foundation

**SERVICE LIST**

**VIA U.S. MAIL**

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|---|--|
| David Gibson<br>Executive Officer<br>San Diego Regional Water Quality Control Board<br>2375 Northside Drive, Suite 100<br>San Diego, California 92108         | Michael S. Regan, Administrator<br>Environmental Protection Agency<br>Office of the Administrator 1101A<br>1200 Pennsylvania Ave N.W<br>Washington, DC 20460 |
| Martha Guzman Aceves<br>Regional Administrator<br>U.S. Environmental Protection Agency<br>Region IX<br>75 Hawthorne Street<br>San Francisco, California 94105 | Eric Oppenheimer<br>Executive Director<br>State Water Resources Control Board<br>P.O. Box 100<br>Sacramento, CA 95812-0110                                   |